

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF PRAIRIE DU CHIEN,

Plaintiff-Respondent,

v.

GEORGE J. EASTMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

EICH, C.J.¹ George Eastman appeals from a judgment finding him guilty of driving while intoxicated in violation of a City of Prairie du Chien ordinance adopting § 346.63(1), STATS. He claims that the judgment cannot stand because there was no evidence that the Intoxilyzer machine used to

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

determine his blood alcohol content had been periodically tested as required by various provisions of the administrative code.²

We reject the argument and affirm the judgment.

Eastman bases his argument on *City of New Berlin v. Wertz*, 105 Wis.2d 670, 314 N.W.2d 911 (Ct. App. 1981), which he says compels the conclusion that the city's failure to affirmatively prove the dates and results of the required testing of the machine requires dismissal of the charge.

Wertz does not so hold, however. In that case, the defendant sought to suppress the results of a breath test on grounds that the testing methods and procedures did not meet provisions of the administrative code requiring (a) continuous observation of the subject for twenty minutes prior to testing and (b) compliance of the "assay report" of the machine's manufacturer with certain standards. *Wertz*, 105 Wis.2d at 672 n.2, 314 N.W.2d at 912. We held that his "contention is not correct" because "[t]he State is not required to

² Specifically, Eastman points to § 343.305(6)(b)3, STATS., which requires the department of transportation to "test and certify the accuracy of [such] equipment ... before regular use of the equipment and periodically thereafter at intervals of not more than 120 days," and to WIS. ADM. CODE § TRANS 311.10(1), which provides:

- (1) All quantitative breath alcohol test instruments ... shall be tested and certified for accuracy in accordance with the following standards:
 - (a) Each instrument shall be tested and certified for accuracy before regular use and periodically thereafter pursuant to s. 343.305 [(6)](b)3, Stats.
 - (b) Each test ... shall include ... an instrument blank analysis and an analysis utilizing a calibrating unit. The result of the calibrating unit analysis shall fall within 0.01 grams of alcohol per 210 liters of the established reference value.
 - (c) The original reports of instrument maintenance and certifications shall be forwarded to and retained by the department.

affirmatively prove compliance with administrative code procedures as a foundation for the admission of a breath[] test." *Id.* at 673, 674, 314 N.W.2d at 912, 913. We based our holding largely on the fact that the statute rendering such tests admissible in court, § 343.305(7), STATS., "places no conditions on the admissibility of the results of [the] test." *Id.* at 673, 314 N.W.2d at 912.

Eastman points to *dicta* in a footnote in *Wertz* where, in discussing statutes establishing time limitations for administration of breath tests³ and requiring proof of authentication or identification of items received in evidence,⁴ we noted that our own examination of the record "reveals an abundance of evidence demonstrating the probable accuracy of the ... test," illustrating the point as follows:

The City offered evidence that the operator of the breathalyzer was certified as an operator and that he was experienced in operating the machine. *There was also evidence that the machine had been properly tested before and after the test* and that the ... operator had carefully followed the recommended procedures for operation of the machine. There was evidence which demonstrated, at the very least, substantial compliance with [Wis. ADM. CODE § TRANS 311], if not actual compliance with the relevant sections dealing with breathalyzer tests and standards.

Wertz, 105 Wis.2d at 676-77 n.10, 314 N.W.2d at 914 (emphasis added).

We framed the issue in *Wertz* as "whether the prosecutor was required to prove compliance with certain administrative code procedures as

³ Section 885.235(1), STATS., requires that where a breathalyzer is used to prove intoxication while operating a motor vehicle the test must be made within 3 hours of the alleged action.

⁴ Section 909.01, STATS., requires a showing of evidence sufficient to support a finding that "the matter in question is what its proponent claims" before evidence may be admitted.

foundation for the introduction into evidence of the results of a breathalyzer test," and we held that "compliance with all administrative code procedures was not required for [the] test results to be admitted" *Wertz*, 105 Wis.2d at 671, 314 N.W.2d at 911. And while, as we said in *Wertz*, trial courts may, in appropriate cases--such as where the court is convinced "that the accuracy of the test is so questionable that its results are not probative" (and thus not relevant evidence under § 904.01, STATS.), or where "accuracy of the test is so questionable that its probative value is outweighed by its prejudicial effect"--properly refuse to admit the test in evidence even though there are "no legislatively imposed foundational prerequisites," *id.* at 675, 314 N.W.2d at 913, there is no argument that such is the case here, and the trial court did not so rule. Indeed, the court recognized that the Intoxilyzer operator had been trained in the machine's operation and "followed the [applicable] procedures," and that the accuracy of the test result (indicating blood alcohol content of .15%) was also corroborated by the observations of the officer who administered a series of field sobriety tests to Eastman at the scene of his arrest.

Eastman has not persuaded us that *Wertz*--or any other case, statute or administrative rule--compels the result he urges. Rather, we conclude that the city was not required to affirmatively prove that the machine used to test his breath had been tested as required by § 343.305(6)(b)3, STATS., or WIS. ADM. CODE § TRANS 311.10(1), as Eastman argues, and that the trial court did not err in ruling as it did.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.