COURT OF APPEALS
DECISION
DATED AND RELEASED

July 16, 1997

NOTICE

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.

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

No. 97-0432-FT

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

CITY OF CHILTON,

PLAINTIFF-RESPONDENT,

V.

RICKI D. BUNNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

NETTESHEIM, J. Ricki D. Bunnell appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) first offense. Bunnell contends on appeal that the trial court erred by admitting the chemical test results from an intoxilyzer containing simulator fluid which was more than 120 days old. Because Bunnell was convicted of OWI and does not

adequately challenge the sufficiency of the evidence underlying his OWI conviction, we affirm the judgment.

At approximately 2:40 a.m. on October 5, 1996, Officer Larry Seipel of the City of Chilton Police Department heard a loud squealing of tires and observed Bunnell's vehicle in a nearby intersection. Seipel and Officer Mary Nicolais followed Bunnell's vehicle. Seipel testified that he observed Bunnell make a U-turn in the middle of an intersection and that Bunnell's vehicle was proceeding very slowly. When Bunnell's vehicle turned into a residential driveway, Seipel approached Bunnell.

Seipel testified that when Bunnell exited his vehicle he had trouble balancing when standing and walking. After questioning Bunnell, Seipel asked Bunnell to perform field sobriety tests. Bunnell was unable to do so. Seipel informed Bunnell that he was under arrest for OWI. Seipel then transported Bunnell to the Calumet County Sheriff's Department. Seipel issued Bunnell a citation for OWI contrary to § 346.63(1)(a), STATS.

Bunnell was read the Informing the Accused Form and he agreed to submit to an Intoxilyzer 5000 test. Officer Kevin Stein, a certified Intoxilyzer 5000 operator, administered the test. The test yielded a prohibited blood alcohol concentration. Bunnell was then issued an additional citation for operating a motor vehicle while having a prohibited alcohol concentration (PAC) contrary to § 346.63(1)(b), STATS.

Bunnell entered a plea of not guilty. The matter proceeded to jury trial. The jury found Bunnell guilty of both OWI and PAC. The trial court entered judgment on the OWI charge and dismissed the PAC charge.

Bunnell contends that the trial court erred by admitting the results of the chemical test from an intoxilyzer containing simulator fluid which had not been certified within 120 days of the test.[1] This argument addresses the validity of the breath test. While this argument would be relevant if Bunnell had been convicted of PAC, it is not dispositive for purposes of an OWI conviction. The jury found Bunnell guilty of both OWI and PAC; however, the court entered judgment on only the OWI charge.

We note that Bunnell only briefly argues that absent the chemical test result, the evidence was insufficient to support an OWI conviction. On this issue he states:

> *It is impossible to conclude that absent the admission of the Intoxilyzer test result, the jury would have reached the same verdict.* Mr. Bunnell was stopped by Officer Seipel for squealing his tires and executing a U-turn …. Officer Seipel stated that the officer following Mr. Bunnell didn't report any weaving, swerving, or crossing the center line by Mr. Bunnell. The instant case was not a situation involving atrocious driving on the part of [Bunnell]. Thus, it cannot reasonably be claimed that the trial court's failure to suppress the breath test was harmless.

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[1] Bunnell's argument is based upon the language of § 343.305(6)(b)3, STATS., which provides:

> (b) The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:
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> ….
>
> 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) or (am) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; ….

We note that the State does not dispute Bunnell's assertion that the simulator fluid had not been tested within 120 days of Bunnell's test.

While we might well conclude that this issue is inadequately brief, *see* ***Reiman Assocs., Inc. v. R/A Advertising, Inc***., 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981), we nevertheless conclude that the record does not support Bunnell's assertions.

Besides Bunnell's erratic driving, [2] Seipel testified that when Bunnell exited his vehicle he "used the vehicle door and the area immediately behind the door to maintain his balance as he came out of the vehicle. At that time he walked down to the rear of his vehicle, and he did lose his balance … and he did fall into the side of his vehicle." Seipel testified that he requested Bunnell to recite the alphabet, count backwards and stand on one leg. As to the alphabet test, Seipel testified that Bunnell "recited the alphabet. Up to the letter R, I believe, he made six errors, recited to the letter G twice, and after the 20th letter ended with A, and made at least six errors on reciting the alphabet, and never did complete it." Nor did Bunnell complete the counting test. When asked to stand on one leg for thirty seconds, Seipel testified that Bunnell stepped down several times, and finally, "[Bunnell] fell to his right, and I then reached out and grabbed him behind the shoulders or upper arm area to keep him from falling."

We conclude that this evidence is sufficient to support a conviction of OWI. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

[2] While Bunnell does not object to Seipel's stop and detention of Bunnell's vehicle, he argues that the U-turn and squealing tires do not demonstrate "atrocious driving." We observe that the testimony in the record reveals that the squealing of tires violated a local ordinance and the U-turn performed by Bunnell was illegal.

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