COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP190-CR **Cir. Ct. No. 2007CT437**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL PERZEL, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. MC ALPINE and MARK L. GOODMAN, Judges. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Michael Perzel, III, appeals a judgment convicting him of driving while having a prohibited alcohol concentration,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10).

contrary to WIS. STAT. § 346.63(1)(b) (2005-06),[2] as a third offense. He also appeals the order denying his postconviction motion.[3] After a police officer obtained evidence of Perzel's intoxication, the officer arrested Perzel and transported him to a hospital for a blood draw. It is undisputed that, at the hospital, a "nurse" took Perzel's blood sample. At trial, the State introduced the test results of that blood sample as evidence of Perzel's blood alcohol level. The State did so pursuant to a statute allowing the test to be admitted without having to call an expert to testify that the results reflected Perzel's alcohol levels while driving. As pertinent here, that statute, WIS. STAT. § 343.305(5)(d), states that "the results of a test administered *in accordance with* this section are admissible" for purposes of proving the defendant's blood alcohol level (emphasis added). *See* ***id.*** (cross-referencing WIS. STAT. § 885.235, which provides, in part, that such tests, without requiring expert testimony, may be used as prima facie evidence of alcohol concentration at the time in question, *see* § 885.235(1g)).

¶2 Perzel's argument is that the circuit court could not have concluded that the blood draw was "in accordance with" the statute. He points to the requirement that "[b]lood may be withdrawn from the person … *only by a* physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." *See* WIS. STAT. § 343.305(5)(b) (emphasis added). Perzel argues that the circuit court had an insufficient basis to

[2] All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] The Honorable Michael J. McAlpine presided over the trial and entered the judgment of conviction, and the Honorable Mark L. Goodman entered the order denying postconviction relief.

determine that the nurse who performed Perzel's blood draw was a "*registered* nurse," as the statute requires (emphasis added).

¶3 Perzel frames his argument in terms of the circuit court's discretionary decision to admit evidence. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (a circuit court's decision to admit or exclude evidence is reviewed under an erroneous exercise of discretion standard). Perzel's argument ultimately turns on the proposition that the circuit court, when making its decision to admit the blood test results,[4] was not permitted to consider that the nurse who drew his blood wrote on the blood specimen form that she was an "RN" because this notation was hearsay with respect to whether the nurse was actually a registered nurse.[5] There can be no serious dispute that, if permitted to consider the "RN" notation, together with the undisputed fact that the person who did the blood draw was a nurse working in a hospital, the circuit court had a sufficient basis for determining that the nurse was a "registered nurse."

¶4 Perzel's argument for reversal is not persuasive. His argument, on its face, is inconsistent with WIS. STAT. § 901.04(1). That statute reads, as pertinent here: "Preliminary questions concerning … the admissibility of evidence

[4] At one place in his brief, Perzel seems to be complaining about the decision to admit "Exhibit 1," which is the specimen form containing the "RN" notation. However, it is apparent that Perzel's argument on appeal is ultimately about the court's decision to admit the blood test results.

[5] When initially explaining the determination that the nurse was a registered nurse, the Honorable Michael J. McAlpine did not expressly rely on the designation "RN" on the form. However, it is apparent from the record that the judge viewed the form. A second judge, the Honorable Mark L. Goodman, addressed Perzel's postconviction motion on this topic and explained that "RN" on the form was evidence supporting the determination that the nurse was a registered nurse. Perzel does not argue that it matters on appeal that the first judge did not expressly rely on the "RN" notation.

shall be determined by the judge …. In making the determination *the judge is bound by the rules of evidence only with respect to privileges* ….” ***Id.*** (emphasis added). So far as I can tell, Perzel is arguing that the “RN” notation is inadmissible hearsay and that it follows that the notation could not be considered by the court in its preliminary determination that the blood test results were admissible under the statute. Section 901.04(1), however, instructs that the rules of evidence apply *only* “with respect to privileges.” In view of this statute, it is not apparent why Perzel believes this preliminary question is governed by the rules of evidence. And, Perzel does not otherwise explain why the hearsay rules of evidence apply to the judge’s decision at issue here.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4. (2009-10).