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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Case No. 2015 AP 978
Portage County Circuit Court Case No. 2014 TR 864

CITY OF STEVENS POINT,

Plaintiff - Respondent,

v.

TODD P. BECK,

Defendant - Appellant.

APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH 1, CASE NO. 14 TR 864
HONORABLE THOMAS B. EAGON, PRESIDING

PLAINTIFF - RESPONDENT'S BRIEF OF City of Stevens Point

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The above-named Plaintiff - Respondent, City of Stevens Point, does not believe that oral argument is necessary in the above-entitled matter pursuant to Rule 809.22(2)(b), Stats., since the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time. The Plaintiff - Respondent recognizes that this appeal is a one-judge appeal and does not qualify under this Court's operating procedures for publication; and therefore, does not believe that the opinion of the Court of Appeals in this case should be published.

ARGUMENT

I. THE DEFENDANT WAIVED HIS OPPORTUNITY TO CHALLENGE THE ADMISSIBILITY OF MR. THOMAS NEUSER'S TESTIMONY BASED UPON WIS. STAT. §343.305

The Defendant raised an objection to the introduction of results from an ethanol test of the Defendant's blood, but did not explain that objection sufficiently at the time it was raised. (R.29: 69). Following the close of the evidence, the Defendant provided a far more detailed explanation of the earlier objection. (R.29: 87-93). That explanation forms the basis of the Defendant's argument. Because the objection was not explained adequately until after the City of Stevens Point ("City") had rested its case, the Defendant effectively waived the objection and the circuit court's decision to admit the evidence should be upheld.

The defense initially raised its objection during the City's case in chief. (R.29: 69). The City asked witness Thomas Neuser, a chemist employed by the Wisconsin State Lab of Hygiene who performed an ethanol analysis of the Defendant's blood, "what was the result of that analysis?" *Id.* At that time, the defense stated simply, "objection. Foundation." *Id.* Judge Eagon overruled the objection and asked the Defendant "do you wish to be heard further?" *Id.* The defense declined to provide any further explanation, stating "that's fine. I'm just making an objection." *Id.*

The Defendant did not explain his objection in terms of Wis. Stat. §343.305 until the City had rested, the defense rested, the court recessed for lunch, and the case was reconvened to discuss jury instructions. (R.29: 83, 84, 86-93). The

defense then stated, "I don't think the City has laid an adequate foundation of the reproduction of the chemical test and hasn't shown that the provisions of 343.305 have been complied with." (R.29: 87). Judge Eagon later stated "you objected on foundation, and I recall, I asked if you wanted to make any more specific objection and you indicated you did not." (R.29: 88). The defense responded, "I understand. I think foundation is sufficient." *Id*. This is the Defendant's fundamental error: simply stating "objection, foundation" fails to explain the grounds for the objection specifically enough to allow the City to fairly respond to the same. Therefore, the objection should be considered waived.

In *State v. Erickson*, the Supreme Court held that the "waiver rule exists to cultivate timely objections. Such objections promote both efficiency and fairness. By objecting, both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) (citing *State v. Agnello*, 226 Wis.2d 164, 593 N.W.2d 427 (1999)) [internal quotations omitted]. The Court further held that, "[J]udicial resources, not to mention the resources of the parties, are not best used to correct errors on appeal that could have been addressed during the trial." *Id*. Under Wis. Stat. §901.03(1) and 901.03(1)(a), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless…a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." The Defendant's initial objection to the admissibility

of the test result failed to clarify its grounds explicitly or via context thereby depriving the City of the "notice of the disputed issues" contemplated in *State v. Erickson*, falling short of the standard under Wis. Stat. §901.03(1)(a), and leading to precisely the misuse of judicial resources the Supreme Court decried in *Erickson*.

At the time the objection was raised, the defense made no explicit reference to Wis. Stat. §343.305, the "informing the accused" statement, or any other statutory prerequisites to admissibility. (R.29: 69). The context provision of Wis. Stat. §901.03(1)(a) does not help the Defendant, as the defense's use of the word "foundation" does nothing to suggest a reference to an alleged statutory requirement under Wis. Stat. §343.305 concerning the interaction between the arresting officer and the Defendant. Instead, "objection, foundation" within the context of Mr. Neuser's testimony would lead a reasonable person to conclude that it was an objection based on Mr. Neuser's credentials and the method of testing. The question regarding the test result was the culmination of a lengthy series of questions concerning Mr. Neuser's educational background, certification and experience related to blood ethanol analysis, the method of testing, calibration of the testing equipment, and handling of the specimen collected from the Defendant. (R.29: 62-69). In that context, "foundation" would suggest a reference to a standard for admissibility of expert opinion, not a statutory requirement under a section related to administrative suspension of operator's licenses.

