

FILED
10-26-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I I

Appeal Case No. 2023AP000919

COUNTY OF WAUKESHA,

Plaintiff-Respondent,

v.

JACOB A. VECITIS,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED IN THE
WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE JENNIFER DOROW, CIRCUIT JUDGE,
PRESIDING

Case No. 21-TR-4801

BRIEF OF PLAINTIFF-RESPONDENT

Susan Lee Opper
District Attorney
Waukesha County

Andrew Nesheim
Special Prosecutor
State Bar No. 1117830
Attorneys for Plaintiff-Respondent

District Attorney's Office
515 W. Moreland Blvd. Room
G-72
Waukesha, WI 53188-2486
(262) 548-7076

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	<i>i</i>
TABLE OF AUTHORITIES	<i>ii</i>
STATEMENT OF THE ISSUES	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	1
ARGUMENT	2
I. THE CIRCUIT COURT PROPERLY CONCLUDED THE INTOXEMETER RESULTS WERE RELIABLE TO SUPPORT FINDING THE DEFENDANT GUILTY OF OPERATING WHILE INTOXICATED	2
A. THIS COURT IN DEFERNCE TO THE TIAL COURT UNDER THE CLEARLY ERRONEOUS STANDARD WILL UPHOLD THE CIRCUIT COURT’S FINDING OF FACT	2
i. THE APPELLANT’S ARGUMENT FOR DE NOVO REVIEW IS WITHOUT MERIT AND FACIALLY ERRONEOUS	3
B. ACCURACY OF THE INTOXIMETER IS A FACTUAL FINDING AFFORDED DEFERENCE AS AN ISSUE OF CREDIBILITY	4
C. THIS COURT SHOULD NOT DISRUPT THE FACTUAL FINDINGS OF THE CIRCUIT COURT BECAUSE THE COURT DEMONSTRATED ITS REASONING ON THE RECORD	6
CONCLUSION	7
CERTIFICATION OF LENGTH AND FORM.....	8
APPENDIX CERTIFICATION	9

TABLE OF AUTHORITIES

CASES CITED

	Page
<i>City of Madison v. Bardwell</i> , 83 Wis. 2d 891, 900, 266 N.W.2d. (1978)	5
<i>City of New Berlin v. Wertz</i> , 105 Wis. 2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981).....	6, 7
<i>Cogswell v. Robertshaw Controls Co.</i> , 87 Wis. 2d 243, 250, 274 N.W.2d 647, 650 (1979).....	4
<i>Cty. of Dane v. Winsand</i> , 2004 WI App 86, ¶7, 271 Wis. 2d 786, 679 N.W.2d 885	5
<i>Dickman v. Vollmer</i> , 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202	5
<i>Johnson v. Merta</i> , 95 Wis. 2d 141, 151-52, 289 N.W.2d 813, 818 (1980)	4
<i>Metropolitan Associates v. City of Milwaukee</i> , 2018 WI 4, ¶ 25, 379 Wis.2d 141, 905 N.W.2d 784.....	6, 7
<i>Martindale v. Ripp</i> , 2001 WI 113, P28, 246 Wis. 2d 67, 629 N.W.2d 698	6
<i>State v. Bailey</i> , 2009 WI App 140, ¶ 15, 321 Wis.2d 350, 773 N.W.2d 488	1, 2
<i>State v. Baldwin</i> , 212 Wis. 2d 245, 259-60, 569 N.W.2d 37 (Ct. App. 1997).....	6
<i>State v. Busch</i> , 217 Wis. 2d 429, 576 N.W.2d 904 (1998)	6
<i>State v. Disch</i> , 119 Wis. 2d 461, 476-477, 351 N.W.2d 492 (1984)	4, 5, 6, 7

STATUTES CITED

Wis. Stat. § 343.3055, 6

Wis. Stat. § 343.305(5)(d)5

Wis. Stat. § 343.305(6).....7

Wis. Stat. § 805.17(2).....2

Wis. Stat. § 809.19(3)(a)(2).....1

Wis. Stat. § 809.22(1)(b)1

Wis. Stat. § 809.23(1)(b)(4)1

Wis. Stat. § 885.2355

OTHER SOURCES

Wis. Adm. Code Ch. Trans 311.046

Wisconsin Administrative Code § Trans 311.056

Wisconsin Administrative Code § Trans 311.096

Wi Jury Instruction 2600(VII)(D) (2021-22)4

ISSUES PRESENTED

Did the circuit court err in its finding of fact that the Appellant-Defendant operated a motor vehicle while under the influence after hearing testimony from three state witnesses and two defense witnesses?

