

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 18, 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.

No. 95-1927

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF DANE,

Defendant-Respondent,

v.

DONALD G. BLATTERMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL B. TORPHY, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Donald G. Blatterman appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), contrary to § 69.01 of the Dane County ordinances, which incorporates § 346.63(1)(a), STATS. Blatterman raises three issues: (1) whether a failure to follow § 343.305, STATS., makes the result of an Intoxilyzer test inadmissible; (2) whether the police's failure to permit Blatterman to obtain an additional blood alcohol test rendered the Intoxilyzer test inadmissible; and (3) whether the trial court denied

Blatterman due process of law by restricting cross-examination of a prosecution witness.

We conclude that the results of the Intoxilyzer test were irrelevant because Blatterman was convicted of OMVWI, not operating with a prohibited blood alcohol concentration, and he has not argued that the evidence was insufficient without the Intoxilyzer test. Similarly, we further conclude that because Blatterman was convicted of OMVWI, any failure to permit an additional test is irrelevant. Finally, we conclude that even if the trial court prevented Blatterman from cross-examining a State's witness, the testimony given by that witness was irrelevant. We, therefore, affirm.

BACKGROUND

Shortly after 9:00 p.m. on September 10, 1993, a Dane County Deputy Sheriff was driving on a road in the Township of Dunn. An approaching van crossed the centerline of the road by about four or five feet into his lane of traffic, causing him to take evasive action. The van missed striking the deputy's marked squad car by about one foot. The deputy pursued the van and pulled it over. Blatterman was driving the van. The deputy noticed slurred speech and a moderate odor of intoxicants on his breath. He asked Blatterman to do field tests, some of which he had difficulty completing. The deputy arrested Blatterman and took him to the McFarland Police Department for an Intoxilyzer test. The deputy issued two citations for violating § 69.01 of the Dane County ordinances. The first citation incorporated § 346.63(1)(a), STATS., which prohibits OMVWI, and the second citation incorporated § 346.63(1)(b), operating a motor vehicle with a prohibited blood alcohol concentration.

After completing the Intoxilyzer test, the deputy told Blatterman that the alternative test authorized by his agency was either a blood test at Dane County's expense or a urine test at Blatterman's expense. Blatterman did not request a blood test. He could have had a urine test at his own expense upon the completion of the paperwork for his release, but apparently he did not do so.

We have taken the preceding facts from the transcript of Blatterman's trial. Blatterman did not testify, so the only testimony was that of the deputy and the Intoxilyzer operator. We will now address Blatterman's assertions of error.

DISCUSSION

Section 343.305(5)(d), STATS., which incorporates § 885.235, STATS., makes the result of a breath test admissible at a trial. For a breath test to be admissible, the procedures set out in § 343.305(6)(c) must be followed. *State v. Grade*, 165 Wis.2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991). Blatterman asserts that these procedures were not followed for the Intoxilyzer machine used to test his breath. Therefore, the result of his breath test should have been suppressed.

But Blatterman was not convicted of operating a motor vehicle with a prohibited blood alcohol concentration. The trial court dismissed that charge. The trial court convicted him of OMVWI, a different violation prohibited by the county ordinance incorporating § 346.63(1)(a), STATS. Though Blatterman's blood alcohol content is relevant to determine whether a person is guilty of OMVWI, he has not argued that the absence of evidence of his blood alcohol content makes the total evidence insufficient to support a conviction for violating § 346.63(1)(a). We, therefore, do not address this issue. *Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (we generally do not decide issues not raised on appeal).

Next, Blatterman argues that because the deputy refused to permit him to take a urine test, the result of his breath test should be suppressed. While we conclude that this assertion incorrectly characterizes the testimony of the deputy, we also conclude that it is irrelevant. Even if Blatterman's factual assertion were correct, Blatterman was not convicted of driving with a prohibited blood alcohol concentration. Since he does not assert that the trial court could not have found him guilty of OMVWI absent the result of the Intoxilyzer test, we reject this argument.

Blatterman's last contention is that he should be given a new trial because the trial court denied him due process of law by restricting his cross-examination of "the crucial prosecution witness." The transcript shows that Blatterman is referring to his cross-examination of the Intoxilyzer operator.¹ Blatterman has not complained that he was forced to cut short his cross-examination of the deputy, and indeed, Blatterman thoroughly cross-examined him. He ended his cross-examination indicating that he had no further questions.

But, as we have noted, Blatterman was not convicted of operating a motor vehicle with a prohibited blood alcohol concentration. The testimony which went to whether Blatterman was guilty of OMVWI was given by the deputy, and the record shows that he had no further questions of the deputy. The testimony given by the Intoxilyzer operator was irrelevant to the statutory violation of which Blatterman was convicted. We see no due process violation in the limitation of irrelevant testimony. *State v. Morgan*, 195 Wis.2d 388, 432, 536 N.W.2d 425, 441-42 (Ct. App. 1995). And Blatterman has not argued that without the Intoxilyzer test, the evidence was insufficient to convict him of OMVWI. Accordingly, we affirm.

By the Court. – Judgment affirmed.

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

¹ Blatterman's counsel stated at the close of the hearing: "For the record, I would indicate that I felt forced to truncate my examination of the Intoxilyzer operator by the time constraints placed upon me by the Court."