RECEIVED
08-31-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP000978
Portage County Circuit Court Case Nos. 2014TR000864
2014TR001169

CITY OF STEVENS POINT,

Plaintiff-Respondent,

v.

TODD P. BECK,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE THOMAS B. EAGON, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT TODD P. BECK

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

TABLE OF CONTENTS

	Page No.
TABLE OF CONTENTS.	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.	iii
STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION.	iii
STATEMENT OF THE CASE/FACTS.	1
STANDARD OF REVIEW.	6
ARGUMENT	7
THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT ADMITTED AND AFFORDED THE TEST RESULT THE FAVORABLE PRESUMPTION OF ADMISSIBLITY WHERE THE CITY FAILED TO LAY AN ADEQUATE FOUNDATION SHOWING THAT THE OFFICER COMPLIED WITH PROVISIONS OF THE IMPLIED CONSENT LAW.	7
CONCLUSION	11
FORM AND LENGTH CERTIFICATION	12
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).	13
APPENDIX CERTIFICATION	14
APPENDIX.	16
Excerpts from Jury Trial- 04/29/2015. .	A.App.1

TABLE OF AUTHORITIES

Page No.

CASES

Wisconsin Supreme Court

Martindale v. Ripp, 2001 WI 113, ¶30246 Wis.2d 67, 629 N.W.2d 698. 9

State v. Alsteen, 108 Wis.2d 723, 727, 324 N.W.2d 426 (1982) 6

State v. Dyess, 124 Wis.2d 525, 543, 547, 370 N.W.2d 222 (1985). 9

State v. Zielke, 137 Wis.2d 39, 51-52, 403 N.W.2d 427 (1987). 8

Wisconsin Court of Appeals

State v. Wilke, 152 Wis.2d 243, 250, 448 N.W.2d 13 (Ct.App. 1989). 9

Steinbach v. Gustafson, 177 Wis.2d 178, 185-86, 502 N.W.2d 156 (Ct.App. 1993) 7

Wisconsin Statutes

Wis. Stat. §343.305(4) 6

Wis. Stat. §343.305(5). 6

Wis. Stat. §885.235. . . . . 6, 8-9

STATEMENT OF THE ISSUES

Did the trial court erroneously admit the blood test result into evidence where the City failed to establish that Officer Brooks complied with the provision of Wis. Stat. §343.305(4)?

The trial court answered: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Todd P. Beck (Mr. Beck) was charged in the Portage County Circuit Court, with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. §346.63(1)(a) and (b). A jury trial was held on April 29, 2015, the Honorable Thomas B. Eagon, Judge, presiding. The jury returned verdicts of guilty to both charges.

On May 11, 2015, the defendant timely filed a Notice of Appeal. The appeal stems from the Court admitting the blood test result over the objection of counsel and affording the test result the presumption of accuracy and prima facie effect where the City failed to establish compliance with the implied consent law.

The pertinent facts to this appeal were adduced at the jury trial held on April 29, 2015 and were introduced through the testimony of several witnesses including City of Stevens Point Police Officer Brian Brooks, Medical Laboratory Scientist Jackie Schara, and Analyst Thomas Neuser. Officer Brooks testified that he had been employed as a police officer for the City of Stevens Point since August, 2012. (R.29:8/ A.App.1).

Brooks testified that on March 6, 2014, he was on routine patrol when he observed Mr. Beck's vehicle "cross the center line on Michigan Ave, just a little bit." (R.29:9/ A.App.2). Brooks testified that he observed the vehicle approach a stop sign, accelerate rapidly and then crossed the center line "just slightly" as it negotiated the curves on Michigan Ave. (R.29:11/ A.App.3). Brooks positioned his squad behind the vehicle as it approached a four-way stop at the intersection of Michigan Ave. and Northpoint Dr. The vehicle made a left turn, approached the oncoming lane of traffic, made the adjustment and nearly went over the median. ***Id.*** Brooks then initiated a traffic stop.

Brooks contacted the driver, whom he identified as Mr. Beck. Brooks observed a very strong odor of intoxicant coming from the vehicle, and as he approached, observed the passenger slumped over. (R.29:13/A.App.4). On cross examination, Brooks acknowledged when he first observed Mr. Beck in the vehicle, he observed nothing about Mr. Beck's motor coordination that suggested Mr. Beck was impaired. (R.29:42/ A.App.11). Brooks agreed that there was nothing impaired with Mr. Beck's ability to exit the vehicle and walk. (R.29:44/ A.App.12).

