COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2084-CR **Cir. Ct. No. 00-CT-76**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY T. MORK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

¶1 BROWN, J.[1] Gary T. Mork was convicted by jury of operating a vehicle while intoxicated. A major part of the State's evidence was a blood test

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

showing Mork's blood alcohol level to have been .175%. Mork's defense was that the blood tested was not his blood and the chain of evidence was lacking to prove otherwise. He therefore objected that the test results were inadmissible, an objection which the trial court overruled. Towards the end of the trial, during rebuttal of the lab expert, the expert allowed as how a second test of Mork's blood had been conducted, this test culminating in a .164% reading. On appeal, Mork claims that he did not know about the second test—thus violating discovery rules, that it never should have been mentioned to the jury and that it prejudiced his case because, had he known of the second test, he would have provided a different defense. Because Mork has not convinced us that he was prejudiced, we affirm.

¶2 As we said, a major piece of the State's case was the .175% test reading. We deem this to be a major part of the State's case because not only did it show that he was intoxicated, it gave strong rebuttal to Mork's testimony that he only had two beers. And as we said, the major theme of Mork's defense was that the blood test was not of his blood. To support his theory, he made a pretrial request to the district attorney to have the remaining sample of his blood sent to a private laboratory so that the DNA of the blood could be tested. The request resulted in an agreement to have the State lab send the blood sample to the private lab, which was done. The record does not indicate what the results were from the private lab. What we do know is that Mork's theory that the blood was not his was based on his challenge to the chain of custody. It was Mork's theory that the blood sample was missing for a period of time and, therefore, the chain of custody was in doubt. If the chain of custody was in doubt, then there was a reasonable doubt about whether the blood tested was his blood.

¶3 In support of his theory, Mork cross-examined the lab expert about the chain of custody. Curiously, Mork also cross-examined the expert on its

procedure when a defendant wants a second sample of the blood sent to a private lab. On rebuttal, the State went into the procedure in more detail. The State asked, "When you send out a sample, do you test that sample prior to shipping it out again?" The lab expert replied that the lab did test the second sample before sending it out so that "we have more information." The State then showed the lab expert a document and asked the expert to identify it. The expert responded that it was a report showing a reading on the second test of .164%.

¶4 Mork immediately objected. He argued that there was a discovery demand filed by him, that this second report was never revealed to him, that the State had a continuing duty to divulge any lab testing and reports, that he was surprised and asked for dismissal. After the State's response, the court said it was not happy that the document appeared in the manner it did and commented, "I don't see any need for it in any event." The court gave Mork two alternatives. It would, if requested, instruct the jury to ignore any testimony with regards to retesting by the state lab or Mork could examine the witness regarding the report. Mork was obviously not happy with the alternatives and argued that the discovery violation had prejudiced him. He asked for a mistrial so that he could consult an expert on the significance of one sample being .175% and another sample being .164%. The trial court denied the motion and the trial proceeded with Mork examining the lab expert about the second test. The jury came back with a guilty verdict and now Mork raises the alleged discovery violation on appeal.

¶5 We will assume without deciding the following: (1) the second test was unknown to Mork before trial; (2) the State had a duty to disclose the existence of the second test before trial; (3) the State did not disclose its existence;

and (4) the evidence regarding the results of a second test should not have been in the record.[2] The question remaining is whether the error was prejudicial. ***State v. Ruiz***, 118 Wis. 2d 177, 199-200, 347 N.W.2d 352 (1984). In other words, the issue is whether the trial court's grant of alternative remedies was insufficient.

¶6 Mork claims that the reason why he was prejudiced is because, at trial, he had already "embarked upon a specific defense strategy, a strategy that had manifested itself in jury selection, opening statements and cross-examination of *all* the state's witnesses." He asserts that denial of access to the second test results prejudiced him by precluding him from consulting expert witnesses and "constructing a defense which fit the actual state of the evidence." Specifically, his theory of defense at trial was that the test was accurate, but the test was not of his blood. With the revelation that there was a second test and that the result was different from the first test result, the theory would change to one where the test result was, in itself, inaccurate.

¶7 The problem with Mork's proposed new defense theory is that it is just speculation. He made no postconviction motion for an evidentiary hearing at the circuit court level putting forth evidence that he had consulted with expert witnesses and that an expert was available who could opine that the conflicting test results signaled a problem with the .175% score. Had he this evidence, he could have attempted to convince the trial court that if the defense had known of a second test and its result, a cogent theory of defense could have been presented.

[2] The fact that we are assuming the enumerated ultimate facts should in no way be construed as a sub silentio holding that we think each is true. Rather, our holding in this case renders discussion of these ultimate facts unnecessary.

Even if the trial court had denied the motion, Mork would have made a record that could have been used for appellate review purposes.

¶8 An offer of proof need not be syllogistically perfect but it ought to enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption. ***Milenkovic v. State***, 86 Wis. 2d 272, 284-85, 272 N.W.2d 320 (Ct. App. 1978). We hold that, without an offer of proof, we have no way of knowing whether Mork would have had a viable defense. It is absolutely true that Mork has a due process right to present a defense. But he has not given this court any semblance of a defense. Rather, his claim appears to be only that he was denied the right to ruminate about a possible defense. That is not good enough. He has to show prejudice and that is shown by evidence that he would have had a real defense, given time to investigate. He has not met that showing.

¶9 Alternatively, Mork argues that, at the very least, trial counsel should have been granted a recess or an adjournment to better collate questions for cross-examination. But he does not tell us how the cross-examination missed things that would likely have been asked had a recess been given. Moreover, when asked by the trial court what a proper remedy would be, the assistant district attorney replied that cross-examination with "a continuance or a recess" would be the appropriate remedy. Immediately following her comments, the trial court gave its ruling allowing Mork to choose between two alternative remedies. While the trial court, in giving Mork two alternative remedies, did not specifically mention that Mork would be entitled to a "recess" or "adjournment" if he chose to examine the witness, a reasonable person would come to no other conclusion but that, if requested, a recess would have been granted. Mork never asked. We affirm his conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.