STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 19, 2001
v	No. 225139 Oakland Circuit Court
MICHAEL ALLEN CUPP, Defendant-Appellee.	LC No. 99-007223-AR

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was charged with operating a vehicle while under the influence of intoxicating liquor/unlawful blood alcohol level, second offense notice, MCL 257.625(1); MSA 9.2325(1). He moved to suppress the results of the blood alcohol test that indicated his blood alcohol content was .12 grams of alcohol per one hundred milliliters of blood. Defendant argued that the results of the test were unreliable because the test was not administered within a reasonable time. The test was given two hours and thirty-six minutes after defendant was stopped by the police. At the conclusion of an evidentiary hearing, the district court ordered suppression of the test results. The prosecution appealed, and the circuit court affirmed. The prosecution appeals to this Court on leave granted. We reverse.

The prosecution argues that the district court erred as a matter of law by failing to apply the correct standard in determining the admissibility of the test results. The prosecution claims that any delay in the administration of the blood alcohol test pertains to the weight to be given to the evidence, and not to its admissibility. A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Mayhew*, 236 Mich App 112, 121; 600 NW2d 370 (1999). However, a preliminary issue of law regarding admissibility based upon construction of a court rule or statute is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The trial court's ruling was premised upon construction of the implied consent statute. Thus, our review is de novo.

The implied consent statute allows the admission of test results showing a defendant's blood alcohol level. The statute provides, in relevant part: "The amount of alcohol . . . in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any

civil or criminal proceeding. MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a). Although not expressly stated in the language of the statute, this Court has interpreted the implied consent statute as requiring the prosecution to make a preliminary showing that the test was performed within a reasonable time of the offense. See *People v Schwab*, 173 Mich App 101, 103-104; 433 NW2d 824 (1989), overruled by *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999); *People v Krulikowski*, 60 Mich App 28, 31-33; 230 NW2d 290 (1975), overruled by *Wager, supra*; *People v Kozar*, 54 Mich App 503, 509 n 2; 221 NW2d 170 (1974), overruled by *Wager, supra.*

In *Wager*, our Supreme Court held that this Court's interpretation of the implied consent statute, as set forth in *Kozar* and its progeny, is erroneous. *Wager, supra* at 122-124. The Supreme Court held that based upon a clear reading of the statute, there is no requirement that chemical analysis be performed within a "reasonable time" of the offense. *Id*. The Court stated that any delay in the administration of a chemical test goes to the weight, not the admissibility of the evidence:

> Pursuant to the express language of the statute, test results "are admissible . . . and will be considered," MCL 257.625a(6)(b)(ii); MSA 9.2325(1)(6)(b)(ii), and the prosecutor is not required to introduce expert testimony on this issue. To the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact. [*Wager, supra* at 125-126.]

In *People v Campbell*, 236 Mich App 490, 506; 601 NW2d 114 (1999), this Court reiterated the *Wager* holding, and held that the only threshold showing for the admissibility of chemical test results is relevance.[1]

We conclude that, pursuant to *Wager*, the district court's ruling was based upon an erroneous interpretation of the statute. The delay in administering defendant's blood alcohol test affects the weight to be given to the test results by the factfinder, and not its admissibility.

The prosecution next claims that that the circuit court erred in failing to give the *Wager* decision retroactive effect and apply its holding to the facts in the instant case. We agree.

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[1] In addition to finding *Wager* inapplicable to this case, the circuit court concluded that the trial court's refusal to admit the blood alcohol test results was proper because the results were unreliable. The dissent concludes that the circuit court did not abuse its discretion in excluding the test results under MRE 403. We disagree with the dissent's conclusion given that our Supreme Court has clearly stated that the delay in administering a blood alcohol test affects the weight to be given to the results, not its admissibility. *Wager, supra.* Therefore, we question the logic expressed in *Campbell* of requiring a threshold showing of relevance as it relates to delay. Given *Wager's* clear statement that delay does not affect a test's admissibility, any threshold showing of relevance should not concern any delay in administering the test. Regardless, we believe the test results at issue in the present case are admissible under the reasoning of *Campbell.* In *Campbell*, this Court held that a delay of two hours and twenty-four minutes was not so long as to render the test administered to the defendant unreliable. *Campbell, supra* at 506-507. We find no justification or excuse for holding that the additional twelve minutes of delay in the present case makes defendant's test results unreliable.

