

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 9, 1996

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.

**Nos. 95-1780-CR
95-1781-CR
95-1782-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RYAN E. BROCKMAN,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
JACK F. AULIK, Judge. *Reversed and cause remanded.*

GARTZKE, P.J.¹ The State appeals from an order to exclude from evidence the results of a horizontal gaze nystagmus (HGN) test of the defendant, Ryan E. Brockman. The issues are whether: (1) the State can appeal the order; (2) the trial court erred when it declared a witness unqualified to testify as an expert on HGN testing; and (3) the trial court improperly entered

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

an order reversing its prior oral decision without holding an additional hearing. We conclude the State can appeal the order, and we reverse it.²

I. BACKGROUND

On October 15, 1994, at 12:08 a.m., Dane County sheriff's deputy Randall P. Wiessinger saw a vehicle traveling about 70 miles per hour on Bailey Road in the Town of Sun Prairie. He stopped it after he saw the vehicle's left wheels cross the center line and then drift back to the right side of the road.

The driver was Ryan Brockman. Wiessinger smelled intoxicants on Brockman's breath and asked if he had been drinking. Brockman said he had been earlier in the evening. Wiessinger asked him to perform field sobriety tests, including the HGN test. During that test, Wiessinger saw eye movements which he later testified indicate possible intoxication. Basing his decision on the results of those tests, Wiessinger arrested Brockman for operating a motor vehicle while under the influence of an intoxicant. After the State charged Brockman with violating § 346.63(1)(a), STATS., operating a motor vehicle while under the influence of an intoxicant, Brockman moved to suppress the results of the HGN test.

Wiessinger testified at the suppression hearing that he was trained in the use of the HGN test. He has used it regularly and almost always corroborated it with other field sobriety tests and the intoxilyzer. He explained that the person administering the HGN test holds a finger or a pen about eighteen to twenty inches in front of the subject's eyes and asks the subject to concentrate on the top of the pen and follow it without moving his head. Eye jerkiness during the test may indicate intoxication.

² The State appeals from the same trial court order in three cases charging Brockman with violations of § 346.63(1)(a), STATS., operating under the influence, § 946.49, STATS., bail jumping, and § 344.44, STATS., operating after revocation. We granted the State's motion to consolidate the appeals.

The State called Dr. Paul M. Godich at the suppression hearing to testify on the scientific foundation of the HGN test as a reliable indicator of intoxication and to establish that a properly trained officer can readily observe nystagmus.

Dr. Godich testified that he has practiced as an optometrist since 1965. In 1965 he received a degree as a Doctor of Optometry from Indiana University School of Optometry. He had testified as an expert on HGN testing in two other cases.

Since 1984, Dr. Godich has served as chairman of the Wisconsin Optometric Association Motorist Vision and Traffic Subcommittee on horizontal gaze nystagmus. As chairman of the subcommittee, he has studied nystagmus testing beyond the normal course work for an optometrist. He has not performed studies on the effects of alcohol on HGN, but tests his patients for nystagmus. Specialized optometric training in HGN is rare, and most knowledge about HGN is gained by reading research articles. Dr. Godich explained that nystagmus is an involuntary jerking of the eyes in which the eye muscles pull the eye quickly in one direction and then slowly back. Nystagmus can occur without the consumption of alcohol.

Dr. Godich brought to the hearing thirty articles that he had studied on the relationship of intoxicants to HGN. He could not testify on the expertise of the authors, and he was unfamiliar with articles on alcohol and HGN the defense offered.

The trial court ruled that Dr. Godich was not qualified to testify as an expert on the scientific foundations of HGN testing and its relationship to intoxicants. The court ruled that Dr. Godich's knowledge of HGN and its relationship to alcohol was based on hearsay and not within the learned treatise exception to the hearsay rule. The court said:

If you want this witness to qualify as an expert, I can tell you right now you have not qualified him, and you will not

qualify him, as far as I'm concerned, based upon some articles that he read that you have no basis to-- and if, as I understand it, the witness has no basis to establish that these, in fact, are learned treatises as defined by law.