After exiting the vehicle, Mr. Beck performed field sobriety tests. The first test Officer Brooks performed was the Horizontal Gaze Nystagmus (HGN) test. Brooks testified that during the HGN test, he observed six of a possible six clues. He testified that his observations indicated that Mr. Beck was impaired.However, on cross examination, Brooks acknowledged that after reviewing the video, he realized that he did not perform the HGN test consistent with his training. (R.29:45-47/ A.App. 13-15).

The second test that Mr. Beck performed was the walk and turn test. On that test, Brooks testified he observed Mr. Beck to have a gap between his heel and toe, step off an imaginary line and raise his arms. (R.29:19-21/ A.App.5-7). Brooks admitted that the three clues would not "necessarily determine impairment". (R.29:21/A.App.7). On direct examination Brooks testified that during the walk and turn test he was looking for four total clues of impairment. ***Id.*** However, on cross examination, he acknowledged that there were actually eight clues. (R.29:49/ A.App.16). He further acknowledged that he failed to see several indicators of impairment on the walk and turn test. (R.29:51-52/ A.App.17-18).

The final test Mr. Beck performed was the one leg stand test. Brooks testified that Mr. Beck hopped, swayed and put his foot down during the test. (R.29:22/ A.App.8). However, Brooks acknowledged that it was "definitely cold that night" and Mr. Beck simply had a hoodie on and no jacket during the testing. (R.29:53/ A.App.19). The jury had the opportunity to observe the squad video of the stop. Officer Brooks testified that after performing the field sobriety tests he placed Mr. Beck under arrest. (R.29:25/A.App.9). He transported Mr. Beck to St. Michael's Hospital and asked Mr. Beck if he would agree to a legal blood draw. (R.29:26/A.App.10). Mr. Beck stated he would. ***Id.***

The City introduced no evidence that Mr. Beck was read the Informing the Accused form or that the implied consent law warning was provided prior to the requested blood draw.

Jackie Schara, a medical laboratory scientist, testified that on the above date, she was employed by St. Michael's Hospital. She testified that she had been so employed for four and one half years, and that part of her duties included collecting blood samples. (R.29:57/A.App.20). She further testified that she withdrew the blood from Mr. Beck on the above date.

The final witness called by the state was Thomas Neuser, an advanced chemist employed by the State Laboratory of Hygiene. Neuser testified that he had been employed by the state lab for thirty-three years. (R.29:62/ A.App.21). He testified that he was trained and permitted to test and analyze blood or the presence of alcohol. (R.29:63-64/ A.App.22-23). He testified that on March 11, 2014 the laboratory received Mr. Beck's blood sample, and they tested it on March 14, 2014. (R.29:64/ A.App.23). Neuser testified that the testing machine was working properly on March 14. (R.29:69/A.App.24). Defense counsel made a specific foundation objection to Mr. Neuser testifying concerning the result of the test. The court overruled the objection. Neuser then testified that the blood alcohol content was .226 grams per 100 milliliters. (R.29:70/A.App.25). Over defense counsel's foundation objection, the court admitted Exhibit 4, the blood test result. (R.29:82/ A.App.26).

At the close of the evidence, the defense moved to dismiss the PAC charge arguing that the test result should not have been admitted in as much as the City failed to lay an adequate foundation showing the Officer complied with the implied consent law pursuant to Wis. Stat. §343.305. The City

argued that this should have been done by motion ahead of trial if the defense was attempting to suppress evidence. (R.29:87/ A.App.27). Defense counsel argued that the City must establish at trial that the provisions of Wisconsin's Implied Consent law were followed, specifically that Mr. Beck was provided the warning required pursuant to Wis. Stat. §343.305(4). Defense counsel also cited the provisions of Wis. Stat. §343.305(5) and (6) arguing that the test result should not be admitted and/or it should not be given the effect as required pursuant to Wis. Stat §885.235. Defendant argued that a defendant who is not informed as required under Wis. Stat. §343.305(4) cannot make the informed decision as to whether they want additional testing. (R.29:92/ A.App.29). The court found that admissibility of the test result is not conditioned on the "Informing the Accused" information, and admitted the test result and denied the defendant's motion to strip the test of the effect required under Wis.Stat. §885.235. (R.29:91-92/ A.App.28-29). The jury returned a verdict of guilty to both charges. Mr. Beck timely filed a Notice of Appeal on May 11, 2015.