The word "foundation" appears throughout case law as shorthand for the expert credentials and soundness of scientific methods required for admissibility of expert opinion and other technical evidence. In *State v. Kandutsch*, Justice Prosser framed one of the contested issues as "[d]id the circuit court err by admitting a computer-generated report from the defendant's [electronic monitoring device] without requiring expert testimony to establish that the EMD produced accurate and reliable time-based reports?" *State v. Kandutsch*, 2011 WI 78, ¶4, 336 Wis.2d 478, 799 N.W.2d 865 (2011). On that issue, the Court held that "[n]either the EMD itself nor the report derived from it is so 'unusually complex or esoteric' that expert testimony was required to lay a *foundation* for the admission of the report as evidence." *Id.*, ¶5. [Emphasis added]. In *Martindale v. Ripp*, the Supreme Court held that "Dr. Ryan . . . should have been allowed to explain how he thought Martindale's TMJ condition was created if he had a reasonable *foundation* for Martindale's whiplash." *Martindale v. Ripp*, 2001 WI 113, ¶48, 246 Wis.2d 67, 629 N.W.2d 698 (2000). [Emphasis added]. The term "foundation" also appears in the advisory committee notes to the adoption of Federal Rule of Evidence 702 regarding expert testimony. "Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education - - may not provide a sufficient *foundation* for expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendments. [Emphasis added]. Taken in the context of the City's questioning of Mr. Neuser leading up to the objection, the only

reasonable conclusion was that the Defendant was objecting based on the technical and professional underpinnings of the ethanol test, not a failure by the City to comply with a statutory procedure under Wis. Stat. §343.305.

Because the Defendant did not explain the objection in the manner raised on appeal until the evidence had been closed and the witnesses dismissed, the City was left with no ability to remedy the alleged shortcoming regarding the admissibility of the test result. For the sake of argument, presume that the City could have presented evidence that the informing the accused statement was read to the Defendant. The Defendant's delay in stating the objection with sufficient clarity deprived the City of its opportunity to do so. The defendant's failure to provide "notice of the disputed issues" as required under *State v. Erickson*, has created the need to "correct errors on appeal that could have been addressed during the trial" as the Supreme Court admonished against in *Erickson*. *State v. Erickson*, 227 Wis. 2d 758, 766. The Defendant's objection was vague and his delay in explaining it more fully deprived the City of an ability to fairly respond to it. The Defendant effectively waived the objection and the circuit court's decision should be upheld.

II. EVIDENCE THAT THE "INFORMING THE ACCUSED STATEMENT" WAS READ TO THE DEFENDANT IS NOT A PREREQUISITE FOR ADMISSION OF THE CHEMICAL TEST

Notwithstanding the Defendant's waiver of the objection, the Defendant is incorrect that Wis. Stat. §343.305 and associated case law require suppression of a chemical test result when no evidence is introduced to show that the informing the

accused statement was read to the defendant. The Defendant argues that the court erroneously applied the presumption of admissibility to the chemical test and therefore a new trial should be granted. These conclusions misinterpret the statutes and cases the Defendant cites in his brief. First, Wis. Stat. §885.235(1g) stands alone to establish the admissibility of the test result independent of whether the informing the accused statement was read to the Defendant. Second, it is well established in case law that the test result may be admissible independent of the informing the accused statement, and the Defendant's argument ignores language to this effect within the cases he cites.

Under Wis. Stat. §885.235(1g), a chemical test of a person's blood "is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration" if the sample was taken within three (3) hours after the event to be proved. 885.235(1g) makes no reference to the informing the accused statement described under Wis. Stat. §343.305(4), and in fact makes no reference to Wis. Stat. §343.305 whatsoever. The testimony of Officer Brian Brooks and medical laboratory scientist, Jackie Schara, established that the traffic stop and blood draw occurred approximately 45 minutes apart being well within the 3-hour timeframe required under 885.235(1g). (R.29: 9, 57). Consequently, Mr. Neuser's testimony that the result of the analysis showed the Defendant had an alcohol concentration greater than 0.08 is prima facie evidence that he was under the influence of an intoxicant and is prima facie

evidence that he had an alcohol concentration of 0.08 or more. Wis. Stat. §885.235(1g)(c).

