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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 13-1166-CR

MARK K. SCHRICK,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND JURY
TRIAL VERDICT, BOTH ENTERED IN THE JACKSON
COUNTY CIRCUIT COURT, THE HONORABLE TODD
ZIEGLER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE DEPUTY'S ADMITTED FAILURE TO COMPLY WITH MANDATORY BREATH TESTING PROCEDURES SHOULD HAVE STRIPPED THE PRESUMPTION OF AUTOMATIC ADMISSIBILITY, LEAVING THE JURY UNABLE TO RELY ON THE BREATH TEST RESULT IN THE ABSENCE OF EXPERT TESTIMONY

The State's brief focuses on the jury's role in criminal trials, arguing that the jurors could have determined that Deputy Gillett operated the breath testing machine correctly, and therefore the jury had sufficient evidence upon which to find Schrick guilty of the PAC charge (State's brief: 5-6). Specifically, the State argues that the jurors "are the sole "deciders" on the question of whether the state had shown that the breath test machine was operated properly" (State's brief: 6-7).

This argument ignores the court's gatekeeping role in determining whether evidence can be placed before the jury, and whether a proper foundation has been presented for such evidence. In OWI cases, breath test results are deemed automatically admissible and reliable without the need for expert testimony to establish foundation so long as the State can demonstrate compliance with statutorily mandated testing protocol. Wis. Stat. secs. 343.305(5)(d) & 885.235(1g). Compliance with testing protocol is therefore a legal issue for the court to decide.

Wisconsin law contains numerous cases where courts found that non-compliance with proper testing protocols results in loss of the statutory presumptions afforded by sec. 885.235. See *State v. Zielke*, 137 Wis. 2d 39, 41 (1987) (noncompliance with the procedures set forth in Wis. Stat. sec. 343.305 results in state losing "its right to rely on the automatic admissibility provisions of the law"); *County of Dane v. Winsand*, 2004 WI App 86, ¶7 n.6 (failure to establish compliance with procedural requirements causes

state to “lose the benefit of §§ 343.305(5)(d) and 885.235”); *State v. Piddington*, 2001 WI 24, ¶34 (In event of failure to comply with implied consent section requirements, “the State would have to establish the admissibility of the blood test, including establishing a foundation”).

This principle extends to cases involving failure to comply with the TRANS. code requirements for proper breath testing procedure. See *State v. Baldwin*, 212 Wis. 2d 245, 263-64 (Ct. App. 1997)¹ (“we now hold that where test results are obtained using an instrument not evaluated and approved as required in § 343.305(6)(b), STATS., and WIS. ADM. CODE § TRANS 311.04, the results are no longer entitled to automatic admissibility or to a prima facie presumption of accuracy to establish the defendant's blood alcohol level. In such cases, prosecutors who wish to rely upon the breath test results will be required to present evidence of the instrument's scientific accuracy and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results”). Thus, if proper testing protocol is not followed, including compliance with mandatory TRANS code protocol, evidence of a breath test result is not competent and cannot be relied upon by the jury in the absence of expert testimony establishing foundation.

Deputy Gillett's testimony demonstrated significant deviations from mandatory TRANS code protocol. TRANS code sec. 311.06(3) mandates that “Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject,” and subsection (a) requires “Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.” Trans. 311.06(3)(a) (emphasis added).

Deputy Gillett testified that rather than reading Schrick the Informing the Accused form before administering the 20 minute observation period, Gillett read him the form during

¹ Reversed sub nom. on other grounds, *State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904 (1998).

the 20 minute period (22: 158-61). Gillett testified that she was also performing other tasks during that period, including data entry, and therefore was not always watching Schrick (22: 158-61). Gillett acknowledged the TRANS. code and her training manual required her to observe Schrick closely for a minimum of 20 minutes, which she did not do (22: 158-61). Gillett specifically admitted she did not administer the test as required by the manual (22: 161).

