

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 30, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-2132**  
**STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-3013**

**IN COURT OF APPEALS  
DISTRICT IV**

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**VILLAGE OF OREGON,**

**PLAINTIFF-RESPONDENT,**

**v.**

**BRADLEY W. ANCELET,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
GERALD C. NICHOL, Judge. *Affirmed.*

¶1 VERGERONT, P.J.<sup>1</sup> Bradley Ancelet was found guilty of violating ordinances of the Village of Oregon that adopted WIS. STAT. § 346.63(1)(a) and (b), which prohibit operating a motor vehicle while intoxicated and with a prohibited alcohol concentration. He appeals the circuit court decision reversing

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the municipal court's finding that the officer read Ancelet the "Informing the Accused" form after the intoximeter test was administered to him. Ancelet contends the circuit court erred in substituting its judgment for the trier of fact on an issue of credibility. We conclude the trial court correctly determined that the municipal court's finding was clearly erroneous. Accordingly, we affirm the circuit court's decision and the judgment entered by the municipal court following remand by the circuit court.

## DISCUSSION

¶2 At the trial before the municipal court, Oregon Police Officer Monica Luther testified as follows. She observed Ancelet speeding at 3:05 a.m. on March 3, 2001, and stopped him. Eventually she arrested him for driving while intoxicated and drove him to the Oregon police station in her squad car.

Q: And what did you do upon arrival at the Oregon Police Department?

A: The first thing that I do is note the observation time by my wristwatch. Mr. Ancelet was seated across the table from me while I observed him. It was 3:40 when I marked with my wristwatch the beginning of the observation time.

I then issued citation for the operating a motor vehicle while intoxicated, and read Mr. Ancelet the Informing the Accused form, and asked if he would submit to a chemical -- evidentiary chemical test of his breath, and he agreed to do so.

Q: Did you issue any other citations besides --

....

A: I also issued the citation for the speed.

....

Q: Now, I'm going to show you what's been marked as Exhibit No. 1 and ask if you can identify that.

A: Okay.

Q: And you should have it in front of you. Can you identify that?

A: Yes. This is the Informing the Accused form.

Q: And is that your signature that appears at the bottom?

A: It is.

Q: Did you read this form to Mr. Ancelet?

A: I did.

Q: And is that indicated on the form in any way?

A: Yes. It's printed right at the bottom that I read this information to him.

Q: And then you dated and signed it; is that correct?

A: I'm sorry, what?

Q: You dated and signed it; is that correct?

A: Yes, I did.

Q: What did you do after reading the Informing the Accused form to Mr. Ancelet?

A: We had to complete the observation time. So at 4:01 Officer O'Neil of the Oregon Police Department transported Mr. Ancelet, escorted him into the Intoximeter room.

¶3 The "Informing the Accused" form was admitted into evidence. Above Luther's signature there was a blank for "Date and Time Signed" and, next to the date, the time "351 A" was written.

¶4 The intoximeter test was administered to Ancelet beginning at 4:01 a.m. and the result was a reading of .13.

¶5 Officer Luther also testified that she filled out an alcoholic influence report, and this was admitted into evidence. She testified that she filled this out,

based on the answers to questions she asked Ancelet, after Ancelet had submitted to the test. However, on this report, next to Ancelet's signature acknowledging that he had been given *Miranda* warnings, "305A" was written for the time. On cross-examination Officer Luther acknowledged that she had written this time in error, mistakenly repeating the time she had written on the citations, and she reconfirmed that she had completed this report after the intoximeter test was administered to Ancelet.

¶6 The municipal court made the following findings and conclusions pertinent to this appeal.

The observation period was from 3:40 a.m. to 4:01 a.m. during which time nothing problematic entered defendant's mouth from outside or inside his body. The defendant cooperated with a breath test starting at 4:01 a.m., resulting in a reading of .13....

The officer admitted the alcoholic influence report was done following the intoximeter test, even though 3:05 p.m. is written on the form as the time defendant signed the waiver of rights portion. The report also states defendant's eyes were glazed and blood shot and that he admitted to having 4-5 beers between 9:00 p.m. and 1:00 a.m. There is no evidence regarding defendant's behavior from 1:00 a.m. until he was seen by the officer at approximately 3:05 a.m. Finally, the alcoholic influence report states that defendant's speech was slurred.