No. The circuit court, in its role as the finder of fact for this bench trial, properly assessed and weighed the credibility of the witnesses between the two parties and determined that the Defendant had in fact operated the motor vehicle under the influence on the evening of August 31, 2021.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. § 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § 809.23(1)(b)(4).

STATEMENT OF THE CASE

The State has chosen to omit this section in accordance with Wis. Stat. § 809.19(3)(a)(2) as the description of the factual and procedural background of the case is undisputed.

STANDARD OF REVIEW

Following a trial to the court, an appellate court will not set aside the factual findings of the circuit court unless they are clearly erroneous. Wis. Stat. § 805.17(2). Making this determination, appellate courts should give due regard to the trial court's ability to assess and judge the credibility of the witnesses. *Id.* A trial court's finding of fact will not be disturbed as long as "it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach." *State v. Bailey*, 2009 WI App 140, ¶ 15, 321 Wis.2d 350, 773 N.W.2d 488.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THE INTOXEMETER RESULTS WERE RELIABLE TO SUPPORT FINDING THE DEFENDANT GUILTY OF OPERATING WHILE INTOXICATED.

This case presents the review of the circuit court's decision to factually conclude that the Appellant-Defendant failed to overcome the presumption of accuracy accorded to the intoximeter used in testing the alcohol content of his breath.

A. THIS COURT IN DEFERENCE TO THE TRIAL COURT UNDER THE CLEARLY ERRONEOUS STANDARD SHOULD UPHOLD THE CIRCUIT COURT'S FINDING OF FACT.

This court in review will find that deference proper as the trial court's examination of the facts before it demonstrated a rational and reasonable conclusion. A trial court's finding of fact will not be disturbed when "it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach." *Bailey*, 2009 WI App at ¶ 15. Following a trial to the court, the factual findings of the circuit court will not be set aside on appeal unless they are clearly erroneous. Wis. Stat. § 805.17(2). This is due to the rule that the appellate court should give due regard to the trial court's ability to assess and judge the credibility of the witnesses. *Id.*

The circuit court considered four factual components, weighing credibility of the evidence. (R. at 179-180). Applying the law, and acting as the factfinder, the court found that the Appellant-Defendant was unable to diminish the credibility and weight afforded to the intoximeter test through either of its theories of defense. *Id.* at 180-181. Thus, the Appellant-Defendant was found guilty of a first offense operating while intoxicated with a preliminary breath test of .12. *Id.* In doing so, the court based its determination on clear and convincing evidence consistent with a reasonable degree of certainty. *Id.*

i. THE APPELLANT’S ARGUMENT FOR DE NOVO REVIEW IS WITHOUT MERIT AND FACIALLY ERRONEOUS.

The Appellant has asserted that the circuit court erred as a “conclusion of law” in making its decision. (App. Br. at 19). It emphasizes that the standard of review is thus *de novo*. *Id.* In doing so, the Appellant cites to the record where the court addresses the matter as:

My conclusions of law would be that the intoximeter testing involved was relevant and conducted to the requirements of the Wisconsin Administrative Code.¹

This quotation is a disingenuous drop-in without context as to what is occurring. In isolation, this statement may seem plausible at best that the court is reciting the findings of the case being conclusions of law under the Wisconsin Administrative Code. However, the transcript illustrates completely otherwise. The court began its decision by establishing the ongoing tension of credibility. *Id.* at 179. Shortly thereafter, the court began addressing its factual findings. *Id.* First, it addressed the accident caused by the Appellant’s driving. *Id.* Second, it addressed the testimony of Deputy McDonald and the odor of alcohol. *Id.* At 180. Third, the procedure involved with the intoximeter and the Appellant-then-Defendant being informed of it. *Id.* And fourth, the competing defenses proffered attempting to show the test results involved “are not appropriately to be considered by the Court and that the tests were conducted with the presence of alcohol or related substance in hand sanitizers utilized by the sheriffs conducting the intoximeter test” with a fall back theory of “expert testimony on the [prior] theory, but also on the theory that the defendant had blood in his mouth from head injuries received in the accident.” *Id.* The plain statements by the circuit court instead illustrate that it did not rule on the issue of the accuracy of the test as a matter of law, rather as a fact. *See Id.* 179-180. A fact, where it weighed credibility and testimony from either side. *Id.* No differently, courts instruct the jury as the fact finder the following:

