COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3058-FT

Cir. Ct. No. 00-TR-9701
00-TR-9702

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT II

CITY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

JOHN BINOTTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] John Binotto raises what he claims is a "question of law heretofore unexamined in Wisconsin jurisprudence": What sanction, if

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

any, should be imposed if an arresting officer fails to keep a drunk driving suspect under continuous observation for twenty minutes prior to the administration of a breath test? Because precedent binds us, we reject Binotto's suggestion that "the test result ought to be stripped of its presumptions of automatic admissibility as the appropriate sanction, and that the prosecution ought to have an opportunity to rehabilitate the test result at trial through the use of expert testimony." Therefore, we affirm.

¶2 During proceedings brought about by Binotto's arrest for his first offense operating while intoxicated charge and first offense operating with a prohibited blood alcohol concentration, it was established that the arresting officer did not maintain continuous observation of Binotto for twenty minutes preceding the administration of a breath test. Binotto moved to suppress the results of the breath test arguing that the intermittent observation violated WIS. ADMIN. CODE § TRANS 311.06(3)(a).[2] The trial court denied the motion, concluding that it was sufficient that Binotto was in the arresting officer's presence for more than twenty minutes preceding the test and the administrative code did not require a continuous observation.

[2] WISCONSIN ADMIN. CODE § TRANS 311.06, provides in part:

> (3) Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:
>
> (a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.

¶3 The issue Binotto raises—the administrative code requires the arresting officer to continuously observe the drunk driving suspect for twenty minutes before administering a breath test—was raised in ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 672 n.2, 314 N.W.2d 911 (Ct. App. 1981). In that case, Wertz contended that "the trial court committed error by not requiring proof of compliance with certain sections of the administrative code as a foundational prerequisite to the admission of the results of the breathalyzer test." ***Id.*** at 672-73. We disagreed with Wertz because the test results carry a statutorily established prima facie presumption of accuracy, WIS. STAT. §§ 343.305(7) and 885.235, and the issue Wertz raised as to how precisely the test was performed went to the weight of the evidence and not the admissibility. ***Wertz***, 105 Wis. 2d at 674-75.

¶4 In ***State v. Disch***, 119 Wis. 2d 461, 477, 351 N.W.2d 492 (1984), the supreme court favorably cited to ***Wertz*** and explained:

> The prima facie presumption of accuracy accorded recognized tests authorized by statute is a permissive inference or rebuttable presumption. The accuracy of the blood-test result is presumed, but the defendant may come forward with some evidence in rebuttal in an effort to show that the result is in fact not accurate. The trier of fact is allowed, not required, to find the result of the test accurate, and the presumption places no burden of any kind on the defendant. The result of a chemical test, although admissible, is open to rebuttal by the defendant, as a matter of defense, to adduce countervailing evidence of the unreliability or inaccuracy of the result. It is at this stage, after admission, that the defendant may attack the weight and credibility to be given the test.

¶5 Binotto is correct that the administrative code requires an observation of the drunk driving suspect to ensure that he or she does not ingest contaminants that will taint the test results. Nevertheless, from ***Disch*** and ***Wertz*** comes the lesson that whether or not the test results were accurately performed in

compliance with the administrative code is a matter of defense. The rule is that if a breath test is specified by statute it cannot be deemed unreliable as a matter of law. ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 900, 266 N.W.2d 618 (1978). In other words, the test cannot be "stripped of its presumption of automatic admissibility" as requested by Binotto.

¶6 We are bound by ***Bardwell***, ***Disch*** and ***Wertz*** and have no authority to ignore or modify these holdings. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

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