COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1599

Cir. Ct. Nos. 03TR007391
03TR007392

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

WINNEBAGO COUNTY,

PLAINTIFF-RESPONDENT,

V.

TRAVIS G. LANKFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Travis G. Lankford appeals from a forfeiture judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to WIS. STAT. § 346.63(1)(b). Lankford argues that

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

the trial court erred when it barred him from introducing evidence that the Intoximeter used in this case had failed to correctly calibrate on other occasions involving other suspects. We uphold the trial court's discretionary evidentiary ruling. Therefore, we affirm the forfeiture judgment.

BACKGROUND

¶2 The underlying facts are undisputed. On August 23, 2003, Lankford was arrested for operating a motor vehicle while intoxicated (OWI). An Intoximeter chemical test of Lankford's breath produced an alcohol concentration result of 0.18. As a result, Lankford was issued citations for both OWI and PAC pursuant to WIS. STAT. § 346.63(1)(a) & (b).

¶3 Pretrial, Winnebago County learned that Lankford intended to present written reports indicating that the Intoximeter used in this case had failed to properly calibrate on other occasions. Accordingly, the County brought a motion in limine to exclude this evidence. The trial court addressed the motion before jury selection on the day of trial. At this hearing, Lankford explained that he intended to offer written reports indicating that the Intoximeter had failed to properly calibrate during testing on May 29, 2003, and had again failed to properly calibrate three times on August 23, 2003, the very day of Lankford's arrest, when the unit was used on three other OWI suspects.

¶4 After hearing the parties' arguments, the trial court granted the County's motion in limine. In essence, the court held that other tests performed on other suspects by other officers were not relevant because external factors, apart from the integrity of the Intoximeter itself, might have caused the unit to improperly calibrate.

¶5 At the ensuing trial, the jury acquitted Lankford of OWI, but found him guilty of PAC. Lankford appeals.

DISCUSSION[2]

¶6 The admissibility of evidence is addressed to the trial court's discretion. ***State v. Franklin***, 2004 WI 38, ¶6, 270 Wis.2d 271, 677 N.W.2d 276. This is a deferential standard of review. *See* ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶25, 265 Wis. 2d 703, 666 N.W.2d 38. Generally, we will not reverse a trial court's discretionary ruling if the record shows that the court, in fact, exercised its discretion and we can perceive a reasonable basis for the court's decision. ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993). A trial court properly exercises its discretion if it considered the facts of the case and reasoned its way to a conclusion that a reasonable judge could reach and that is consistent with the law. ***Id***. at 186.

¶7 Lankford cites to the general rule that "the question of how accurately the test was performed goes to the weight to be given to the test, not to its admissibility." ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 674, 314

[2] As noted, Lankford delineated two categories of written reports that he wanted to introduce as evidence: (1) the May 29, 2003 calibration report, and (2) the August 23, 2003 reports regarding three other OWI suspects. In the trial court, Lankford clearly indicated that the August 23 reports were the result of Intoximeter tests involving other suspects. However, he did not expressly indicate that this was so with regard to the May 29 report. Instead, he simply asserted that the May 29 report was the product of a calibration test to assure that the Intoximeter was working properly. We do observe, however, that as the parties debated the issue in the trial court, they did not allude to any possible differences as to how the calibration results were produced on the different dates. Instead, both parties debated the issue as if the calibration tests resulted from testing performed on other OWI suspects. On appeal, the parties argue the issue in the same manner. We also note that the trial court decided the issue on the basis that all of the written reports were the product of Intoximeter testing on other OWI suspects. Given that, we will address the issue on the same basis as that used by the trial court.

N.W.2d 911 (Ct. App. 1981). He argues that the reasons given by the trial court for the exclusion of the written reports went to the weight, not the admissibility, of the evidence. We disagree. The recurrent theme of the trial court's ruling was that other tests performed on other suspects by other officers were not relevant because the record did not reveal "the specific factors that took place with these other tests." Later, the court echoed the same concern: "[I] don't think you can take that step because, as argued by the prosecutor here, there could be other external factors that resulted in the variances here that put it outside the so-called standard. We don't know what those external factors might be." Instead, the court said that in order for the evidence to be admissible, Lankford had to "establish with some sort of expert or some specific record that says the equipment wasn't any good." In essence, the court ruled that Lankford was obliged to present foundation testimony eliminating the possibility that external factors, unrelated to the integrity of the Intoximeter itself, produced or contributed to the failure of the unit to properly calibrate.

¶8 As noted, ***Wertz*** holds that the accuracy of a chemical test for alcohol presents a question of the weight, not the admissibility, of the evidence. ***Id.*** at 674. However, ***Wertz*** did not present the threshold evidentiary question presented here; nor did it abrogate the fundamental principle that all evidence must be admissible in the first instance. Here, had Lankford provided the necessary foundation evidence, whether by expert testimony or otherwise, demonstrating that external factors did not cause the Intoximeter to improperly calibrate, the trial court was fully prepared to treat the written reports as relevant admissible evidence. Thus, rather than passing on the weight of the evidence and improperly excluding the evidence on that basis as Lankford contends, the trial court instead was properly exercising its "gatekeeper" function to assure that only admissible

evidence was provided for the jury to weigh. *See* ***State v. Walters***, 2004 WI 18, ¶21, 269 Wis. 2d 142, 154, 675 N.W.2d 778.

¶9 For the same reasons, we reject Lankford's further argument that the written reports were fair and proper rebuttal to the County's evidence showing that the Intoximeter had been properly maintained and certified pursuant to WIS. STAT. § 343.305(6)(b).[3] While Lankford obviously was entitled to present evidence to counter the County's evidence, his evidence had to be admissible in the first instance. It was not.

CONCLUSION

¶10 We uphold the trial court's evidentiary ruling as a proper exercise of discretion. We therefore affirm the forfeiture judgment.[4]

By the Court.—Judgment affirmed.

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

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[3] An Intoximeter result is entitled to admissibility pursuant to WIS. STAT. § 343.305(5)(d) and to the presumptive effects of WIS. STAT. § 885.235.

[4] Both parties ask that we publish our decision, noting that the only appellate commentary on this issue is reflected in an unpublished opinion. *See* ***State v. Laumann***, unpublished slip op. (Wis. Ct. App. Mar 23, 1999). There, the court of appeals held that the trial court had erroneously excluded evidence of repeated malfunctions of an Intoximeter. ***Id***. at 2. In so ruling, the court of appeals rejected the State's arguments that the evidence was not relevant and risked juror confusion. ***Id***. at 3-4. However, ***Laumann*** did not discuss the grounds for exclusion of the evidence presented by this case—the lack of the necessary foundation for admitting the evidence in the first instance. Because this case is fact intensive on that narrow question, and because we do not reach the larger question of whether such evidence, if properly admitted, suffices as a defense under ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981), we do not see our opinion as meriting publication.