COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1189

Cir. Ct. Nos. 2011TR14297
2011TR14576

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

WINNEBAGO COUNTY,

PLAINTIFF-RESPONDENT,

V.

ANASTASIA G. CHRISTENSON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Anastasia G. Christenson appeals from judgments of conviction finding her guilty after a court trial of first-offense operating while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intoxicated (OWI) and with a prohibited alcohol concentration (PAC). She contends the trial court erred in denying her motion to suppress the result of a preliminary breath test (PBT) administered to her and blood test results derived from it; in admitting the blood test results at trial, despite the County's failure to prove it had followed statutory procedures for drawing her blood; and in concluding the County met its burden of establishing at trial that the blood test results were accurate and reliable. We affirm.

BACKGROUND

¶2 Christenson's motion to suppress was heard in conjunction with the court trial. Winnebago County Sheriff's Deputy Darren Putzer provided the following testimony. At approximately 12:13 a.m., on Sunday morning, November 6, 2011, Putzer was dispatched to a car crash, where he found Christenson had driven into a ditch. Christenson appeared to Putzer to be under the age of twenty-one, and he confirmed she was in fact seventeen years old.

¶3 Injured, Chistenson was treated on the scene by medical personnel. While Putzer was speaking with Christenson in an ambulance, he smelled "something," which he described at trial as an odor of "intoxicating beverages." Due to Christenson's physical condition at the time, Putzer was not able to perform field sobriety tests on her. Having observed the odor, however, Putzer wanted to "substantiate [his] suspicion," so he administered a PBT to Christenson, which indicated a .08 percent blood alcohol concentration (BAC).

¶4 Christenson was taken by ambulance to Theda Clark Medical Center where Putzer went through the Informing the Accused form with her, which indicated that, among other things, she was under arrest for operating a motor vehicle while intoxicated and her driver's license would be revoked if she refused

to take a requested test. Christenson agreed to give a blood sample. Putzer testified that "somebody" from the medical center drew Christenson's blood. Putzer sent the sample to the Wisconsin State Laboratory of Hygiene.

¶5 Ed Oliver, an analyst at the state lab, testified that he initially tested the blood sample twice, in accordance with lab protocols and regulations, with the result each time indicating .084 percent BAC. He testified that for the lab to "report out a result," test results need to be within .005 of each other, as Christenson's were. Oliver further testified that a later test on the same sample produced a result of .081 percent BAC. On cross-examination, Oliver testified that, due to the .005 "margin of error," the results of .084 and .081 percent could "just as easily" mean .079 and .076 percent, respectively.

¶6 At the conclusion of the trial, the court found Christenson guilty of first-offense OWI and PAC. Christenson appeals.

DISCUSSION

Motion to suppress

¶7 Christenson contends the trial court erred in denying her motion to suppress the PBT result and the blood test results derived from it. Specifically, she argues that Putzer did not have the probable cause required by WIS. STAT. § 343.303 to lawfully administer the PBT to her, and that without the PBT result, Putzer did not have probable cause to arrest her and ultimately draw her blood to be tested.

¶8 In reviewing a motion to suppress evidence based on a lack of probable cause, we uphold the trial court's fact-finding unless clearly erroneous. ***State v. Kutz***, 2003 WI App 205, ¶13, 267 Wis. 2d 531, 671 N.W.2d 660. If the

facts are not in dispute, or when we uphold the trial court's findings of fact, all that remains is the question of whether the facts fulfill the probable cause standard. ***Id.*** This court reviews that question de novo. ***Id.***

¶9 WISCONSIN STAT. § 343.303 states, in relevant part, that "[i]f a law enforcement officer has probable cause to believe that the person is violating or has violated [WIS. STAT. §] 346.63(1) or (2m) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath." Section 346.63(2m), the "absolute sobriety" law, provides that "[i]f a person has not attained [21 years of age] the person may not drive or operate a motor vehicle while he or she has an alcohol concentration of more than 0.0 but not more than 0.08." The applicable standard of probable cause to request a PBT is a level of proof greater than the reasonable suspicion necessary to justify an investigative stop but less than the proof needed to establish probable cause to arrest. ***State v. Goss***, 2011 WI 104, ¶25, 338 Wis. 2d 72, 806 N.W.2d 918. We determine whether probable cause for a PBT existed by considering the totality of the circumstances. ***Id.***

¶10 The trial court denied Christenson's motion to suppress the PBT result and the blood test results because Putzer "thought he smelled the odor of intoxicants, and ... because of the fact that he knew that she was underage that that gives him the opportunity to PBT her." The court was correct.

