COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0904-CR **Cir. Ct. No. 02CT000321**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE K. BLANCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] In Wisconsin, error "may not be predicated upon a ruling which … excludes evidence unless … the substance of the evidence was made known to the judge by offer or was apparent from the context within which

[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.

questions were asked." WIS. STAT. § 901.03(1) and (1)(b). Dale K. Blanck failed to make an offer of proof to support his motion for the admission of preliminary breath test (PBT) results to support an alcohol concentration curve defense; thus, he has failed to preserve a meaningful record for appellate review and we affirm his conviction for operating while intoxicated, second offense.

¶2 Prior to his jury trial on charges of operating while intoxicated and operating with a prohibited alcohol concentration, both a second offense, Blanck filed a motion seeking admission of the test results. Blanck proposed that the results of the PBT administered prior to his submission to the Intoximeter would support an alcohol concentration curve defense which he argued was sanctioned in ***State v. Vick***, 104 Wis. 2d 678, 312 N.W.2d 489 (1981). The motion was unaccompanied by an evidentiary affidavit and during argument on the motion, he advised the circuit court that no evidence would be elicited in support of the motion. The circuit court denied the motion.

¶3 On appeal, Blanck contends that under ***Chambers v. Mississippi***, 410 U.S. 284 (1973), and ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), he has a Sixth Amendment right to present evidence in support of his defense and that state evidentiary rules cannot frustrate this right. He concedes that WIS. STAT. § 343.303 prohibits the admission of PBT results in evidence but asserts a "preliminary breath alcohol test is relevant and exculpatory when used with the later Intoximeter result to establish an alcohol concentration curve." He argues that the prohibition to the admission of the PBT results must give way to his right to present exculpatory evidence that would include a retrograde extrapolation of the test results that would reduce his blood alcohol concentration below the legal limit at the time of the offense. Blanck points out that the prohibition of § 343.303 is not absolute; he relies on ***State v. Doerr***, 229 Wis. 2d

616, 599 N.W.2d 897 (1999), and ***State v. Beaver***, 181 Wis. 2d 959, 512 N.W.2d 254 (Ct. App. 1994). He claims that both cases stand for the proposition "the results of a PBT may be made relevant—and therefore be admitted at trial—if the proponent presents with an expert witness who can verify that the instrument was both reliable and accurate."

¶4 We do not address the merits of Blanck's argument because of his failure to establish a meaningful record for appellate review.[2] "When a claim of error is based upon the erroneous exclusion of evidence, 'an offer of proof must be made in the trial court as a condition precedent to the review of any alleged error.'" ***State v. Hoffman***, 106 Wis. 2d 185, 217-18, 316 N.W.2d 143 (Ct. App. 1982) (citation omitted). "[T]he general rule in this state is that a circuit court must hear an offer of proof to determine whether evidence would support a proffered defense before ruling on the relevancy of the evidence."[3] ***State v. Dundon***, 226 Wis. 2d 654, 674, 594 N.W.2d 780 (1999). The proponent of the proffered evidence carries the burden of setting forth the substance of the evidence in making an offer of proof. ***State v. Friedrich***, 135 Wis. 2d 1, 13, 398 N.W.2d 763 (1987). "Error may not be predicated on an evidence ruling if the proponent fails to apprise the judge of the substance of the evidence." ***Id.***

¶5 In ***Doerr***, we held that the bar on the evidentiary use of PBT results is limited to motor vehicle violations and if a party wished to rely upon PBT

[2] Appellate courts decide cases on the narrowest possible grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

[3] In ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 322 (1990), the supreme court explained: "Confrontation and compulsory process only grant defendants the constitutional right to present *relevant evidence* not substantially outweighed by its prejudicial effect." (Emphasis added.)

results in other types of cases he or she would have to establish the reliability of the machine.

> The PBT device has not been approved by the DOT and does not receive a prima facie presumption of accuracy to establish a defendant's blood alcohol level. Therefore, [a party] who wish[es] to rely on the PBT results [is] required to present evidence of the device's scientific accuracy and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results.

Doerr, 229 Wis. 2d at 624-25. Thus, as a proponent of the PBT results, Blanck had the obligation to support his motion for the admissibility of the results with an evidentiary offer of proof that met the standards established in ***Doerr***.

¶6 Blanck's reference to provisions of the Wisconsin Administrative Code governing the use of a PBT was not enough to make a meaningful record. An administrative requirement that a PBT must meet certain general specifications is not the same as establishing that the PBT used when Blanck was arrested was scientifically accurate and reliable. An offer of proof must state "an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." ***Milenkovic v. State***, 86 Wis. 2d 272, 284, 272 N.W.2d 320 (Ct. App. 1978). The offer of proof must enable the reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained. ***Id.***

¶7 In his reply brief, Blanck contends that the motion hearing on his pretrial motion to admit the PBT results "was not the forum in which the actual accuracy and reliability of the instrument needed to be proved." He argues that "[t]he full breath, scope and depth of every evidentiary question is not explored at hearings prior to trial." In response, we need only point out that the supreme court

has held it appropriate to use motions in limine to test the admissibility of evidence. ***State v. Horn***, 139 Wis. 2d 473, 487, 407 N.W.2d 854 (1987). "[T]he purpose of the motion in limine is to 'obtain [an] advance ruling on admissibility of certain evidence….' The ruling on admissibility may be based on whether evidence is relevant." ***Id.*** at 487 n.8. A leading trial practice treatise explains:

> [T]the wisdom of obtaining early evidentiary rulings on complex matters of evidence is readily apparent. From a tactical standpoint, it is much better to ask a trial judge to deliberate and consider a complex evidence question while the judge is not facing the pressure of knowing that the jury panel is waiting to proceed to trial, or the pressure of the normal trial flow, than it is to seek critical evidentiary rulings while the judge is facing these pressures.

R. George Burnett, et. al., WISCONSIN TRIAL PRACTICE, State Bar of Wisconsin CLE Books (2001), § 2.8.[4]

¶8 Blanck's failure to make an offer of proof and to present us with a meaningful record for appellate review is fatal to his appeal.[5] Therefore, we will not address the issue he raises and we affirm his conviction.

By the Court.—Judgment affirmed.

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

[4] Blanck complains that he was not given the opportunity to make an offer of proof at the motion hearing. As the proponent of the evidence, it was his obligation to marshal the necessary witnesses and have them, or their evidentiary submissions, available for the hearing on his motion. It is not the obligation of the circuit court to try the case for Blanck or the State.

[5] Blanck also failed to make an offer of proof to support his argument that a retrograde extrapolation of the PBT results would yield relevant evidence.