The City concedes that *State v. Zielke* does state clearly that the City loses the right to rely on the automatic admissibility provisions if the procedures under Wis. Stat. §343.305 are not followed. *State v. Zielke*, 137 Wis.2d 39, 50, 403 N.W.2d 427 (1987). However, the Defendant conveniently ignores language immediately preceding that passage which states, "[t]his section demonstrates the separateness of the civil refusal proceeding set forth in sec. 343.305 and the underlying criminal offenses involving operating a motor vehicle while intoxicated set forth in secs. 346.63, 940.09 and 940.25." *Id*. The Court elaborated on this point, stating that "it would be absurd to infer that the legislature intended that critical evidence in a felony homicide must be excluded for failure to comply with the procedures set forth in a chapter entitled "Operators' Licenses" and a section dealing with civil licenses revocation actions." *Id.*, 52-53. While the loss of *automatic admissibility* is a consequence of noncompliance with 343.305, *inadmissibility* clearly is not.

The Defendant makes no argument whatsoever for the inadmissibility of the test result, and the record supports the circuit court's decision to admit the same. "Hence, we hold that if evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." *Id*., 52. "Chemical test evidence may be otherwise legally obtained . . . with the consent of the driver." *Id.* Officer Brian

Brooks testified that following the arrest, he asked the Defendant if he would consent to a legal blood draw and that the Defendant stated that he would. (R.29: 26). The three (3) hour timeframe under Wis. Stats. §885.235(1g) was satisfied. (R.29: 9, 57). The blood draw was performed by a medical professional authorized to draw blood in accordance with Wis. Stat. §343.305(5)(b). (R.29: 57). The ethanol test was performed substantially according to the technical requirements of Wis. Stat. §343.305(6)(a). (R.29: 62-69). The evidence was constitutionally obtained and all technical standards required by statute were met. Whether or not the presumption of admissibility applies, the circuit court properly admitted the test result.

III. IF THE TEST RESULT WAS IMPROPERLY ADMITTED, IT WAS HARMLESS ERROR AND DOES NOT CONSTITUTE GROUNDS FOR A NEW TRIAL

The Defendant argues that without the test result, the outcome of the trial was not strongly supported by evidence untainted by the alleged error, but offers no evaluation of the other evidence to support this claim.

The City introduced substantial evidence apart from the test result. Officer Brooks testified that the Defendant's vehicle crossed the center line multiple times, failed to use a signal when turning at an intersection, nearly turned into the oncoming lane of traffic, and came close to striking a median while correcting into the appropriate lane. (R.29: 10-11). Officer Brooks testified as to his training and experience in detecting impairment in drivers. (R.29: 14-15). When making contact with the Defendant, Officer Brooks observed "a very strong odor of

intoxicants." (R.29: 13). Officer Brooks also noticed the Defendant's face was "flushed and very red" and that his eyes were "glossy and red." (R.29: 14). Officer Brooks testified that he performed Standardized Field Sobriety Tests (SFSTs) on the Defendant, including the horizontal gaze nystagmus test (HGN) and one leg stand (OLS) test (R.29: 15-25). Officer Brooks testified that the result of the HGN test indicated impairment. (R.29: 19). Officer Brooks further gave testimony that during the OLS test the Defendant swayed, hopped, and placed his foot on the ground. (R.29: 22). Officer Brooks testified that he discontinued the OLS test because "it looked like he was going to fall" and that the result of the test indicated impairment. (R.29: 22-23). A video recording was played which Officer Brooks identified as being an accurate depiction of the field sobriety tests performed on the Defendant. (R.29: 24-25). In conclusion, Officer Brooks testified that the SFSTs along with his observations when first contacting the Defendant indicated that the Defendant was under the influence of alcohol. (R.29: 25).

The Defendant also agreed to complete an alcohol influence report in which he answered questions regarding his intake of intoxicants the night of the arrest. (R.29, 27). Officer Brooks stated that the Defendant admitted to drinking six (6) beers throughout the night and finished drinking about an hour prior to the traffic stop. *Id*. Officer Brooks testified that the alcohol influence report reflected what the Defendant told him that evening. (R.29: 28). The alcohol influence report and video were admitted as evidence without objection. (R.29: 56).

The Defendant's driving behavior, odor of an intoxicant and appearance, performance on the WAT and HGN tests, and admission to drinking six (6) beers shortly before operating a vehicle strongly support the outcome of the trial, regardless of whether the chemical test was properly admitted. There is no reasonable possibility that the alleged error contributed to the outcome of the action or proceeding at issue; and therefore, any error should be considered harmless. The decision of the circuit court should be upheld and the Defendant's request for a new trial should be denied.

CONCLUSION

WHEREFORE, the City respectfully requests this Court to uphold the decision of the circuit court and deny Mr. Beck's request for a new trial.

Respectfully submitted this _____ day of October, 2015.

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a new roman font, 13 point font with 11 point font for quotes; double spaced; 1.5 inch margin on the left and 1 inch margin on all other sides. This brief is __2,445__ words in length.

Dated this _____ day of October, 2015.

_____

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