

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 2004

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. 03-2893
STATE OF WISCONSIN**

Cir. Ct. No. 01TR007783

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY A. MICKELSON,

DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Gregory Mickelson appeals from a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration in violation of WIS. STAT. § 346.63(1)(b) and an order denying his

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

motion to suppress. The sole issue on appeal is whether the term “within” as used in WIS. ADMIN. CODE § TRANS 311.06(3)(d) requires that sequential blood alcohol test results have a difference of less than .02 grams of alcohol per 210 liters of breath. The circuit court held that when the two breath tests results were exactly .02 apart, they were within .02 of each other. We agree and affirm the judgment and order.

¶2 The underlying facts are undisputed. After Mickelson was arrested for OWI, he submitted to two consecutive breath tests as required under WIS. ADMIN. CODE § TRANS 311.06. Under the code, if the two consecutive test results are not within .02 of each other, the test results are deficient and inadmissible. The test results were .176 and .156, a difference of exactly .02.

¶3 Mickelson moved to suppress the test results on the basis that the criteria for admissibility under WIS. ADMIN. CODE § TRANS 311.06(3)(d) was not met. He argued to the circuit court, as he does now, that the difference between the two test results of exactly .02 does not meet the code’s requirement that the two test results be “within” .02 of each other. The court denied his motion, concluding that the phrase “within .02” means not more than a difference of .02.

¶4 The relevant parts of the WIS. ADMIN. CODE § TRANS 311.06 provide:

Approved techniques and methods of performing chemical analysis of the breath. (1) Only methods approved by the department may be used to perform quantitative breath alcohol analysis.

(2) Techniques used in performing quantitative breath alcohol analysis shall be those which are designed to assure accuracy, detect malfunctions and to safeguard personnel and equipment.

(3) Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:

....
 (d) Consecutive breath alcohol analysis results in a test sequence within .02 grams of alcohol per 210 liters of breath shall be deemed to be an acceptable agreement. Breath sample analysis failing to meet this criteria shall be deemed deficient.

¶5 When interpreting an administrative regulation, courts generally use the same rules of construction and interpretation applicable to statutes. *State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998). Words that are used in common, daily, nontechnical speech should, in the absence of evidence of a contrary intent, be given the meaning they have in such daily usage. *Henderson v. State Farm Mut. Auto. Ins. Co.*, 59 Wis. 2d 451, 457, 208 N.W.2d 423 (1973). Also, as a general rule, all words and phrases shall be construed according to common and approved usage. WIS. STAT. § 990.01(1).

¶6 Mickelson contends that the word “within” should be given its ordinary meaning and cites the second edition of WEBSTER’S NEW UNIVERSAL UNABR. DICTIONARY, which defines within as: “inside the limits of; not exceeding; not overstepping, etc; as within the law.” He argues the test results must be less than .02 in order to be within .02 of each other. Mickelson reasons that it would seem logical that test results with a difference of .02 or greater should be deemed not acceptable. Thus, he concludes the court erred by not suppressing the alcohol test results.

¶7 We will also use Webster’s dictionary. The most relevant definitions refer to “within” as meaning

in the limits or compass of : not beyond; ... not exceeding in quantity or degree; ... used as a function word to indicate a specified difference or margin of error <came

[within] two percentage points of a perfect mark> <guessed her weight to [within] two pounds> ... not going outside the scope or influence of.

WEBSTER'S THIRD NEW INT'L DICTIONARY 2627 (unabr. 1993).

¶8 Importantly, if as the State suggests, we look at the word “without,” Webster’s defines it as “outside ... on the outside of.” *Id.* Obviously, the two test results are not outside of .02 but are in the limits of .02.

¶9 We agree with the circuit court that the more reasonable reading of “within” means not beyond or not exceeding the difference of .02. Thus, we affirm the court’s order denying the motion to suppress and the judgment convicting Mickelson of operating a motor vehicle with a prohibited alcohol concentration.

By the Court.—Judgment and order affirmed.

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