¶11 At the time Putzer administered the PBT to Christenson, he was aware that she had driven her car into a ditch, smelled of "intoxicating beverages" around midnight on Saturday night/Sunday morning (a day and time that increases suspicion of alcohol consumption), and was under twenty-one years of age. Under WIS. STAT. § 343.303, this provided Putzer with probable cause to believe Christenson had violated, at a minimum, WIS. STAT. § 346.63(2m), which

prohibits a BAC above 0.0 percent for a person under twenty-one years of age who is operating a motor vehicle, and thus justified the administration of the PBT to her. Because we conclude that the PBT was lawfully administered to Christenson, her argument that the trial court erred when it admitted the blood test results derived from the PBT necessarily fails.

¶12 Christenson complains that she was arrested for and charged with OWI, not a violation of WIS. STAT. § 346.63(2m). However, the violation she ultimately was arrested for and charged with is irrelevant to our PBT inquiry. WISCONSIN STAT. § 343.303 requires only that the officer have "probable cause to believe that the person is violating or has violated [§] 346.63(1) or (2m)" for the officer to administer a PBT. That statute goes on to state that the PBT result then "may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of [§] 346.63(1), (2m), (5) or (7) ... and whether or not to require or request chemical tests," including a blood sample. Sec. 343.303. At the time the PBT was administered to Christenson, a reasonable officer with knowledge of the facts of which Putzer was aware would have had probable cause to believe § 346.63(2m) had been violated, justifying the PBT.[2] *See, e.g.*, ***Kutz***, 267 Wis. 2d 531, ¶11 (probable cause determination is based upon whether the totality of the circumstances within the officer's knowledge would lead a reasonable police officer to believe the suspect probably committed a crime). As permitted by § 343.303, Putzer then properly used the result of that PBT in deciding whether to arrest Christenson for a violation of

[2] Christenson appears to have conceded before the trial court that, if the absolute sobriety law was a legitimate justification for the administration of the PBT to Christenson, which we conclude it was, that "there probably is evidence to that level."

§ 346.63(1) and whether to request a blood sample. *See* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277 (no requirement "that persons be arrested for and charged with the same crime as that for which probable cause initially existed" for search).

¶13 The trial court properly denied Christenson's motion to suppress.

Admittance of blood test results at trial

¶14 Christenson also contends the trial court erred in admitting evidence of the blood test results at trial despite the County's failure to prove it had followed statutory procedures for drawing blood. We disagree.

¶15 Determining whether the procedures used in procuring a blood sample for someone suspected of OWI meet the requirements of WIS. STAT. § 343.305, the implied consent law, involves the application of a statute to the facts of record, which presents a question of law we review de novo. ***State v. Penzkofer***, 184 Wis. 2d 262, 264, 516 N.W.2d 774 (Ct. App. 1994). If the determination of that issue involves factual findings made by the trial court, we accept those findings unless they are clearly erroneous. ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶4, 256 Wis. 2d 1032, 650 N.W. 2d 891.

¶16 At trial, Christenson objected to the admission of the blood test results on the ground that procedures identified in WIS. STAT. § 343.305(5)(b) were not followed. She points out on appeal that not only did the person who drew Christenson's blood not testify at the trial, the only evidence related to the person who drew the blood was Putzer's statement that "somebody" from the medical center drew the blood. We agree with Christenson that the evidence was

insufficient to establish that a person qualified under § 343.305(5)(b) drew her blood. This does not, however, decide the issue.

¶17 WISCONSIN STAT. § 343.305(5)(b) states, in relevant part, that "[b]lood may be withdrawn from a person arrested for violation of [WIS. STAT. §] 346.63(1), (2), (2m) ... only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician." In addition to subsection (b), Christenson points to § 343.305(5)(d), which states, in relevant part, that "the results of a test administered in accordance with this section are admissible" on the issue of whether a person is under the influence of an intoxicant or has a prohibited alcohol concentration. She argues that because subsection (d) affirmatively states that blood test results "are admissible" if the related blood samples are procured "in accordance with this section," which includes subsection (b), blood test results are per se *inadmissible* if the sample was not procured in compliance with subsection (b). She is mistaken.

¶18 To begin, nothing in WIS. STAT. § 343.305(5)(d) states that a blood test procured in a manner which does not comport with subsection (b) is inadmissible. Indeed, in subsection (d), the sentence immediately following the one which states "the results of a test administered in accordance with this section are admissible," provides that "[t]est results shall be given the effect required under [WIS. STAT. §] 885.235." Section 885.235 addresses the prima facie effect of the blood test evidence if a sample is taken in compliance with the statutory procedures. Nothing in these statutes suggests that blood test evidence which does not satisfy the statutory procedures cannot otherwise be admitted.

