**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 11, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal Nos. 03-1645-CR**
**03-2462-CR**

**Cir. Ct. No. 02CT000016**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JASON D. VANSTRATEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Reversed and cause remanded with directions.*

¶1 SNYDER, J.[1] Jason D. VanStraten appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), third offense,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offense. He contends that the trial court erred when it granted his motion to dismiss the PAC charge and subsequently reinstated the charge, subjecting him to double jeopardy. He further alleges that the court erred when it did not exclude the State's Intoxalyzer test results as required under the pretrial discovery statute. We agree, reverse the PAC conviction, and remand the OWI charge for a new trial.

¶2 The undisputed facts are as follows. VanStraten was arrested on January 13, 2002, for his third OWI, contrary to WIS. STAT. § 346.63(1)(a), and his third PAC, contrary to § 346.63(1)(b). A jury trial was held on September 25, 2002. At trial, Deputy Sheriff Christopher Wendorf testified that he had taken VanStraten into custody and transported him to the Calumet County Jail for an Intoxalyzer test. Certified Jailer Roy Dietzen conducted the test on VanStraten.

¶3 At trial, Dietzen testified that he could not, with any degree of certainty, confirm that the Intoxalyzer machine was working properly or that the test results were accurate. The State then informed the court it had no further witnesses. VanStraten moved for dismissal of the PAC charge on grounds that the Intoxalyzer test result lacked foundation and, therefore, the State had insufficient evidence to support the charge. The State indicated a willingness to introduce further documentation regarding the Intoxalyzer machine; however, the court stated: "No, you have put your case in …. It's too late." The trial court granted VanStraten's motion to dismiss the PAC charge.

¶4 After the lunch break, the State returned to court with certified maintenance records for the Intoxalyzer machine. VanStraten argued that the

State had rested its case and, furthermore, that the records had not been produced pursuant to a pretrial discovery demand. Over VanStraten's objection, the court decided that "[t]he State has not rested yet" and allowed the records to be admitted as evidence. The trial court also reinstated the previously dismissed PAC charge.

¶5 The jury found VanStraten guilty on both the OWI and the PAC charges. VanStraten filed a motion for postconviction relief, which was denied. He appeals the judgment of conviction on both counts. The State concedes the PAC issue, but argues that the OWI charge should stand.

DISCUSSION

¶6 Whether a defendant's conviction violates his double jeopardy rights under the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution is a question of law. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). Therefore, this court owes no deference to the decision of the lower court on this issue. ***Id.***

¶7 Once a defendant has been acquitted of a charge, it cannot "be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the constitution." ***United States v. Martin Linen Supply Co.***, 430 U.S. 564, 571 (1977) (citation omitted). An acquittal occurs if "the ruling of the judge, *whatever its label*, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." ***State v. Turely***, 128 Wis. 2d 39, 48, 381 N.W.2d 309 (1986). Here, the court granted VanStraten's motion to dismiss the PAC charge and, addressing the prosecutor, stated:

> You did not prove that the Intoxalzyer was in proper working condition …. So, there is no evidence in the

> record here that demonstrates that the Intoximeter test result should be admitted into evidence.

The State requested an opportunity to bring in certified Intoxalyzer maintenance records, but the court determined that such evidence would not be allowed because it was "too late." The court's dismissal of the PAC charge was tantamount to an acquittal. Reinstating the PAC charge after it was dismissed placed VanStraten in double jeopardy. The PAC conviction is therefore reversed.

¶8 VanStraten next argues that the court erred in allowing the State to use the Intoxalyzer maintenance records to support the OWI charge. These records were not produced by the State despite VanStraten's pretrial discovery demand. We review a trial court's evidentiary rulings to determine whether the court exercised its discretion appropriately. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Because the exercise of discretion is not the equivalent of unfettered decision making, the trial court's decision must reflect a reasoned application of the appropriate legal standard to the relevant facts of the case. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). Whether discretion was properly exercised is a question of law. ***Seep v. Pers. Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct. App. 1987).

¶9 The State does not dispute VanStraten's allegation that it failed to produce the Intoxalyzer records. Rather, the State posits that failure to do so did not result in "trial by ambush" and therefore the records were properly admitted. When the State fails to comply with its responsibilities, WIS. STAT. § 971.23(7m) requires the court to determine whether the noncompliance was for good cause:

> SANCTIONS FOR FAILURE TO COMPLY. (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, *unless good cause is shown for failure to comply*.

> The court may in appropriate cases grant the opposing party a recess or a continuance. (Emphasis added.)

¶10 We have held that this statute requires investigation by the trial court. "First, the court must determine whether the noncomplying party (here, the state) has shown good cause for the failure to comply. If good cause is not shown, the statute is mandatory—the evidence *shall* be excluded." ***State v. Wild***, 146 Wis. 2d 18, 27, 429 N.W.2d 105 (Ct. App. 1988). The inquiry does not end here however, because a finding of good cause does not preclude exclusion of the evidence as a sanction; exclusion is just no longer mandatory. ***Id.*** at 28. The statute also provides that in appropriate cases, the court may grant a recess or continuance. ***Id.***

¶11 When VanStraten objected to the new Intoxalyzer maintenance records, the trial court responded by acknowledging that the documents "could have been submitted under the discovery demand," admitting them into evidence, and finding that VanStraten was "not prejudiced by the [State's] failure to disclose these documents." This analysis, however, is not what WIS. STAT. § 971.23(7m) demands. The trial court should have determined whether the State's failure to comply was for good cause. If not, the statute requires exclusion of the Intoxalyzer records. We hold, therefore, that the Intoxalyzer records should not have been allowed into evidence without a showing of good cause by the State. The trial court erroneously exercised its discretion when it failed to apply the proper law to the pertinent facts and failed to provide a reasonable basis for its ruling. *See* ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918 (1999).

¶12 On appeal, in an apparent attempt to show good cause, the State explains that two witnesses who were to present maintenance information about the Intoxalyzer were unexpectedly unavailable on the day of the trial. This left the

Intoxalyzer records as the only source of verification that the appliance worked properly at the time of VanStraten's arrest. While we understand that witnesses can be unavailable for trial, we do not see how this absolves the State from its duty to produce the maintenance records under the discovery demand.

¶13 We conclude that VanStraten's rights under the Fifth Amendment to the United States Constitution were violated with regard to the PAC conviction and further hold that the court erroneously exercised its discretion when it allowed the Intoxalyzer records to be admitted into evidence. VanStraten's conviction for PAC is therefore reversed, and a new trial on the OWI charge is ordered.

*By the Court*.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.