COURT OF APPEALS
DECISION
DATED AND RELEASED

February 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-2343-CR
94-2344-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KURT W. WARRINGTON,

Defendant-Respondent.

APPEALS from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

GARTZKE, P.J. The State appeals from a judgment acquitting Kurt Warrington of operating a motor vehicle with a blood alcohol concentration (BAC) of .10% or more, contrary to § 346.63(1)(b), STATS., second offense, a misdemeanor.[1] The issues are (1) whether, as the trial court concluded, admitting into evidence a BAC test result as a regularly conducted activity without a showing that the absent declarant was an unavailable witness would violate Warrington's confrontation right; and (2) whether the State's

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

evidence establishing his BAC was insufficient in view of the instructions, notwithstanding an expert's opinion.[2]

We conclude that the trial court's evidentiary ruling was wrong but the prohibition against double jeopardy prevents us from ordering a second trial. We also conclude that the trial court properly granted the judgment acquitting Warrington.

I. BACKGROUND

The State based its prohibited BAC allegation upon a blood test result obtained by the Wisconsin State Laboratory of Hygiene. The result showed a BAC of .141% by weight. William C. Johnson, a laboratory employee, performed the analysis. He was not called to testify, since he was on vacation. On appeal, Warrington concedes that the BAC test result qualifies as a record for a regularly conducted activity, and therefore comes within a hearsay exception, § 908.03(6), STATS.

Warrington opposed the introduction of the BAC test result, arguing that merely because the hearsay exception applies does not mean that his confrontation rights have been protected. He insists that they are not protected absent a showing that declarant Johnson is unavailable. During the trial, the court granted Warrington's motion to exclude the BAC test result. Consequently, the document produced as a result of the BAC test was not presented to the jury.

The court admitted the testimony of Thomas Ecker, a supervisor in the State Laboratory of Hygiene, Toxicology Section. We summarize his testimony as follows. He has been a chemist for over seventeen years and has

[2] The State concedes it lost the right to appellate review of a third issue: whether the State must prove in an OMVWI case that the blood testing equipment was in good operating order and was correctly operated by a qualified person. The State lost the right to review because it failed to object to a pertinent instruction placing the burden upon it. ***State v. Schumacher***, 144 Wis.2d 388, 424 N.W.2d 672 (1988).

been a supervisor at the laboratory for about six years. He performs chemical analysis of blood and urine for alcohol and drugs. Exhibit 1 (which is not in the record on appeal) is a copy of Warrington's blood test result and is consistent with the original. Ecker did not do the test, but he supervises William Johnson, and Johnson is qualified to do blood alcohol tests. The laboratory uses a Hewlett Packard Gas Chromatograph. Ecker's laboratory keeps on file each day's analyses record, worksheets that show the results of every test, and original printouts from the instrument that shows the actual blood alcohol concentration. Based upon the data available to him, Ecker could form an opinion to a reasonable degree of scientific certainty that Kurt Warrington's BAC when the blood sample was drawn was 0.141% by weight.

On cross-examination, Ecker acknowledged that he had no personal knowledge that the normal procedures were indeed followed for Warrington's sample. Ecker acknowledged that his review of the BAC through the control samples assumed that the examiner followed proper procedures and was legitimate only "if" the examiner followed proper procedures. Ecker admitted he had no personal knowledge whether Warrington's blood sample was properly prepared for testing.

II. RIGHT OF CONFRONTATION

The State persuasively argues that the court erred when it excluded the BAC test result because the absent declarant Johnson had not been shown to be unavailable. Warrington concedes that the BAC test result qualifies as a record for a regularly conducted activity and therefore comes within a hearsay exception, § 908.03(6), STATS. "Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied" without showing that the declarant is unavailable. ***White v. Illinois***, 502 U.S. 346, 356 (1992).

A hearsay exception adopted by the Federal Rules of Evidence and by a large number of states is "firmly rooted." ***White v. Illinois***, 502 U.S. at 356 n.8 (1992). FED. R. EVID. 803(6) is identical to the regularly conducted activity hearsay exception in § 908.03(6), STATS., except that the federal rule refers to a "regularly conducted business activity" and the Wisconsin exception does not.

