COURT OF APPEALS DECISION DATED AND RELEASED

February 28, 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. 95-2226

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

CITY OF MEQUON,

Plaintiff-Respondent,

v.

MICHAEL STERR,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed*.

SNYDER, J. Michael Sterr was convicted of operating a motor vehicle with a prohibited blood alcohol concentration, contrary to § 346.63(1)(b), STATS.[1] Sterr contends that the trial court erred in admitting the result of the Intoxilyzer test because of a lack of foundation as to its accuracy. In a related claim, he also argues that based on the inadmissibility of the test result,

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[1] Sterr was also charged with operating a motor vehicle while under the influence of alcohol, contrary to § 346.63(1)(a), STATS. The jury found him not guilty of that charge.

the trial court should have dismissed the § 346.63(1)(b) count at the close of the evidence. Finally, he claims that the trial court erred when it failed to give a requested jury instruction.

We conclude that the lack of presentation of proof of certification (proving the machine had been properly tested for accuracy within the required time period) did not render the test results inadmissible. Therefore, the trial court's denial of the requested dismissal of the "operating with a prohibited blood alcohol concentration" count was proper. The trial court's refusal to give Sterr's requested jury instruction was also properly within its discretion. Consequently, we affirm.

The underlying incident occurred when City of Mequon Police Officer Darren Selk, on routine patrol, observed a vehicle in a ditch. After Selk stopped to offer assistance, Sterr identified himself as the driver of the vehicle and stated that he drove into the ditch when another vehicle attempted to pass him and he overcompensated to the right. During his conversation with Sterr, Selk detected an odor of alcohol; after Sterr failed field sobriety tests, he was placed under arrest and transported to the Mequon police department. An Intoxilyzer test showed his blood alcohol concentration to be 0.17%. Sterr pled not guilty to the charged violations of § 346.63(1)(a) and (b), STATS., and a jury trial was held. After Sterr was found guilty of operating a motor vehicle with a prohibited blood alcohol concentration, this appeal followed.

Sterr's first claim of error is based upon the admission of the results of the Intoxilyzer test. At trial, Sterr claimed that the test results were

not admissible because the City had not introduced "certificates of accuracy," and this omission was contrary to the requirements of § 343.305(6)(b), STATS.

A determination of whether the test results were admissible is governed by the language of § 343.305(6)(b), STATS. Statutory interpretation is a question of law that is resolved without deference to the trial court. ***Sauer v. Reliance Ins. Co.,*** 152 Wis.2d 234, 240, 448 N.W.2d 256, 259 (Ct. App. 1989).

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

> The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:
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> 1. Approve training manuals and courses ... for the training of law enforcement officers in the chemical analysis of a person's breath;
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> ....
>
> 3. Have trained technicians ... test and certify the accuracy of the equipment to be used by law enforcement officers ... at intervals of not more than 120 days ....

The issue in this case is whether the requirements of this paragraph are a prerequisite to the automatic admissibility of the test result.

Tests by recognized methods, such as speedometer, breathalyzer and radar, do not need to be proved for reliability in every case. ***State v. Trailer Serv., Inc.,*** 61 Wis.2d 400, 408, 212 N.W.2d 683, 688 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be

seriously frustrated. ***Id.*** at 408, 212 N.W.2d at 688-89. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. ***Id.*** at 408, 212 N.W.2d at 688.

The ***Trailer Service*** case was subsequently followed by ***City of New Berlin v. Wertz,*** 105 Wis.2d 670, 314 N.W.2d 911 (Ct. App. 1981), which determined that compliance with administrative code procedures was not required as a foundation for the admissibility of breathalyzer results. ***Id.*** at 674, 314 N.W.2d at 913. In that case the court noted that "an attack on the qualifications of the operator, the methods of operation or the accuracy of the equipment is a matter of defense and goes to the weight to be accorded to the test and not to the test's admissibility." ***Id.*** at 675 n.6, 314 N.W.2d at 913.

According to ***State v. Grade,*** 165 Wis.2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991), the requirements of § 343.305(6)(c), STATS., which outline the *procedures* which must be followed when the test is administered, must be given a mandatory reading. The test must consist of an adequate breath sample analysis, a calibration sample and a second adequate breath sample. *See* § 343.305(6)(c). In order to be adequate, the instrument must analyze the sample and not reject it as deficient. ***Id.*** Finally, the individual tested must provide two separate, adequate breath samples in the proper sequence. ***Id.*** Failure to meet these requirements undermines the accuracy of the underlying test. ***Grade,*** 165 Wis.2d at 149, 477 N.W.2d at 317.

Our review of case law which addresses the requirements for the admissibility of Intoxilyzer test results leads us to conclude that the mandatory

aspects regarding automatic admissibility relate only to the procedures for administering the test, *see* § 343.305(6)(c), STATS., not to the requirements that the Department of Transportation certify the accuracy of the machines at regular intervals. *See* § 343.305(6)(b).[2] We reiterate, as we stated in ***Wertz***, that this holding does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative. ***Wertz***, 105 Wis.2d at 674-75, 314 N.W.2d at 913. That, however, did not happen here.[3]

We conclude that the trial court did not err when it admitted the results of the Intoxilyzer test. Based upon the proper admission of the test results, the trial court's denial of Sterr's motion to dismiss the charge of operating a motor vehicle with a prohibited blood alcohol concentration was proper. The results of the Intoxilyzer test were properly before the jury, and the denial of the motion to dismiss was a proper exercise of discretion.

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[2] Sterr argues that the statement in § 343.305(5)(d), STATS., "the results of a test administered in accordance with this section are admissible," requires that all portions of the statute are mandatory. Case law interpreting the requirements of § 343.305 has not supported this broad generalization. *See generally* ***City of New Berlin v. Wertz,*** 105 Wis.2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981), *and* ***State v. Grade,*** 165 Wis.2d 143, 149, 477 N.W.2d 315, 317 (Ct. App. 1991).

[3] We note that Sterr points to an unpublished decision, ***State v. Hirthe,*** No. 95-1058-CR, unpublished slip op. (Wis. Ct. App. Sept. 6, 1995), for the proposition that the language of the statute is mandatory, and automatic admissibility is dependent upon compliance with the statute. The significant difference is that in that case evidence was produced that the machine had been calibrated 167 days before the testing of the defendant's breath, which was an affirmative showing by the defense that the accuracy of the test results was suspect.

Sterr's final claim is that the trial court erred when it denied a requested jury instruction. The instruction would have informed the jury of the fact that § 343.305(6)(b)3, STATS., requires the Intoxilyzer to be certified every 120 days and that the City had offered no proof of such certification.

A trial court has wide discretion in instructing a jury. ***Wingad v. John Deere & Co.,*** 187 Wis.2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). If the instructions adequately cover the law, we will find no misuse of discretion when the court refuses to give a requested instruction, even when the proposed instruction is correct. ***Id.*** The trial court properly determined that the lack of evidence of certification of the machine did not render inadmissible Sterr's test results. The denial of Sterr's requested instruction was in line with its earlier determination. There was no misuse of discretion.

By the Court.—Judgment affirmed.

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