COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1035-CR **Cir. Ct. No. 2005CT901**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. POWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Paul L. Powers appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. He contends that the circuit court erred when it denied his motion to suppress his breath test results. He asserts that the arresting officer violated the implied consent law by marking Powers' refusal as consent and proceeding with the breath test. In the alternative, Powers argues that the accuracy of the test result was not sufficiently established by the State. We disagree with Powers' arguments and conclude that the circuit court's evidentiary holdings were proper. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 On July 28, 2005, Officer James Priebe of the City of Sheboygan Police Department made an investigatory stop of Powers' car. Priebe detected a strong odor of intoxicants and he noted that Powers spoke with slurred speech and that he was "slumping forward with heavy eyelids." Powers' performance on field sobriety tests indicated to Priebe that Powers was under the influence of intoxicants. Priebe placed Powers under arrest.

¶3 Powers was taken to the police department where Priebe read him the informing the accused form and asked him to submit to a chemical test of his breath. According to Priebe, the following exchange then took place. Priebe asked Powers to submit to the breath test and Powers answered, "Yes, with my lawyer." Priebe then explained that he did not have the option to have his lawyer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

present. Powers repeated that "yes, he would take the test with his lawyer present." Priebe then read from the form to Powers, asking "Will you submit to an evidentiary chemical test of your breath? I need a yes or a no, please." Powers replied, "Yes, with my lawyer." Priebe told Powers once more that having his lawyer present was not an option, and Priebe then marked down that Powers had consented to the test because he had said "yes." Two usable samples were obtained and the breath tests resulted in alcohol concentration readings of .184 and .169.

¶4 Powers filed a motion to suppress the results of the test, arguing that his response to Priebe's request for a breath test amounted to a refusal. The circuit court denied the motion and the case went to trial. At trial, Powers objected to the admission of the test results arguing that without additional indicators of accuracy the State could not establish a proper foundation. The court overruled Powers' objection and the test results were admitted into evidence. During the trial, Powers challenged the accuracy of the breath test results by introducing IntoxNet data from July 28, 2004 to February 1, 2006. Nonetheless, the jury returned a verdict of guilty on both the OWI and the PAC charge. Powers appeals.

DISCUSSION

¶5 We turn first to Powers' contention that Priebe violated the implied consent law when he interpreted Powers' response as consent to the chemical test. The parties agree that there is no right under the implied consent statute to consult with an attorney before deciding whether to submit to a chemical test. ***State v. Neitzel***, 95 Wis. 2d 191, 206, 289 N.W.2d 828 (1980). Because the driver has already consented, it is unnecessary to obtain the advice of an attorney about the decision to submit. ***Id.*** at 193-94. As Powers points out, many courts have held

that a driver who insists on speaking with an attorney or having an attorney present as a condition of consent is deemed to have refused consent to the test. *See* ***State v. Reitter***, 227 Wis. 2d 213, 235 n.18, 595 N.W.2d 646 (1999) (listing cases from various jurisdictions, including Wisconsin, that have so held). The difference here is that Powers' insistence on having his attorney present was deemed (by Priebe) to be consent, rather than a refusal.

¶6 Powers argues that his response ("yes, with my lawyer" and lack of cooperation during the test) is tantamount to a refusal to submit to the test. The State counters that Powers was told he had no right to counsel and therefore his response (the "yes" and cooperation during testing) was tantamount to consent. The State emphasizes that Powers neither asked to call his lawyer nor unequivocally refused to submit to the test. It asserts that Priebe reasonably interpreted Powers' response as consent in the context of the entire exchange. Powers' nonverbal cues are not clear from the record and there is some inconsistency in the record about his level of cooperativeness during the actual testing.

¶7 When our review requires that we apply the implied consent law to a set of facts, we accept the factual findings and credibility determinations of the circuit court unless they are clearly erroneous. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Construction of the statute and its application to those facts then presents a question of law. ***State v. Stary***, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). Here, the circuit court concluded that "Officer Priebe could have considered this response as a refusal, but he did not. Officer Priebe considered the yes as a consent and he was right to do so. When offered the breathalyzer, Mr. Powers consented and took the breath

test." The court held that Priebe had complied with the law and that Powers' consent was voluntary and not coerced.

¶8 At the hearing on Powers' motion to suppress, the court allowed further briefing of the issue. It permitted the State two weeks to submit a brief and gave Powers an additional week to respond if he chose to do so. The court continued the hearing to April 13, 2006. On the official court minutes of the hearing on April 13, there is the following notation: "Motion is denied." That is the extent of the circuit court's treatment of the issue in the record originally supplied to us on appeal. Generally, when faced with inadequate findings, we may: (1) review the record anew and affirm if a preponderance of the evidence clearly supports the ruling; (2) reverse if the ruling is not so supported; or (3) remand for further findings and conclusions. *See* ***Haugen v. Haugen***, 82 Wis. 2d 411, 415, 262 N.W.2d 769 (1978). Under the circumstances here, we issued an order to the circuit court directing it to memorialize its findings of fact and conclusions of law on the record to facilitate appellate review. The court provided us with the written findings indicated above, and further stated, "These are some same findings and analysis I made on the record on April 13, 2006."