The breadth of the term "business" as used in the federal rule is, however, such that it includes laboratory test results. *See* ***United States v. Farmer***, 820 F. Supp. 259, 264 (W.D. Va. 1993) (state laboratory certification of analysis of driver's blood alcohol content admissible as business record under FED. R. EVID. 803(6)). Sixteen states have adopted FED. R. EVID. 803(6) verbatim and seventeen states have adopted the rule with only minor changes. 4 WEINSTEIN'S EVIDENCE, UNITED STATES RULES § 803(6)[08]. Because two-thirds of the states have adopted the federal rule or its equivalent, we conclude that the hearsay exception for records of regularly conducted activities is "firmly rooted." *See also* ***United States v. Johnson***, 971 F.2d 562, 573 (10th Cir. 1992) ("regularly conducted" records exception, FED. R. EVID. 803(6), is a firmly rooted hearsay exception).

But we cannot in this appeal reverse the judgment of acquittal on grounds that the court should have admitted evidence that was not presented to the jury. Nor can we in this appeal order a new trial at which the excluded evidence may be presented. Either course would violate the constitutional prohibition against placing a criminal defendant in double jeopardy. Because this is so, the State cannot appeal from the judgment of acquittal on grounds that the trial court's evidentiary ruling was wrong. *See* § 974.05(1)(a), STATS., (the State may appeal a "[f]inal order or judgment ... if the appeal would not be prohibited ... by double jeopardy"). *See also* ***State v. Eichman***, 155 Wis.2d 552, 565, 456 N.W.2d 143, 148 (1990) ("[a] defendant, if convicted may seek post-conviction review of an adverse ruling excluding evidence as a matter of right. The State has no remedy, however, if the defendant is acquitted.").

III. JUDGMENT NOTWITHSTANDING THE VERDICT

Although Warrington designated his postverdict motion as one for judgment notwithstanding the verdict, he challenged the sufficiency of the evidence. On appeal, the State argues that the motion for judgment notwithstanding the verdict and a motion regarding the sufficiency of the evidence should not be combined. The State cites ***State v. Escobedo***, 44 Wis.2d 85, 90-91, 170 N.W.2d 709, 711 (1969). The ***Escobedo*** court said it had grave doubt whether a motion for judgment notwithstanding the verdict could be used in a criminal proceeding. However, by raising the issue for the first time

on appeal, the State lost the right to challenge the propriety of the motion. We therefore turn to the merits of Warrington's contention.

When ruling on Warrington's motion, the court noted that it had instructed the jury, "The State is required to establish that the gas chromatograph was in proper working order and that it was correctly operated by a qualified person." The court ruled

> [S]ince the expert who did testify didn't have any idea whether or not a person, whose report he was relying on, correctly operated it, the Court finds that the facts do not meet the test and the law as given in the jury instructions and, therefore, grants the motion for judgment notwithstanding the verdict.

We review a decision reversing a verdict without deference to the trial court. When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. ***State v. Koller***, 87 Wis.2d 253, 266, 274 N.W.2d 651, 658 (1979). If the jury could have drawn the appropriate inferences from the evidence to find the requisite guilt, we will not overturn a verdict even if we believe that a jury should not have found guilt based on the evidence before it. ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982).

On cross-examination, Ecker acknowledged that he did not know whether the sample of Warrington's blood was properly prepared for testing. He said that the blood test results for control specimens run the same day were accurate, from which he inferred that the procedure used to test samples had been correctly followed.

> With each stage run, first the chemical analyst has to calibrate the instrument, the gas chromatograph, and then verify every sixth sample is a known sample that we know what the results should be, but by carrying it through the entire procedure we can find out if everything

> has been done correctly. In other words, if I have a specimen of blood that I know the result is .150 and I take it through the result--the entire analysis and get .150 or close enough within tolerance, then I know that the procedure has been followed correctly and also the instrument is working correctly, and that's the case throughout this day's run. There were five different levels of alcohol in water, three different levels in blood, and two different levels in urine that were interspersed throughout the day's run that show at those points that the test was done accurately.

On appeal, the State does not challenge Warrington's assertion that, to meet its burden under the instruction, the State had to prove that Johnson properly conducted the test, and not just that Johnson had correctly operated the chromatograph. Whether or not the correct procedure used to test samples was followed, the samples themselves had to be properly prepared. Warrington cites Ecker's testimony conceding that he had no personal knowledge whether Warrington's blood sample was properly prepared for testing.

The State asks us to sustain the verdict on grounds that the jury could have inferred that Johnson had properly conducted the test and properly run the gas chromatograph. The State asserts that because the control sample results were correct, Johnson must also have properly tested Warrington's results. But there was no evidence that Warrington's blood samples were properly prepared or prepared in the same manner as the control samples.

We conclude that the trial court's ruling that the State failed to meet the burden placed upon it by the instruction must be sustained.

By the Court.—Judgment affirmed.

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