STANDARD OF REVIEW

In determining whether a trial court properly admitted evidence the reviewing court is limited to whether the trial court

erroneously exercised its discretion. ***State v. Alsteen,*** 108 Wis.2d 723, 727, 324 N.W.2d 426 (1982). The question is whether the trial court applied the proper law to the established facts. If so, a reviewing court will not find an erroneous exercise of discretion if there is any reasonable basis for the trial court's ruling. ***Steinbach v. Gustafson,*** 177 Wis.2d 178, 185-86, 502 N.W.2d 156 (Ct.App. 1993).

ARGUMENT

THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT ADMITTED AND AFFORDED THE TEST RESULT THE FAVORABLE PRESUMPTION OF ADMISSIBLITY WHERE THE CITY FAILED TO LAY AN ADEQUATE FOUNDATION SHOWING THAT THE OFFICER COMPLIED WITH PROVISIONS OF THE IMPLIED CONSENT LAW

Wis. Stat. §343.305(4), provides that "at the time that a chemical test specimen is requested under sub. (3)(a), (am) or (ar), the law enforcement officer shall read the following to the person from whom the specimen is requested…" The statute continues with the warning that must be provided to drivers who are requested to submit to chemical testing. That language is found verbatim in the Informing the Accused form.

Furthermore, pursuant to Wis. Stat. §343.305(5)(d), "at the trial of any civil…action…arising out of the acts committed by a person alleged to have been driving … a motor vehicle

while under the influence of an intoxicant…or having a prohibited alcohol concentration…the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant… or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235."

Additionally, pursuant to Wis. Stat. §885.235(1g) the test is automatically admissible and afforded the prima facie affect as outlined therein. The presumption of admissibility allows the test to be admitted without the need for expert testimony establishing the relevancy of the alcohol concentration where the test is taken within three hours and the provisions of the §343.305 have been followed. *See* Wis.Stat. §343.305(5)(d).

However, if an officer fails to provide the warning required by Wis.Stat. §343.305(4), it is well settled law that the City can lose the presumption of automatic admissibility. *See* ***State v. Zielke,*** 137 Wis.2d 39, 51-52, 403 N.W.2d 427 (1987). In ***Zielke,*** the court stated that "if the procedures set forth in sec. 343.305, Stat. are not followed the State… loses its right to rely on the automatic admissibility provisions of the law." ***Id.*** at 49. What is required is that an officer substantially comply with the

implied consent statute. ***State v. Wilke,*** 152 Wis.2d 243, 250, 448 N.W.2d 13 (Ct.App. 1989).

Here, the City failed to put forth any evidence that Officer Brooks complied with the provisions of Wis. Stat. §343.305(4). Officer Brooks provided no testimony that he read Mr. Beck the implied consent warning nor did the City introduce an Informing the Accused Form. Without said evidence, the test result should not have been afforded the presumption of admissibility discussed *supra* and should not have been given the effect set forth in Wis. Stat. §885.235.

Because of the above, the court erroneously exercised its discretion when it admitted the test result into evidence.

Finally, the defense concedes that not all erroneous exercises of discretion should result in a new trial. A harmless error analysis must be conducted to determine if the error "affected the substantial rights of the party." ***Martindale v. Ripp,*** 2001 WI 113, ¶30246 Wis.2d 67, 629 N.W.2d 698. "For an error "to affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Id.*** at ¶32 citing to ***State v. Dyess,*** 124 Wis.2d 525, 543, 547, 370 N.W.2d 222 (1985). In ***Martindale v. Ripp***, the court citing to ***Dyess*** stated "where the

erroneously admitted or excluded evidence affects constitutional rights or where the outcome of the action or proceeding is weakly supported by the record, a reviewing court's confidence in the outcome may be more easily undermined than where the erroneously admitted or excluded evidence was peripheral or the outcome was strongly supported by evidence untainted by error. ***Id.*** at ¶32.

Here, the admission of the test result was not harmless error, there clearly was a reasonable possibility that the error contributed to the outcome of the trial. The court directed the jury that by using the test result alone, they could find from that fact that Mr. Beck had operated his motor vehicle while under the influence and operated his motor vehicle with a prohibited alcohol concentration. Furthermore, without the test result, the outcome of the trial "was not strongly supported by evidence untainted by the error."

CONCLUSION

Because of the above, the court erroneously exercised its discretion when it admitted the test result. Furthermore because the error was not harmless, the court should reverse the conviction, and grant Mr. Beck a new trial.

Dated this 31st day of August, 2015.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 20 pages. The word count is 3391.

Dated this 31st day of August, 2015.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

CERTIFICATION 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.

Dated this 31st day of August, 2015.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of August, 2015.

Respectfully submitted,

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

`