¶19 Moreover, the Wisconsin Supreme Court has ruled that "noncompliance with the procedures set forth in [WIS. STAT. § 343.305] does not

render chemical test evidence otherwise constitutionally obtained inadmissible at the trial of a substantive offense involving intoxicated use of a vehicle." ***State v. Zielke***, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987). As the ***Zielke*** court noted, the intent of the legislature in enacting § 343.305 "was to facilitate the gathering of evidence against drunk drivers in order to remove them from the state's highway." ***Zielke***, 137 Wis. 2d at 46. Noting this intent, the court concluded that, in "the absence of explicit legislative direction," it would be absurd to infer that the legislature intended the automatic exclusion of critical evidence due to the failure to follow statutory procedures. ***Id.*** at 51-52. While the procedures at issue in ***Zielke*** related to a different subsection of § 343.305, the court's holding applies with equal force here. *See also* ***County of Dane v. Winsand***, 2004 WI App 86, ¶7 n.6, 271 Wis. 2d 786, 679 N.W.2d 885 (failure to establish compliance with procedural requirements does not entitle a defendant to exclusion of chemical test results, but the evidence "would simply lose the benefit of §§ 343.305(5)(d) and 885.235").

¶20 Further, we contrast the language used by the legislature in WIS. STAT. § 343.305(5)(d) with that used in a subsequent subsection. Subsection 343.305(6)(a) addresses the chemical analyses of blood or urine samples, stating: "Chemical analyses of blood or urine *to be considered valid* under this section shall have been performed substantially according to methods approved" by the state lab of hygiene and an individual with an appropriate permit issued by the department of health services. (Emphasis added.) The language employed in this subsection—"to be considered valid"—necessarily means that analyses which are not performed substantially according to the approved methods are invalid. Had the legislature intended for blood samples not drawn in accordance with the procedures of § 343.305(5)(b) to render the related blood test results automatically

inadmissible, we would expect it to have used language more akin to that of § 343.305(6)(a). *See* ***Monroe Cnty. Dep't of Human Servs. v. Luis R.***, 2009 WI App 109, ¶42, 320 Wis. 2d 652, 770 N.W.2d 795 ("Under well-established principles of statutory construction we do not read extra words into a statute to achieve a particular result and, when the legislative body uses particular words in one subsection of a statute but not in another subsection, we conclude the legislative body specifically intended a different meaning." (citing ***Responsible Use of Rural & Agric. Land v. PSC***, 2000 WI 129, ¶¶37, 39, 239 Wis. 2d 660, 619 N.W.2d 888)).

¶21 Based on the foregoing, we hold that failure to follow the strictures of WIS. STAT. § 343.305(5)(b) in procuring a blood sample does not result in the automatic exclusion of the blood test evidence resulting from that sample. Christenson raises no additional grounds for challenging the blood draw; thus we find no error in the trial court's admittance of the test results from Christenson's blood sample and its reliance on them in finding Christenson guilty.

Accuracy and reliability of blood test results

¶22 Christenson further contends the trial court clearly erred when it concluded that the County met its burden of establishing by clear and convincing evidence that Christenson's BAC was .08 percent or greater. We disagree.

¶23 On review, we are "limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met." ***City of Milwaukee v. Wilson***, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). In forfeiture actions that involve or are closely associated with acts of a criminal nature, as here, the County must prove a defendant's guilt by "clear, satisfactory and convincing evidence." ***Id.*** at 22. We

may not substitute our evaluation of the evidence for that of the trier of fact, but rather must determine whether the trier of fact reasonably evaluated the evidence, including any inferences it reached in such evaluation. ***State v. Smith***, 2012 WI 91, ¶33, 342 Wis. 2d 710, 817 N.W.2d 410. In applying this test, we will not reverse the findings of the trier of fact unless they are clearly erroneous and we view the evidence in the light most favorable to the findings made by the trier of fact. *See* ***Town of Mt. Pleasant v. Werlein***, 119 Wis. 2d 90, 95, 349 N.W.2d 102 (Ct. App. 1984).

¶24 As the trial court found here, Oliver's uncontroverted testimony was that two initial tests were done on Christenson's blood sample, both of which showed a reading of .084 percent BAC. A later test done on the same sample showed a result of .081 percent. Oliver did testify to a "margin of error" of .005, which could "just as easily mean" that the BAC on the .084 and .081 tests were really .079 and .076, respectively. However, the trial court's decision to rely on the test results actually obtained from the testing rather than speculate on the possibility that the results could have been below .080 percent was not clearly erroneous. The trial court could reasonably conclude Christenson's BAC level was at or above the .08 percent limit and that her guilt was proven by clear, satisfactory, and convincing evidence.

By the Court.—Judgments affirmed.

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