The officer agreed that the informing the accused form was done following the administration of the intoximeter, even though the form shows it was done at 3:51 a.m. Wis. Stats. 343.305(4) provides that the "informing the accused" information must be read "at the time that a chemical test specimen is requested under sub. (3)(a)." As stated above, this was not done at the proper time.

¶7 The municipal court concluded that because the "Informing the Accused" form was not read at the proper time, and because verification of the machine's accuracy had not been shown at time intervals as required by statute,

the statutory presumption of accuracy accorded the results was lost. Because there was no other testimony on the reliability and accuracy of the test results, the municipal court determined that the Village had not proved that Ancelet was operating with a PAC. The municipal court also concluded that the evidence of the officer's observation of Ancelet and his performance on the field sobriety tests was not sufficient to prove that his ability to drive was impaired.

¶8 The Village requested a review in the circuit court of the transcript pursuant to WIS. STAT. § 800.14(5). The circuit court concluded that there was no evidence in the record to support the municipal court's finding that the officer read Ancelet the "Informing the Accused" form after the test was administered. The circuit court also determined that the municipal court had erred in calculating the time intervals between maintenance checks on the machine. The circuit court therefore reversed the municipal court's determination that the Village had not met its burden of proving that Ancelet was driving while intoxicated or with a PAC, and remanded to the municipal court for findings not inconsistent with its opinion.<sup>2</sup>

¶9 After remand, the municipal court determined that the result of the intoximeter test was admissible and that Ancelet was guilty of both driving while intoxicated and driving with a PAC.

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<sup>2</sup> The court reversed another factual finding of the municipal court that is not relevant to this appeal.

## DISCUSSION

¶10 The only issue Ancelet raises on this appeal is the circuit court’s reversal of the municipal court’s finding that Officer Luther agreed that she read the “Informing the Accused” form after the test was administered in spite of the 3:51 a.m. time written on that form. As the circuit court correctly recognized, when it reviews the transcript of a municipal court proceeding, its scope of review is analogous to that of an appellate court reviewing a trial to the circuit court under WIS. STAT. § 805.17(2). *Village of Williams Bay v. Metzl*, 124 Wis. 2d 356, 361, 369 N.W.2d 186 (Ct. App. 1985). The circuit court examines the transcripts and exhibits to determine if they contain evidence to support the municipal court’s decision. *Id.* The circuit court may not set aside factual findings unless they are clearly erroneous, and due regard must be given to the opportunity of the municipal court to judge the credibility of the witnesses. *Id.* On our review of the circuit court’s decision, we apply this same standard of review to the municipal court’s decision. *Id.* at 362.

¶11 Ancelet argues that the municipal court made a credibility determination although it did not expressly say so. According to Ancelet, because Officer Luther acknowledged writing the wrong time on the alcohol influence report, the municipal court could reasonably infer that she wrote the wrong time on the “Informing the Accused” form. Ancelet’s argument ignores the finding the municipal court actually made. The municipal court found that “[t]he *officer agreed* that the informing the accused form was done following the administration of the intoximeter, even though the form shows it was done at 3:51 a.m.” (Emphasis added.) There is no evidence or testimony that the officer agreed to this, and none from which one can reasonably infer that she agreed. Therefore, the finding that the officer agreed she read the form after the test is clearly erroneous.

¶12 There is nothing in the municipal court’s decision to suggest that it was finding that the officer’s testimony on when she read the “Informing the Accused” form or the time she wrote on the form, both of which were consistent, was not credible. The only reasonable reading of the municipal court’s decision is that the municipal court mistakenly believed that Officer Luther had testified that both the alcohol influence report and the “Informing the Accused” form were completed after the test, when the record plainly shows that she testified only that the former was.

¶13 Moreover, even if we were to rephrase the municipal court’s finding as Ancelet implicitly asks us to do, we would reject his argument. We conclude it is not reasonable to infer from Officer Luther’s testimony on the mistake she made in writing 3:05 a.m. on the alcohol influence report that she read the “Informing the Accused” form to Ancelet after she gave him the test. We see no logical connection in the record between the erroneous time she wrote on the former and when she read the latter to Ancelet.

¶14 Accordingly, we conclude the circuit court correctly reversed the municipal court’s finding that the officer agreed that the “Informing the Accused” form was done following the administration of the intoximeter.

*By the Court.*—Judgment affirmed.

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

