COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1996

NOTICE

No. 95-3097

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

VILLAGE OF WESTFIELD,

Plaintiff-Respondent,

v.

THOMAS A. MOORE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

SUNDBY, J. Defendant-Appellant Thomas Moore appeals from a judgment entered November 1, 1995, on a jury verdict finding him guilty of operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration. Moore's appeal presents for our[1] review pretrial motions denied by the trial court September 28, 1995, to suppress any evidence of Moore's intoxication because the police lacked

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. "We" and "our" refer to the court.

probable cause to arrest him, and to bar this prosecution under the Double Jeopardy Clause because Moore's operating privilege had been administratively revoked. Moore concedes that his double jeopardy claim fails under ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *review granted*, 546 N.W.2d 468 (Wis. Mar. 12, 1996). However, he presents this issue to preserve it for further review. Moore also presents his trial motion to exclude evidence of the result of the Intoxilyzer test of his breath. We affirm the judgment.

BACKGROUND

On May 28, 1995, Officer Scott Johnston, a police officer for the Village of Westfield, stopped the vehicle operated by Moore because he had failed to dim his headlights. Officer Johnston testified that when he questioned Moore, he observed that Moore's eyes were bloodshot, there was a strong odor of intoxicants coming from Moore's vehicle, and the vehicle contained an open can of beer, which Moore stated belonged to the passenger. Moore admitted he had recently consumed six to seven cans of beer but later admitted that he had had twelve beers. After Officer Johnston required Moore to perform several field sobriety tests, Johnston arrested Moore for operating a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration.

At trial, Officer Johnston testified as to his observations of Moore. Also, Steven Kemnitz testified that the Intoxilyzer test he conducted showed that Moore's breath sample contained .18 grams of alcohol in 210 liters of his breath. Moore moved to exclude the test result and for judgment on the prohibited alcohol concentration charge because the Village had failed to establish that the Intoxilyzer was properly operated by a qualified individual. The trial court denied Moore's motion.

ISSUES

Moore presents the following issues:

(1) Can the Horizontal Gaze Nystagmus (HGN) test alone, in the face of good performance on all other field tests, provide probable cause to search a subject's breath with a Preliminary Breath Test (PBT)? We conclude that the record shows that Officer Johnston did not find probable cause solely as the result of the HGN test and that the totality of the circumstances established probable cause to search Moore's breath.

(2) Should the trial court have excluded the results of the Intoxilyzer test because the Village failed to show that the operator was qualified to conduct such tests? Admission of the Intoxilyzer test result, if error, was harmless because, without the result of that test, the evidence was sufficient to sustain the jury's verdict.

(3) Does Moore's conviction for operating while under the influence violate his constitutional right to be free from double jeopardy? Moore concedes that we are bound by ***State v. McMaster***. Therefore, we cannot find that Moore's conviction for operating while under the influence violated his constitutional right not to be twice placed in jeopardy.

I.

THE HORIZONTAL GAZE NYSTAGMUS TEST

We must consider the facts and circumstances faced by the arresting officer to determine whether he or she reasonably believed that the defendant committed an offense. ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990). Taking a breath sample is a search and seizure, which may be conducted without a warrant only if a police officer has probable cause to arrest. ***County of Milwaukee v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). Moore contends that the videotape of the field sobriety tests shows that he was not impaired. Moore argues, therefore, that the arresting officer would have had to rely on the HGN test. Moore does not argue that Officer Johnston did not have reasonable suspicion

to make an investigative stop nor does he claim that Johnston's stop was pretextual.

The facts known to Johnston were sufficient to arrest Moore for operating under the influence without considering the HGN test. Certainly the evidence was sufficient to empower Officer Johnston to require Moore to perform field sobriety tests. Moore claims that the videotape of the field sobriety tests shows that Moore was not impaired. However, Officer Johnston stated that Moore failed the heel-to-toe test. Our review of the videotape does not lead us to conclude that Officer Johnston's observations were faulty.

Therefore, the Village did not rely solely on the result of the HGN test. Considering all of the facts and circumstances available to Officer Johnston, we conclude that he had probable cause to arrest Moore for operating while under the influence, even if the HGN test is excluded. The jury heard Moore's attack on the evidence and concluded that Moore was operating under the influence. The evidence of the HGN test was not such a critical part of the Village's evidence that it is probable the jury would have reached a different result if that evidence had been excluded. *See* ***State v. Horenberger***, 119 Wis.2d 237, 246-49, 349 N.W.2d 692, 696-98 (1984).

II.

RESULTS OF THE INTOXILYZER TEST

A chemical test for intoxication is only evidence, admissible on the issue of whether an operator of a motor vehicle was under the influence of an intoxicant or had a prohibited alcohol concentration when he or she operated a motor vehicle. Section 885.235(1), STATS. The weight to be given to a chemical test is spelled out in § 885.235. However, § 885.235(4) provides:

> 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. 346.63(2m) or 350.101(1)(c).

It is entirely appropriate for Moore to attack the sufficiency of the Village's evidence. However, Moore's approach seems to be that he is entitled to reversal of his conviction if an evidentiary test used by the Village to determine intoxication is *by itself* insufficient to support the conviction. It was the function of the jury to consider all of the evidence, whatever its imperfections. Moore attacked the sufficiency of the evidence and the test which we must apply to the jury's verdict is whether there is any credible evidence to support that verdict. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757 (1990). We conclude that there is.

We recognize, however, that the results of chemical tests are given great weight by the police and by juries and the courts in testing for intoxication and prohibited alcohol concentration. Therefore, we do not lightly dismiss Moore's attacks on the Intoxilyzer test results. We conclude, however, that Moore has failed to show that the test operator was unqualified or that he improperly conducted the test.

Moore attacks Kemnitz's expertise by showing that his certification as an operator was withdrawn by the department of transportation shortly after he tested Moore's breath, that he required retraining and that his recertification in July of 1995 was not routine. However, Moore failed to show that Kemnitz performed the breath test improperly. We have said that in order for a defendant to show prejudice because of counsel's deficient performance, the defendant must show that relevant exculpatory evidence could have been presented or inculpatory evidence excluded. *See* ***State v. Wirts***, 176 Wis.2d 174, 500 N.W.2d 317 (Ct. App.), *cert. denied*, 114 S. Ct. 257 (1993). We said that a criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant. ***Id***. at 187, 500 N.W.2d at 321. Similarly, a defendant charged with operating a motor vehicle while under the influence or with a prohibited alcohol concentration cannot claim prejudice unless he or she can show that the chemical test was improperly performed. Here, Moore asks us to infer from the fact that Kemnitz was recertified that he did not perform the breath test properly. We refuse to draw that inference.

Moore also claims that the Village does not dispute that proper operation of the Intoxilyzer required checking of the hoses and propeller on the simulator used to calibrate the machine during testing. However, Moore did not present any evidence that he was prejudiced by the operator's failure to follow these procedures. He does not claim that there was a leak in the hose connection or that the Intoxilyzer indicated a leak. Nor did Moore present any evidence that the Intoxilyzer was not functioning properly. The Village asserts that when Kemnitz tested Moore's breath, the Intoxilyzer was working properly. In his reply brief, Moore does not dispute that fact. We therefore conclude that the trial court did not err in admitting Kemnitz's testimony as to the result of the Intoxilyzer test administered to Moore.

III.

THE DOUBLE JEOPARDY ISSUE

Moore concedes that we are bound by our decision in ***State v. McMaster***. We therefore do not reach Moore's claim that this prosecution denied his constitutional right to be free from being placed twice in jeopardy for the same offense.

By the Court.—Judgment affirmed.

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