

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 6, 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**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1058-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS HIRTHE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed and cause remanded.*

FINE, J. Douglas Hirthe appeals from his conviction by a jury of operating a motor vehicle under the influence of an intoxicant. See §§ 346.63(1)(a) and 346.65(2), STATS. The sole issue presented by this appeal is whether the trial court erroneously admitted into evidence the results of the chemical analysis of Hirthe's breath. We reverse.

Section 346.63(1), STATS., makes it illegal for a person to operate a motor vehicle both “[u]nder the influence of an intoxicant” and with “a prohibited alcohol concentration.”<sup>1</sup> After he failed to satisfactorily perform field sobriety tests, Hirthe was arrested for operating a motor vehicle under the influence of an intoxicant. Police then tested Hirthe's breath with an intoxilyzer machine, and got results of .136% and .132%.

Sections 343.305(5) & (6), STATS., permit receipt into evidence the results of a test measuring the blood-alcohol content of a person's breath without establishing the scientific validity of the test so long as the “equipment used by law enforcement officers” is tested and certified as accurate “at intervals of not more than 120 days.”<sup>2</sup> See *State v. Grade*, 165 Wis.2d 143, 148-

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<sup>1</sup> Section 346.63(1), STATS., provides:

**Operating under influence of intoxicant or other drug. (1)** No person may drive or operate a motor vehicle while:

- (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
- (b) The person has a prohibited alcohol concentration.
- (c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

<sup>2</sup> Section 343.305(5)(d), STATS., provides:

At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an

149, 150, 477 N.W.2d 315, 316-317 (Ct. App. 1991) (automatic admissibility conditioned on compliance with statute). This was not done here; the machine on which Hirthe's breath samples were run had been tested and certified for accuracy 167 days before and forty-six days after the testing of Hirthe's breath. Nevertheless, the trial court admitted the results, ruling that failure to comply with the certification schedule went to the "weight" of the results, not their  
(.continued)

intoxicant or a controlled substance or a combination of alcohol and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, or having a prohibited alcohol concentration, or alleged to have been driving or operating or on duty time with respect to a commercial motor vehicle while having any measured alcohol concentration above 0.0 or possessing an intoxicating beverage, regardless of its alcohol content, or within 4 hours of having consumed or having been under the influence of an intoxicating beverage, regardless of its alcohol content, or of having an alcohol concentration of 0.04 or more, *the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant or a controlled substance or a combination of alcohol and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or any issue relating to the person's alcohol concentration.* Test results shall be given the effect required under s. 885.235.

(Emphasis added.)

Section 343.305(6)(b), STATS., provides:

The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

....

3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3) (a) or (am) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days.

“admissibility.” Although the jury found Hirthe guilty of operating a motor vehicle under the influence of an intoxicant, it found him not guilty of “operating a motor vehicle with a prohibited alcohol concentration of 0.10% or more.” (Uppercasing omitted).

A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has “a reasonable basis” and was made “in accordance with accepted legal standards and in accordance with the facts of record.” *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). As noted, the legal standards governing the admissibility of test results are governed by §§ 343.305(5)(d) & (6)(b)3, STATS. These standards are mandatory; the test results are not automatically admissible unless there is compliance. *Grade*, 165 Wis.2d at 149, 150, 477 N.W.2d at 317-318.<sup>3</sup> Accordingly, the trial court applied the incorrect legal standard. Inasmuch as we cannot conclude that this error was harmless beyond a reasonable doubt, see *State v. Dyess*, 124 Wis.2d 525, 544-545, 370 N.W.2d 222, 232-233 (1985), Hirthe is entitled to a new trial.<sup>4</sup>

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<sup>3</sup> This does not mean that the validity of the results of a test that was not “administered in accordance with” § 343.305, STATS., § 343.305(5)(d), STATS., could not be proved by expert testimony. See § 885.235(4), STATS. (“The provisions of this section relating to the admissibility of chemical tests for alcohol concentration, intoxication or blood alcohol concentration shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a specified alcohol concentration or had a blood alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 346.63 (2m) or 350.101 (1) (c).”). Automatic admissibility *via* § 343.305, STATS., however, would be barred.

<sup>4</sup> Although not argued, we must consider whether there is sufficient evidence, other than the breath test, to sustain Hirthe's conviction for operating a motor vehicle under the influence of an intoxicant. See *State v. Ivy*, 119 Wis.2d 591, 607-610, 350 N.W.2d 622, 630-632 (1984) (retrial prohibited by double-jeopardy clause unless evidence is sufficient to support conviction). The evidence here is sufficient to permit a retrial. The arresting officer testified that Hirthe failed the field sobriety tests, that Hirthe's eyes were “glassy and bloodshot,” that Hirthe admitted to drinking six beers prior to the accident, and that the officer “detected an odor of alcoholic beverage” on Hirthe's breath. Under our standard of review, see *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990), there is sufficient evidence aside from the breath-test results to support the jury's verdict that Hirthe was guilty of operating a motor vehicle under the influence of an intoxicant.

*By the Court.* – Judgment reversed, and cause remanded.

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