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

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ARGUMENT

Initially, the City contends that trial counsel failed to adequately object to admission of the chemical test result. Brief of the Respondent-Plaintiff page 1. The City attempts to infuse a requirement that an objector explain the objection. There is no such requirement under Wis. Stat. §901.03(1). What is required is that the objection be timely and state the specific ground for the objection.

In this case, the City attempted to introduce the test result without the necessary foundation establishing that the officer complied with the Implied Consent Law, trial counsel timely made the objection stating the specific reason "foundation." The trial court, without requesting anything more overruled the objection. Trial counsel made a timely objection and stated the specific grounds.

In fact, counsel made the same objection when the City later offered the test result into evidence. (R.29:82/Reply App.7). At no point did the court indicate it needed further clarification, prior to overruling the objection and admitting the test result. Contrary to the City's contention, there is no requirement in Wis. Stat. §901.03(1) that counsel provided

further explanation beyond the specific ground. The City's first argument is without merit.

Second, the City contends that compliance with the implied consent law is not a prerequisite to admissibility of the test result. The City seems to overlook Wis. Stat. §343.305(5)(d) which in part reads "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."

Clearly, the above statute discusses the admissibility of the test result, and permits the test result to be used to establish a prohibited alcohol concentration and impairment when the test is administered in accordance with Wis. Stat. §343.305. Here, the City failed to put forth any evidence that Officer Brooks complied with the provisions Wis. Stat. §343.305(4). Because of this, the test at a minimum loses the favorable presumptions under Wis. Stat. §885.235. The City claims that Mr. Beck

argued that the test result should have been suppressed. No such argument was made at trial, the defendant's objection focused solely on whether the City laid a sufficient foundation for the admission of the test results. The City did not, and thus the court erred in admitting the test result.

Finally, the City contends that if the test result was admitted in error, the error was harmless. The City argues that the driving behavior, Officer Brooks observations and the field sobriety tests strongly support the verdict. Contrary to the City's contention, the video played to the jury did not show Mr. Beck crossing the centerline. (R.29:34/Reply App.1). Furthermore, Officer Brooks testified that he did not observe any problem with Mr. Beck's motor coordination as he was in the vehicle and no problem with his balance as he exited the vehicle. (R.29:42,44/Reply App.2,3). Additionally, while Brooks testified that he was trained to perform the horizontal gaze nystagmus test, he acknowledged that he did not perform the test according to his training. (R.29:46,47/Reply App.4,5). Finally, Brooks acknowledged that there were several clues on the walk and turn test that did not indicate impairment. (R.29:52/Reply App.6).

"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." ***Martindale v. Ripp,*** 2001 WI 113, 246 Wis.2d 67, 629 N.W.2d 698 at ¶32 citing to ***State v. Dyess,*** 124 Wis.2d 525, 543, 547, 370 N.W.2d 222 (1985).

Despite the City's contention, the admission of the test result was not harmless error. There was a reasonable possibility that the error contributed to the outcome of the trial. The test result is not peripheral evidence. It is direct evidence which established the prohibited alcohol concentration. Additionally, the Court instructed the jury that it could use the test result alone to establish that Mr. Beck was impaired at the time of the operation. Because of the above, the error was not harmless.

CONCLUSION

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

Dated this 22nd day of October, 2015.

Respectfully Submitted

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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 1759.

Dated this 22nd day of October, 2015.

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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 22nd day of October, 2015.

Respectfully submitted,

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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 22nd day of October, 2015.

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APPENDIX

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