COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2012

Diane M. Fremgen
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. 2011AP2012-CR **Cir. Ct. No. 2010CT136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VLADIMIR SONIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Following a jury trial, Sonin was found guilty of operating while under the influence of an intoxicant and of operating with a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

prohibited alcohol concentration. He asserts that the circuit court erred in admitting blood analysis evidence and in instructing the jury with respect to this evidence. Sonin also argues that the evidence was insufficient to support the verdicts. I affirm the circuit court.

Background

¶2 On December 26, 2009, Dane County Sheriff's Deputy Bradley Schroeder was dispatched at 3:35 p.m. to the scene of a rollover accident on a "pretty straight" section of County Highway TT between Madison and Marshall, Wisconsin. Deputy Schroeder arrived on the scene and made contact with the driver of the rolled over vehicle, an SUV, who identified himself as Vladimir Sonin. Deputy Schroeder observed that Sonin's eyes were bloodshot and glassy and his breath had a strong odor of intoxicants. Deputy Schroeder administered field sobriety tests and the results, according to the deputy, indicated intoxication. The deputy later transported Sonin to a medical facility, where medical personnel conducted a blood draw. The result of a subsequent blood analysis showed .142 grams of alcohol per 100 milliliters of blood. Additional facts are provided below as necessary.

Discussion

A. Whether The Circuit Court Erred In Admitting The Blood Analysis

¶3 Sonin argues that the circuit court misused its discretion when deciding that the blood analysis was admissible under WIS. STAT. § 885.235(1g). Under this statute, a blood analysis is admissible "if the [blood] sample was taken within 3 hours after" vehicle operation. *See* ***id.*** Sonin argues that this requirement was not met because "the time of driving was never established with any

precision." According to Sonin, all that the evidence does show with sufficient certainty is that the blood draw occurred at 7:10 p.m. and the time of driving was sometime before the 3:35 p.m. dispatch call.

¶4 Sonin's argument is not clear, but he seemingly assumes that, if evidence relating to the timing of the operation and the blood draw is disputed, the circuit court may not admit the blood analysis evidence. Sonin, however, provides no support for such a proposition, and I am aware of none. To the contrary, it is common for circuit courts to resolve factual disputes when making decisions on the admission of evidence. Here, the evidence easily supports a finding that the blood draw occurred within three hours of Sonin driving his SUV.

¶5 As to the time of driving, Deputy Schroeder testified that he was dispatched to the scene about 3:35 p.m. and he arrived within ten minutes after that. Upon arriving, according to Deputy Schroeder, he asked Sonin about the time lapse between the accident and the deputy's arrival. Deputy Schroeder testified that Sonin "basically" said it "just occurred." According to Sonin, this evidence is insufficient because the phrase "just occurred" is so imprecise that it could mean several minutes or several hours. I disagree. In the context of a police officer who has just arrived at an accident scene asking an involved driver when the accident occurred, it is not reasonable to suppose a driver would use the phrase "just occurred" to mean an hour or more. "[J]ust occurred" does, on the other hand, aptly describe the much more likely scenario in which the occupant of a passing car reported the accident and Deputy Schroeder arrived on the scene about ten minutes later.

¶6 Moreover, even without Deputy Schroeder's testimony regarding Sonin's statement, the evidence easily permitted the inference that the time-lag

between the dispatch call and Deputy Schroeder's arrival was less than one hour. First, the time of day was about 3:30 in the afternoon on a county highway and Sonin's SUV had flipped and ended up resting on its roof. It would have been odd if it had taken more than an hour for an occupant of a passing car to observe the scene and call in the accident. Second, the accident occurred on December 26. It is not reasonable to suppose that Sonin would have remained in his overturned vehicle with the motor and heater running or, instead, just stood in the cold for an hour, for no apparent reason, when there was at least one nearby house.[2]

¶7 As to the time of the blood draw, Deputy Schroeder testified that, after questioning Sonin and having him perform field sobriety tests, he took Sonin from the accident scene to a medical facility where the Informing the Accused form was completed at 5:04 p.m. and where the blood draw took place at 5:08 p.m. The deputy testified that the Alcohol/Drug Influence Report was completed at 5:25 p.m., after the blood draw. All three of these time assertions are supported by times written on the Informing the Accused form and the Alcohol/Drug Influence Report. Notably, Sonin signed the Alcohol/Drug Influence Report next to the 5:25 p.m. time.