Suggesting that the State could later provide a "properly" qualified expert witness, the court did not grant or deny the motion to suppress. The court said:

[T]he way to qualify ... an expert is to disclose to the defense the articles upon which he bases his opinions under the provisions of the statute, the learned treatise provisions of the statute.... As far as this motion is concerned, I'm not granting it or denying it, I am simply saying that, unless the State puts on an expert who qualifies on this particular test, I will not allow this test to be used in the course of this trial.

The court later granted Brockman's motion in limine to bar the State from presenting opinions of a police officer at trial of the facts surrounding the nystagmus test administered to the defendant. The court ruled that the State had the burden to show a scientific basis supports HGN testing by an officer to determine the effect of alcohol and the nystagmus of a subject. The State had not shown that Dr. Godich was qualified to testify whether police officers had sufficient training to give an opinion that a driver showed nystagmus from the consumption of alcohol and had not shown that Dr. Godich qualified as an expert on the subject of HGN testing.

II. STATE'S RIGHT OF APPEAL

Brockman argues that the State cannot appeal the order suppressing evidence under § 974.05(1)(d)2, STATS. He cites *State v. Eichman*, 155 Wis.2d 552, 456 N.W.2d 143 (1990), for the proposition that the State may appeal only pretrial orders "barring" admission of evidence which might normally determine the success of the prosecutor's case.

Section 974.05(1)(d)2, STATS., provides in pertinent part:

[A]n appeal may be taken by the state from any ...

- (d) Order or judgment the substantive effect of which results in:
1. Quashing an arrest warrant;
 2. Suppressing evidence; or
 3. Suppressing a confession or admission.

The *Eichman* court held that the State may appeal as of right an order excluding evidence that normally determines the successful outcome of the prosecution. *Id.* at 564 n.1, 456 N.W.2d at 148. We have construed *Eichman* to mean that the State may resolve by an appeal under § 974.05(1)(d)2, STATS., any "significant evidentiary question prior to trial to avoid delays once trial has commenced." *State v. Maass*, 178 Wis.2d 63, 67, 502 N.W.2d 913, 915 (Ct. App. 1993).

Because it would tend to establish whether one of the elements of § 346.63(1)(a), STATS., exists for operating under the influence, Brockman's HGN test result is significant evidence. The trial court's order barred its admission. The State may appeal the order under § 974.05(1)(d)2, STATS.

III. EXPERT WITNESS

Whether a witness is qualified as an expert is a discretionary determination for the trial court. *State v. Donner*, 192 Wis.2d 305, 317, 531 N.W.2d 369, 374 (Ct. App. 1995). The court properly exercises its discretion when it applies the correct theory of law to the facts of record in a reasoned manner. *Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). If the witness knows something beyond that generally known, the witness is an expert. *State v. Hollingsworth*, 160 Wis.2d 883, 896, 467 N.W.2d 555, 560 (Ct. App. 1991).

The trial court ruled that Dr. Godich was not qualified because his opinions were based on hearsay, since no evidence existed that the articles he brought to the hearing came under the learned treatise exception, but even if they did the State had not complied with the forty-day notice requirement in that exception, § 908.03(18)(a), STATS.

The articles were not hearsay. They were not offered to establish the truth of their contents. The State asked Dr. Godich about the articles to establish his qualifications and not to establish the basis of his opinion.

Even if the articles formed the basis of Dr. Godich's opinions, an expert may base his or her opinion on hearsay. *E.D. Wesley Co. v. City of New Berlin*, 62 Wis.2d 668, 675, 215 N.W.2d 657, 661 (1974). An expert may testify and give reasons for his opinions without prior disclosure of the underlying facts or data. Section 907.05, STATS. "[C]hallenges to the admissibility of source materials underlying an expert's opinion go not to the qualifications or competency of the witness, but only to the weight accorded to his or her testimony." *In re Paternity of T.L.S.*, 125 Wis.2d 399, 401, 373 N.W.2d 55, 56 (Ct. App. 1985).

Because the trial court's ruling is based in part upon error of law, we reverse and remand the matter to the trial court for further consideration of Dr. Godich's qualifications. We do not rule that Dr. Godich is or is not qualified. An appellate court will not exercise discretion vested in a trial court. *Barrera v. State*, 99 Wis.2d 269, 282, 298 N.W.2d 820, 826 (1980).

By the Court.—Order reversed and matter remanded for further proceedings.

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