COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1680-CR **Cir. Ct. No. 03CT000534**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. HAWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

¶1 BROWN, J. [1] Andrew J. Hawe was arrested for operating a motor vehicle while intoxicated and after being read the informing the accused form, he refused to take a chemical test of his blood. So, Hawe was transported to a

[1] This appeal is decided by one judge 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.

hospital where a blood test was performed. He failed. The test revealed a blood alcohol concentration of .219g/100 ml. The test was introduced by the State at his trial and, over objection, the jury was advised of the statutory presumptions under WIS. STAT. § 343.305(5)(d) and WIS. STAT. § 885.235. Hawe argues that the statutory presumption only pertains to test results conducted under the implied consent law. Since he did not consent, he argues that the implied consent law was not in force at the time of his blood draw and, therefore, the State was duty-bound to provide expert testimony as to the validity of the result. We hold that just because the test was not administered pursuant to § 343.305(5) does not mean that the test result is less valid. If the elements to § 885.235 are present, the presumption exists.

¶2 Hawe's argument is based on the language of WIS. STAT. § 343.305(5)(a) and (d). At the beginning of § 343.305(5)(a), the statute says: "If the person submits to a test *under this section*, the officer shall direct the administering of the test." (Emphasis added.) The statute then goes on to describe how the test is to be administered. Under § 343.305(5)(d), "[t]est results shall be given the effect required under s. 885.235." WISCONSIN STAT. § 885.235 describes the various tests for intoxication and informs the reader that the results of these tests "shall be given effect as follows without requiring any expert testimony as to its effect" if the sample is taken within three hours after the event to be proved. Hawe appears to assert that the condition precedent to the presumption accorded under § 885.235 is that the test must have been taken pursuant to § 343.305(5). Since that statute requires that the person "submit" to the test before the statute comes into play, and because he refused the test, § 343.305 was not the authority by which the test was taken and the presumption may not be accorded.

¶3 We reject this theory based on our independent review of the statute. *See* ***Reginald D. v. State***, 193 Wis. 2d 299, 533 N.W.2d 181 (1995). WISCONSIN STAT. § 885.235 is a stand-alone statute. It does not need the imprimatur of WIS. STAT. § 343.305(5) in order to be effective. Thus, whether the chemical test was administered after the accused "submitted" to the test is immaterial. No language in § 885.235 states otherwise.

¶4 True, if law enforcement officers do not follow the procedures of WIS. STAT. § 343.305, the State cannot rely on the favorable statutory presumptions concerning the admissibility of chemical test results. But this is judge-made law, not law coming from the statute. In ***State v. Zielke***, 137 Wis. 2d 39, 54, 403 N.W.2d 427 (1987), our supreme court listed all the repercussions it believed should fall upon law enforcement if the officers failed to abide by the implied consent law. One of the prophylactic measures announced by the court was that failure to follow the statute meant that the government would lose the luxury of asserting the presumption of validity accorded chemical tests. Because the officer in this case in no way ran afoul of the implied consent law here, the prophylactic measure set forth in ***Zielke*** is simply not material.

¶5 So, just because the accused has refused to take the test does not mean that the State is foreclosed from seeking a presumption of validity. The very notion is absurd. It would reward him for his intransigence. But more to the point, Hawe has provided no explanation why the test is suddenly suspect just because he refused to voluntarily allow the test to be taken. The blood test is a proven, scientifically sound method of measuring the alcohol concentration of an individual. It is illogical to suppose that if the State is not required to prove the underlying reliability of the method used by the testing device when the accused submits to the test and the police do not screw up its administration, the State is

required to prove its reliability when the accused does not submit to the test. Hawe's argument makes no sense.

¶6 At bottom, Hawe's argument is based on a technical reading of the two statutes without any thought given to the reason for their existence. As the supreme court said in ***Zielke***, the legislature did not promulgate WIS. STAT. § 343.305 to give the accused greater rights. ***Zielke***, 137 Wis. 2d at 52. Rather, § 343.305 was designed to simply articulate to the public how the implied consent statute works. And the presumption afforded the test results under WIS. STAT. § 885.235 was not published with the caveat that the accused first agree to take the test. Rather, the statute gives currency to the scientific validity of the results.

By the Court.—Judgment affirmed.

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