¶8 Sonin contends that this evidence was insufficient because a medical document prepared by a person at the medical facility indicated the blood draw took place at 7:10 p.m. This argument, however, has been forfeited. At no time before the circuit court did Sonin point to the medical document as proof of an alternative time of the blood draw. Moreover, even if the argument had been

[2] A man who lived on County Highway TT testified that he left his residence at about 4:00 p.m. on the day of the accident and observed that his mailbox was down and, to the left of that, he saw an SUV on its roof.

made, it is plainly more reasonable to credit testimony subject to cross-examination and supported by a document signed by Sonin than to credit the time written by a non-testifying declarant when it is not known when that document was filled out or whether the declarant was even willing to stand behind the assertion.[3]

¶9 Thus, the evidence plainly supports a finding that the driving and the blood draw occurred about two hours apart.

¶10 Sonin argues that the circuit court misunderstood its gatekeeping function under WIS. STAT. § 885.235(1g). According to Sonin, the circuit court must, as a prerequisite to admission, determine that the statutory three-hour time period was met. I agree with Sonin's interpretation of the statute. Section 885.235(1g) reads, in relevant part:

> [E]vidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood …, *is admissible* on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration *if the sample was taken within 3 hours after the event to be proved.*

[3] It appears that Sonin's counsel did not notice prior to or during trial that the medical document indicated a different time for the blood draw. Rather, it appears that this discrepancy was first noticed by the jury during deliberations. Thus, both the court and the jury were deprived of any meaningful testing of the veracity of the time assertion in the document. Moreover, it is not surprising that Sonin's counsel did not notice the discrepancy. The times written on the Informing the Accused form and the Alcohol/Drug Influence Report are consistent with the on-scene investigation Deputy Schroeder described and his testimony that he took Sonin from the scene to a medical facility for the blood draw. There is nothing to suggest why there would have been two additional hours of delay. The obvious inference is that the medical person mistakenly recorded "1910," instead of "1710." I do not purport to resolve this factual issue. Rather, I note these facts because they support my view that it was more than reasonable for the court and the jury to credit Deputy Schroeder's testimony and the times indicated on the police documents.

(Emphasis added.) Thus, the plain language of the statute says that evidence of blood alcohol level "is admissible … if" the three-hour requirement is met. And, I agree that the circuit court's comments suggest that it may have misunderstood that it needed to decide, as a matter of admissibility, whether the State proved that the draw occurred within three hours.[4] However, I also conclude that reversal is not warranted on these facts because no reasonable judge would have excluded the evidence. As I have already made clear, the evidence supporting a factual inference that the blood draw occurred within three hours of Sonin's accident is very strong.

¶11 In sum, the record easily supports admission of the blood analysis under WIS. STAT. § 885.235(1g).

B. Whether The Circuit Court Erred In Instructing The Jury

¶12 Sonin complains that the circuit court erroneously declined to instruct the jury that it had an obligation to determine whether the blood draw occurred within three hours of operation of the vehicle. According to Sonin, the instruction the circuit court did give denied Sonin his right to have the jury make

[4] It may be that the State similarly misapprehends the statutory scheme. The State says: "Judge Sumi correctly ruled that the State made a prima facie case and allowed the lab analyst's results into evidence." However, the admissibility issue under WIS. STAT. § 885.235(1g) is not whether the State makes a prima facie case for admission. Rather, under this statute, the admissibility issue is whether the State has made a showing that the blood draw occurred within three hours of operation. The "prima facie" dimension of the statute comes into play only after a blood analysis is determined to be admissible. *See, e.g.*, § 885.235(1g)(c) ("The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.").

this factual determination. I conclude that the jury instruction that was given was adequate.[5]

¶13 In accordance with WIS JI—CRIMINAL 2669, the circuit court instructed:

> The law states that the alcohol concentration in a defendant's blood sample taken within three hours of operating a motor vehicle is evidence of the defendant's alcohol concentration at the time of the operating.