The question whether a judicial decision should have retroactive application is a question of law, subject to de novo review. *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998). "Resolution of the matter in turn rests on the decisional basis of the holding." *Id*. The general rule is that judicial decisions are given full retroactive effect. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). However, in criminal cases, ex post facto and due process concerns prevent retroactive application in some cases. *People v Doyle*, 451 Mich 93, 100-101; 545 NW2d 627 (1996). This is especially true where the decision is unforeseeable and has the effect of changing existing law. *Id*. at 101. But, retroactive application does not implicate due process or ex post facto concerns where the decision does not change the law and is not unforeseeable. *Id*.

Our Supreme Court's analysis in *Doyle* is instructive to the case at bar. In that case, the Court considered whether its opinion in *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991), addressing the interaction between the Motor Vehicle Code and the habitual offender statute, should be given full retroactive application. *Doyle*, *supra* at 95. The *Doyle* case arose while the *Bewersdorf* appeal was pending in the Supreme Court. After the Supreme Court's decision in *Bewersdorf* was issued, the trial court granted the defendant's motion to dismiss the habitual offender charge, determining that application of *Bewersdorf* to the defendant's conduct would violate the Ex Post Facto Clause of the United States and Michigan Constitutions. *Id.* at 97-98.

On the prosecution's appeal, this Court affirmed the trial court's ruling, finding that "that application of *Bewersdorf* to Mr. Doyle's conduct would effectively increase the authorized penalty for a crime after the fact, in violation of ex post facto principles." *Doyle, supra* at 98, quoting *People v Doyle*, 203 Mich App 294, 296; 512 NW2d 59 (1994). This Court determined that the Supreme Court's holding in *Bewersdorf* changed the law. *Doyle*, *supra* at 98-99, quoting *Doyle*, *supra*, 203 Mich App 297.

The Supreme Court reversed, holding that *Bewersdorf* did not create "new law," and therefore, its retroactive application did not implicate ex post facto and due process issues. *Doyle*, *supra* at 108. The Supreme Court reasoned that *Bewersdorf* was "based on a clear reading of unambiguous statutory provisions[.]" *Id.* at 103. Furthermore, the Court noted that the *Bewersdorf* case addressed a question of statutory interpretation that had never been previously decided at the Supreme Court level. *Id*. Because the *Bewersdorf* Court had determined that the proper interpretation of the statute "lay in the clear language of the statute, as enacted by the Legislature," the *Doyle* Court concluded that *Bewersdorf* was not unforeseeable, and did not create new law. *Id*. at 103-104, 108. The *Bewersdorf* Court merely "gave effect to an unambiguous statute, implementing the intent of the Legislature. Thus, the law was as we interpreted it to be, because of the nature of the unambiguous statutory language." *Id*. at 104. The *Doyle* Court explained:

> This approach taken by the Court of Appeals overlooks the hierarchical nature of the court system, as well as the special rule of the Legislature when it provides a clear statutory enactment. In the view of the Court of Appeals majority, the "rule of law" in this state is more offended by the retroactive application of a controlling decision by this Court, than it is by a continued

> application of an erroneous and overruled decision by the Court of Appeals. As stated in part II, we find that *Bewersdorf* was not an unforeseeable decision that had the effect of changing the law. [*Id.* at 109.]

The Court summarized its holding as follows:

> Accordingly, we hold that, as in this case, where a precisely drafted statute, unambiguous on its face, is interpreted by this Court for the first time, there has not been a "change" in the law. Where the Legislature has passed an unambiguous statute, that statute is the law. Our role is to enforce the law as written. Our holding today is grounded in the belief that it is perfectly clear that anyone reading the habitual offender act and the Motor Vehicle Code easily could have concluded that the *Tucker* decision was contrary to their plain meanings. [*Id.* at 113.]

Applying the above analysis to the case at bar, we agree with the prosecution that the *Wager* decision should be applied retroactively because it did not create new law. In *Wager*, the Supreme Court overruled an erroneous interpretation of the statute governing the admissibility of blood test results. As observed by the Supreme Court, the statutory language was clear and unambiguous, and it was in effect at the time of defendant's offense. *Wager, supra* at 123, 125.