¶9 The appellate record contains only the official court minutes of the April 13 hearing; no transcript of the hearing has been provided. Because this court does not have a copy of the transcript, the record is incomplete and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Furthermore, because the record indicates a reasonable dispute about the details of the exchange between Priebe and Powers, we defer to the circuit court as the finder of fact to make credibility determinations. *See* ***Rivera v.***

Eisenberg, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We therefore accept the circuit court's finding that Powers consented to the breathalyzer test and, consequently, ascertain no error in the court's decision to allow the breath test evidence at trial.[2]

¶10 Powers also argues that the court erred when it overruled his objection to the admissibility of the test results on grounds the State had not laid a proper foundation. Specifically, Powers argues that the State was required to provide a calibration test report performed after Powers' breath test and within 120 days since the prior calibration test on the Intoximeter. *See* WIS. STAT. § 343.305(6)(b)3. (technicians must certify the accuracy of the chemical test equipment periodically, at intervals of not more than 120 days). The circuit court held that the State would be required to prove that the breath test device "was in good working order before [the jury] rel[ies] upon the results." The court saw the issue as one of weight, not of admissibility, and held that it was within the province of the jury to decide how much weight the test result would carry.

[2] Had the record established that Powers did indeed refuse the test, we still would affirm. Essentially, Powers argues that the results of the breath test were erroneously admitted into evidence because he refused to voluntarily submit to the test. However, that proposition has been expressly rejected. The refusal to submit to the chemical test under WIS. STAT. § 343.305 is a civil matter and a driver who refuses to submit to the test faces certain risks and consequences that are entirely independent of the OWI charge. *See* ***State v. Zielke***, 137 Wis. 2d 39, 41, 49, 403 N.W.2d 427 (1987). The legislature enacted the implied consent law to combat drunk driving. *See* ***State v. Gibson***, 2001 WI App 71, ¶7, 242 Wis. 2d 267, 626 N.W.2d 73. The law was designed to facilitate the collection of evidence in order to remove drunk drivers from the state's highways by securing convictions. ***Id.*** A refusal does not prevent the State from legally proceeding to obtain the evidentiary chemical sample of blood, breath or urine by using other legal means. *See* ***State v. Wodenjak***, 2001 WI App 216, ¶7, 247 Wis. 2d 554, 634 N.W.2d 867. Like Gibson, Powers does not challenge the taking of his breath sample as a violation of ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993) (providing circumstances under which a warrantless blood sample is permissible). *See* ***Gibson***, 242 Wis. 2d 267, ¶4.

¶11 "As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (citations omitted). WISCONSIN STAT. § 343.305(6)(b) addresses the requirements for the accuracy and reliability of chemical breath analysis, providing in relevant part:

> The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:
>
> ….
>
> 3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3)(a), (am), or (ar) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days ….

¶12 The result of a test administered in accordance with WIS. STAT. § 343.305 is admissible in an action for OWI or PAC on the issue of whether the person was under the influence of an intoxicant, and it is given "prima facie effect" without the need for expert testimony in certain circumstances. Section 343.305(5)(d); *see also* WIS. STAT. § 885.235(1g)(c) (chemical analysis of person's breath is prima facie evidence that he or she was under the influence of an intoxicant and had the alcohol concentration as shown by the analysis). 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 them 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 on other grounds sub nom.* ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998).

¶13 The circuit court held that the breath test results were admissible, and relied on our analysis in ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 672 n.2, 314 N.W.2d 911 (Ct. App. 1981). There, the defendant sought to suppress the results of a breathalyzer test on grounds that the testing methods and procedures did not meet provisions of the administrative code requiring (a) continuous observation of the subject for twenty minutes prior to testing and (b) compliance of the "assay report" of the machine's manufacturer with certain standards. ***Id.*** There we explained that the proponent of a breath alcohol test result need not prove compliance with the administrative code. ***Id.*** Powers asserts that ***Wertz*** is distinguishable because the question involved compliance with the code rather than with statutory requirements. However, in ***Wertz***, we also stated that WIS. STAT. § 343.305(7) (1981-82)[3] sets no conditions for the admissibility of the results of such a test. ***Id.*** at 673.

¶14 This does not, however, pave the way for unhindered admission of unreliable information. As we said in ***Wertz***, circuit courts may, where the court is convinced "that the accuracy of the test is so questionable that its results are not probative," or where "accuracy of the test is so questionable that its probative value is outweighed by its prejudicial effect," properly refuse to admit the test in

[3] WISCONSIN STAT. § 343.305(7) (1981-82) is substantially similar to the text of WIS. STAT. § 343.305(5)(d) (2005-06), which reads in relevant part:

> At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating 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 … or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under [WIS. STAT. § 885.235]."

evidence even though there are "no legislatively imposed foundational prerequisites." ***Wertz***, 105 Wis. 2d at 675. Here, Priebe testified regarding his qualifications to administer the tests and about the accuracy testing that was done on the Intoximeter during Powers' arrest. The court reached a reasonable conclusion, based on a correct view of the applicable law, that the chemical breath test results were admissible and that Powers would be free to challenge the reliability of the tests by using the IntoxNet data he had in his possession. Furthermore, both parties were free to elicit testimony from a DOT expert witness, Melissa Kimball, regarding the workings of the breath test device.

¶15 Powers has not persuaded us that any case law or statute compels the evidentiary foundation he urges. Rather, we conclude that the State was not required to affirmatively prove that the Intoximeter had been tested as required by WIS. STAT. § 343.305(6)(b)3. The circuit court did not err in ruling as it did.

CONCLUSION

¶16 The circuit court did not err in denying Powers' motion to suppress the results of the breath test. Powers' assertion that he refused the test was rejected by the circuit court and nothing in the record persuades us to discard that finding. We further conclude that the circuit court properly exercised its discretion when it held the results of the breath tests were admissible without the foundational requirements asserted by Powers.

By the Court.—Judgment affirmed.

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