This instruction sufficiently informed Sonin's jury that, for the blood alcohol concentration evidence to have probative value, the trial evidence needed to show that the blood sample was drawn within three hours of Sonin driving his SUV. The instruction does this by stating that the alcohol concentration in Sonin's blood "is evidence [of intoxication and blood alcohol concentration at the time of operation] … if" the three-hour requirement is met. It follows that, if the three-hour requirement is not met, the alcohol evidence is not evidence of either intoxication or blood alcohol concentration at the time of operation. A reasonable juror would understand that this was something the State was required to prove.

¶14 Additionally, the proposition that the State had the burden on this issue would have been reinforced by the nature of closing arguments. In particular, Sonin's counsel's short closing argument (covering just five pages of transcript) focused almost entirely on the *time* of the accident. Sonin's counsel

[5] The State's response to Sonin's jury instruction argument focuses on an issue that Sonin does not raise, the proposition that, if the admissibility requirements of WIS. STAT. § 885.235(1g) are met, the statute permissibly creates a presumption that the blood test result is probative of intoxication and blood alcohol level at the time of driving. Sonin, however, is complaining that the instruction did not sufficiently apprise the jury of its obligation to decide, as a threshold factual matter, whether the blood draw occurred within three hours of operation. He does not challenge the presumption that is created once the three-hour requirement is met.

questioned why, if the accident occurred shortly before a nearby homeowner walked out of his house at about 4:00 p.m. and saw the result of the accident, the homeowner did not hear the accident. The remainder of counsel's argument consisted mostly of challenging the veracity of Deputy Schroeder's assertion that Sonin indicated to the deputy that the accident had "just occurred." The obvious import of these arguments was that the State failed to prove when the accident occurred and, therefore, failed to prove that the accident occurred less than three hours before the blood draw.

¶15 During deliberations, the jury apparently discovered the notation on the medical form indicating that the blood draw was at "1910" hours and sent out a question asking: "Collection time of the blood was written as 1910 which is 7:10 p.m. If the accident occurred at 3:35 p.m. 7:10 is over 3 hours which voids the blood test?" Sonin suggests that this question indicates juror confusion over the three-hour issue. While it may be that the jury was simply verifying its correct understanding of the three-hour issue, I agree that it is also possible that the question shows that at least one juror was not sure whether the test result was probative if the blood draw was more than three hours after the accident. Regardless, I conclude that the circuit court's decision to direct the jury's attention to WIS JI—CRIMINAL 2669 was the correct response and that the instruction, carefully considered by a reasonable juror, provided the answer.

¶16 Accordingly, I conclude that the jury instruction that was given did not deprive Sonin of his right to have the jury independently decide whether the blood draw occurred within three hours of Sonin's operation of the vehicle.

C. Whether The Evidence Was Sufficient To Support The Jury's Verdicts

¶17 Sonin argues that the evidence was insufficient as a matter of law to prove that the blood was drawn within three hours of the time he drove his SUV and, therefore, insufficient to support the jury's verdicts. In making this argument, Sonin states the proper test—whether evidence, viewed most favorably to the State, supports the jury verdict—but he does not properly apply that test. Rather than discuss the evidence from a viewpoint most favorable to the State, Sonin argues for inferences and credibility determinations that favor his defense.

¶18 Regardless of Sonin's argument, the evidence was sufficient and the discussion above explains why. In the context of explaining why the circuit court properly admitted the blood analysis evidence, I also effectively explained why the evidence is sufficient to support a jury finding that the blood draw was within three hours. I need not repeat that discussion here.

By the Court.—Judgment affirmed.

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