The origin of the "reasonable time" requirement stemmed from a footnote in *Kozar* containing dictum. The footnote stated that one of the prerequisites to the admissibility of test results was a showing by the prosecution that the test was performed within a reasonable time. *Kozar, supra* at 509 n 2. This footnote contained no citation of authority, and was not necessary to the resolution of the issue in that case. *Id.*[2]

The *Kozar* footnote was subsequently cited by this Court in *Krulikowski* in which this Court reversed the defendant's conviction because "one of the 'prerequisites' to admissibility had not been shown." *Krulikowski, supra* at 32. In *Schwab*, this Court held that the results of a breathalyzer test were inadmissible, where the test was administered 122 and 133 minutes after the driver's arrest. *Schwab, supra* at 103.

The *Wager* Court found no basis for requiring the prosecution to show, as a condition of admissibility, that the test was given within a reasonable time, because such language is not found in the statute. The statute clearly and unambiguously permits the admission of the test results. The Supreme Court reasoned:

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[2] The *Kozar* footnote gives four foundational requirements, providing: "These prerequisites, not at issue in the case at bar, include establishing the qualifications of the operator administering the test, the method or procedure followed in administering the test, that the test was performed within a reasonable time after the arrest, and the reliability of the testing device. Foundation testimony concerning these prerequisites must be introduced before the test results may be admitted into evidence." *Kozar, supra* at 509 n 2.

> Our Legislature has enacted several provisions governing the admissibility of blood tests. In reviewing those provisions, we find a flat statement that "[t]he amount of alcohol . . . in a driver's blood . . . as shown by chemical analysis of the person's blood . . . is admissible into evidence in any civil or criminal proceeding." MCL 257.625a(6)(a); MSA 9.2325(1)(6)(a). Nowhere does the section impose a requirement concerning the interval of time in which the test must be given.
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> The section further provides that the Department of State Police is to promulgate rules concerning the administration of tests under the section. MCL 257.625a(6)(g); MSA 9.2325(1)(6)(g). However, those rules are also silent with regard to a time requirement.
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> To be clear, the Legislature is only stating a principle of admissibility. The parties are free to introduce "any other competent evidence" bearing on the question whether a driver was driving under the influence or otherwise in violation of this portion of the statute. MCL 257.625a(7); MSA 9.2325(1)(7).
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> Despite the absence of such a requirement in the statutory section, the Court of Appeals has developed the principle that a blood test is inadmissible unless given within "a reasonable time." *People v Kozar*, 54 Mich App 503, 508; 221 NW2d 170 (1974); *People v Schwab*, 173 Mich App 101; 433 NW2d 824 (1988). [*Wager, supra* at 121-122, footnotes omitted.]

The Supreme Court found no basis for this Court's earlier opinions which impose this burden on the prosecution to establish a "reasonable time" frame in order to admit test results:

> Looking at the origin of the rule as set forth in *Kozar* and the absence of a dispositive ruling on point from this Court, we are satisfied that no sound reason exists to engraft the "reasonable time" element onto the clear language of the statute. Thus, to the extent that *Kozar* and its progeny adopt a "reasonable time" element, they are expressly overruled.
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> In [*Krulikowski*], the Court of Appeals failed to apply clear statutory language. Pursuant to the express language of the statute, test results "are admissible . . . and will be considered," MCL 257.625a(6)(b)(ii); MSA 9.2325(1)(6)(b)(ii), and the prosecutor is not required to introduce expert testimony on this issue. To the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact. [*Wager*, *supra* at 123-126, footnote omitted.]

The plain reading of the statute permits the admissibility of blood alcohol test results, without qualification for a time frame in which the test must have been administered. Thus, *Wager* did not change the law, nor did it create "new law." As in *Doyle*, the Supreme Court's

opinion in *Wager* addressed this issue for the first time and corrected a lower court's erroneous interpretation of a clear and unambiguous statute. Because *Wager*, did not create new law, its retroactive application does not implicate ex post facto concerns. For these reasons, we conclude that *Wager*, should be given retroactive application, and that the circuit court erred in declining to apply *Wager*, to the facts of this case.

Given our resolution of these issues, we need not address the prosecution's third issue on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Brian K. Zahra