¹ *Id.* (citing R. at 180)

The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.²

The claim that this is a “conclusion of law” is improper. The Appellant is attempting to subvert the deference afforded to factual inquiries by disguising their argument as something the circuit court simply did not do. A decision based on Wis Admin Trans 311 is a factual inquiry on the basis of credibility and weight to be given to a particular test. *State v. Disch*, 119 Wis. 2d 461, 476-477, 351 N.W.2d 492 (1984). This is a factual determination to be made by the finder of fact, who in this matter was the circuit court. *Id.* The court in its closing colloquy stated so as it determined the State had supported its burden, and the credibility of the test with supporting testimony as a matter of fact, supported the conclusion of law that the Appellant was operating while intoxicated. (R. at 179, 181).

B. ACCURACY OF THE INTOXIMETER IS A FACTUAL FINDING AFFORDED DEFERENCE AS AN ISSUE OF CREDIBILITY.

The trial judge is the ultimate arbiter of the credibility of witnesses, and “when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647, 650 (1979). It is not an appellate court’s function or role “to review questions as to weight of testimony and credibility of witnesses.” *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813, 818 (1980). An appellate court will affirm a circuit court’s findings “so long as there is evidence in the record that would permit a reasonable person to make the same findings, even if contrary findings could also reasonably be made based

² WI JI—Criminal 2600(VII)(D) (2011)

on the same evidence.” *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202.

Test results administered in accordance with Wis. Stat. § 343.305 are admissible in an OWI proceeding and given prima facie effect without the need for expert testimony in certain circumstances. *Cty. Of Dane v. Winsand*, 2004 WI App 86, ¶7, 271 Wis. 2d 786, 679 N.W.2d 885 (citing Wis. Stat. §§ 343.305(5)(d) and 885.235). The rule is that if a breath test is specified by statute, it cannot be deemed unreliable as a matter of law. *City of Madison v. Bardwell*, 83 Wis. 2d 891, 900, 266 N.W.2d (1978). It is a rebuttable presumption as countervailing facts may attack the credibility and weight to be given to a test. *Disch*, 119 Wis. 2d at 477. Questioning goes to the weight to be given the testimony, not to admissibility. *Id.* at 476.

As a factual inquiry into the weight to be given to the test, this is a matter the court must afford deference to. The appeal here is nothing more than a rehash of the arguments put forth before the trial court and asks this Court to reassess the credibility of the witnesses offered by the State and Defense counsel. The circuit court applied the proper evidentiary standard of proof, making the necessary factual findings, and applied those findings to the merits prior to making its “conclusion of law.” (R. at 179-181). This very principle is the foundation of *State v. Disch*, 119 Wis. 2d 461, 476-477, 351 N.W.2d 492 (1984), Wis. Stat. §§ 343.305(5)(d), and 885.235. There is no evidence offered by Appellant’s brief or in the record that the court entirely ignored or dismissed the testimony proffered by the defense’s witnesses. In fact, there was a complete dialogue over the issue before the decision on the merits. (R. at 174-178). The circuit court then concluded that the intoximeter testing involved was conducted according to the Wisconsin Administrative Code (R. at 180) and found that the intoximeter involved in this case was functioning properly at the time of the final test result (R. at 181). In its closing summation, the circuit court explicitly acknowledged that it had considered the testimony of all of the witnesses, including that thereof the Appellant-Defendant’s expert on hand sanitizer use before coming to its decision. (R. at 180).

C. THIS COURT SHOULD NOT DISRUPT THE FACTUAL FINDINGS OF THE CIRCUIT COURT BECAUSE THE COURT DEMONSTRATED ITS REASONING ON THE RECORD.

Factual findings of the trial court will not be overturned unless they are clearly erroneous and it is within the duty of the factfinder to determine the weight and credibility of witness testimony. *Metropolitan Associates v. City of Milwaukee*, 2018 WI 4, ¶ 25, 379 Wis.2d 141, 905 N.W.2d 784. This court will uphold a evidentiary decisions when the circuit court examines the relevant facts, applies a proper legal standard, and using a rational process, reached a reasonable conclusion. *Martindale v. Ripp*, 2001 WI 113, P28, 246 Wis. 2d 67, 629 N.W.2d 698.

