

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 03-0348-CR

Cir. Ct. No. 02CT000518

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEOPOLDO PEQUENO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 BROWN, J.¹ WISCONSIN STAT. § 343.305(6)(b)3 requires that the Wisconsin Department of Transportation test and certify the accuracy of the equipment used by law enforcement officers for chemical analysis of the blood alcohol level of those accused of operating a motor vehicle while intoxicated

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

before the equipment is put into use and then every 120 days thereafter. Failure of the State to show certification means that, upon objection, the test results will be inadmissible at trial. In this case, Leopoldo Pequeno argues that the statute must be read to also require the State to prove that the intoxilyzer machine the DOT used to test the accuracy of the City of Sheboygan Police Department's intoximeter is itself accurate. We agree with the State and the trial court, however, that the statute requires no such proof. We affirm.

¶2 The facts as they pertain to the legal issue at hand are brief. Pequeno was arrested for driving while intoxicated and was taken to the Sheboygan police department, where he was given a breath test using an Intoximeter EC/IR. At trial, the State produced evidence that the Intoximeter EC/IR had been tested and certified as required. However, Pequeno claimed that the Intoxilyzer 5000, used by the DOT to certify the gaseous standard used in the Intoximeter EC/IR, must also have been shown to be tested and certified as accurate every 120 days. The trial court disagreed, the test result was admitted, a jury found Pequeno guilty and he appeals.

¶3 WISCONSIN STAT. § 343.305(6) states in pertinent part:

(6) REQUIREMENTS FOR TESTS....

(b) 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) or (am) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days.

Pequeno's argument is very simply this: The Intoxilyzer 5000 is itself a breath-testing device. It is designed as "equipment" used in the "chemical analysis of a person's breath." See WIS. STAT. § 343.305(6)(b)3. Therefore, it must be tested and certified as accurate before it can be regularly used by the DOT and thereafter at intervals of not more than 120 days. To allow an uncertified machine used to test alcohol content to test another machine used to test alcohol content and to not require that the DOT's machine itself be accurate would, in Pequeno's opinion, be contrary to the clear intent of the statute.

¶4 We agree with Pequeno as to our standard of review. He correctly cites *State v. Wilson*, 170 Wis. 2d 720, 722, 490 N.W. 2d 48 (Ct. App. 1992), for the proposition that interpretation of a statute presents an issue of law which appellate courts review de novo. And he also properly cites *Weiss v. Regent Properties, Ltd.*, 118 Wis. 2d 225, 229-30, 346 N.W. 2d 766 (1984), which says that when a statute is clear and unambiguous, interpretation is unnecessary and intentions cannot be imputed to the legislature except those to be gathered from the terms of the statute.

¶5 We disagree, however, with Pequeno's interpretation of the statutes. Looking closely at WIS. STAT. § 343.305(6)(b)3, it says that the DOT must test and certify the accuracy of equipment "to be used by law enforcement officers." The DOT trained technicians are not law enforcement officers. The equipment they use does not come within the purview of the statute. Moreover, the equipment that the statute speaks to is equipment to be used by law enforcement officers for "regular use." As such, it is readily apparent that the statute is speaking to the equipment to be used by law enforcement agencies at their station houses on a regular basis. The DOT testing equipment does not come under this statute.

¶6 Finally, it is for the DOT to determine the “techniques or methods of performing chemical analysis of breath.” As Pequeno concedes, WIS. ADMIN. CODE § Trans 311.01 et seq. was created to comply with this passage of the statute. Thus, the statute clearly leaves it to the DOT to set forth how law enforcement’s equipment will be tested. As pointed out by the State, WIS. ADMIN. CODE § Trans 311.04(1) requires that “[o]nly instruments and ancillary equipment approved by the chief of the chemical test section may be used for the qualitative or quantitative analysis of alcohol in the breath,” while § Trans 311.04(2)(a) and (b) vest the choice of methods for evaluating this equipment with the chief of the DOT’s chemical test section.

¶7 Thus, it is clear that the legislature does not require the State to prove, as a condition precedent to admissibility of a blood alcohol test result, that both the law enforcement agency’s equipment and the DOT’s testing equipment be tested and certified as accurate.

By the Court.—Judgment affirmed.

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