The trial court acknowledged Gillett's testimony that she performed the 20 minute observation period, but that she was reading the informing the accused and entering data into the Intoximeter during that 20 minute period (23: 295). The court also acknowledged the transportation code's language requiring the reading of the informing the accused form to occur before the 20 minute observation period (23: 295-96).

Since Gillett did not comply with the TRANS code requirements, the State was not entitled to the statutory presumption of admissibility. In the absence of expert testimony to establish foundation for the breath test evidence, the jury could not rely on the test result as competent evidence. Therefore, the court erred when it denied Schrick's motion for a directed verdict. Likewise, the court erred when it overruled Schrick's objection to the jury instruction regarding the statutory presumption of admissibility.

II. THE DEPUTY'S TESTIMONY THAT SHE SAT IN THE SAME ROOM WITH SCHRICK FOR 20 MINUTES WHILE PERFORMING OTHER TASKS DID NOT SATISFY THE "OBSERVATION" REQUIREMENT OF TRANS CODE SEC. 311.06(3)

The State quibbles with the assertion that Gillett did not "observe" Schrick for a minimum of 20 minutes by pointing out Gillett was in the same room with Schrick for that long, sitting 4-5 feet away, despite the fact that she was engaged in other tasks and wasn't actively watching Schrick for that entire time period (State's brief: 7). In support, the State notes there is no definition of "observe" in the TRANS code (State's brief: 6).

Because “observe” is not defined by statute or administrative code, it must be given its ordinary meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The common meaning of a word may be ascertained by resort to a dictionary. See *State v. Denis L.R.*, 2005 WI 110, ¶40, 283 Wis. 2d 358, 699 N.W.2d 154.

Merriam-Webster.com defines “observe” as “to watch and sometimes also listen to (someone or something) carefully,” or “to watch carefully especially with attention to details or behavior for the purpose of arriving at a judgment.” “Observe.” Merriam-Webster.com. Accessed October 8, 2013. <http://www.merriam-webster.com/dictionary/observe>. Likewise, the American Heritage Dictionary online provides three relevant definitions of “observe:”

- a. To be or become aware of, especially through careful and directed attention; notice: observed a car leaving the property.
- b. To watch attentively: observe a child's behavior.
- c. To make a systematic or scientific observation of: observe the orbit of a comet.

“Observe.” The American Heritage Dictionary of the English Language, Fourth Edition. Accessed October 8, 2013. <http://www.ahdictionary.com/word/search.html?q=observe&submit.x=68&submit.y=22>.

The common thread with each definition is watching carefully or attentively. Deputy Gillett conceded she was not watching Schrick carefully or attentively for the minimum period of 20 minutes required by code (22: 158-61).

While the State correctly points out there is no evidence Schrick ate, drank, vomited or smoked during the 20 minute period (State’s brief: 7), Schrick did have his dentures in during that period (22: 230). At no point during Gillett’s “observation” of Schrick did she check Schrick’s mouth or remove his dentures (22: 157). Since the purpose of the 20 minute observation period is to eliminate the possibility of residual mouth alcohol affecting the test result, and since

dentures retain mouth alcohol, Gillett's failure to observe Schrick continuously for 20 minutes before testing and check his mouth indicates that Gillett's failure to comply with proper testing protocol may have influenced the result (see, e.g., 22: 155-56, 264-65). Based on these errors, the breath test was not entitled to the benefit of the statutory presumptions. Without those presumptions, the State was required to present expert testimony to demonstrate a foundation for admission of the breath test result. The State did not do so. Schrick is entitled to a new trial.

CONCLUSION

For the reasons discussed this brief and the defendant-appellant's brief-in-chief, the defendant-appellant respectfully requests that the court vacate the judgment of conviction and dismiss the charge or order a new trial.

Respectfully submitted this 8th day of October, 2013:



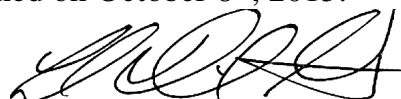
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,341 words.

Signed on October 8th, 2013:



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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed on October 8th, 2013:



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