The State is not required to affirmatively prove compliance with Wisconsin Administrative Code §§ Trans. 311.05 through 311.09 procedures as a foundation for the admission of a breathalyzer test. *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981). Potential violations affect the credibility rather than admissibility of the test. *Id.*

A recognized method of testing authorized by statute is entitled to a prima facie presumption of accuracy. *Disch*, 119 Wis. 2d at 475. Evaluation and approval of breath test instruments is intended to ensure the results have the accuracy that is deserving of the prima facie effect given without an expert testifying on the accuracy. *State v. Baldwin*, 212 Wis. 2d 245, 259-60, 569 N.W.2d 37 (Ct. App. 1997), *rev'd sub nom. on other grounds, State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904 (1998). Thus, results from a breath alcohol instrument recognized as accurate complying with the specifications of Wis. Stat. § 343.305 and Wis. Admin. Code § Trans 311.04, are presumed accurate and reliable. *See Disch*, 119 Wis. 2d at 475.

The Appellant's brief essentially amounts to a factual recitation of their argument in front of the trial court. *See and compare* (App. Br. at 22-24) with (R. at 167-174). The brief reiterates the facts indicated within the record while offering little legal basis for why this Court should now overturn the decision of the circuit court. *Id.* The State is not required to prove the underlying scientific reliability of the method used by the testing device as established in *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981). The State is required to establish that the testing device was in proper working order and was correctly operated by a qualified person. Of which, it did.

During the trial to the court, the State called to the stand two deputies with the Waukesha County Sheriff's Department who initiated the interaction with Mr. Vecitis and ultimately cited him

for operating while under the influence. In their testimony, one of the deputies testified to arriving to the scene of a vehicle crash with Mr. Vectis being attended to by EMS personnel (R.7:21). Deputy McDonald then spoke with Mr. Vecitis and noticed a mild odor of intoxicants coming from his breath. Mr. Vecitis proceeded to tell the deputy he had “two drinks” that afternoon (R. 8: 14, 21). After Mr. Vecitis was brought back to the Waukesha County Sheriff’s Department for an intoximeter test, Deputy McDonald started a 20 minute observation period where he did not see Mr. Vecitis smoke, regurgitate, vomit or drink alcohol beverages (R. 16:9). Deputy Fettig stated she had a permit to conduct a chemical breath test (R. 25:12) and then administered the Intoximeter Test on Mr. Vectis and received an accurate test result (R. 31:17). Furthermore, Terese Sanders from the Department of Transportation testified to the certification of the Intoximeter both before and after the date the Intoximeter was used to test Mr. Veictis’s breath (R. 55: 7, 12).

Accordingly, under Wis. Stat. § 343.305(6), the State met all requirements for the intoximeter test as well as its burden, and the circuit court agreed. The credibility of the intoximeter results were not diminished to afford that the weight given to them is “clearly erroneous” as the standard for reversal is. *Metropolitan Associates*, 2018 WI 4 at ¶ 25. Supported by *Wertz*, 105 Wis. 2d at 674, and *Disch*, 119 Wis. 2d at 475, the discretion of the trial court is to be upheld. The argument before this court is no different than that proffered by the Appellant-Defendant before the trial court, where it’s argument did not amount to rebutting the presumption of admissibility, nor outweigh the credibility of its results.

CONCLUSION

For the aforementioned reasons, this Court should affirm the findings of the circuit court as the court applied the correct evidentiary standard, assessed the credibility of the witness testimonies on the record, and provided a reasonable and articulable basis for making its determination that Mr. Vecitis operated a motor vehicle while under the influence.

Dated this 26th day of October, 2023.

Respectfully submitted,

SUE OPPER
District Attorney
Waukesha County


Andrew Nesheim
Special Prosecutor
State Bar No. 1117830

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3191.

October 26, 2023
Date


Andrew Nesheim
Special Prosecutor
State Bar No. 1117830

**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.

October 26, 2023

Date



Andrew Nesheim

Special Prosecutor

State Bar No. 1117830

P.O. Address:

Waukesha County District Attorney's Office

515 W. Moreland Blvd. Room CG-72

Waukesha, Wisconsin 53188

(262) 548-7076

Attorneys for Plaintiff-Respondent.