

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2011

A. John Voelker
Acting 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. 2011AP931

Cir. Ct. No. 2010TR2937

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. WILT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

¶1 NETTESHEIM, NEAL, Reserve Judge.¹ Michael R. Wilt appeals from a judgment of conviction for operating while under the influence of an

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

intoxicant or other drug (OWI). *See* WIS. STAT. § 346.63(1)(a). He claims the trial court erred in admitting the breath test result where there was no showing that the test was administered within the three-hour limit as required by WIS. STAT. § 885.235(3) and where there was no expert testimony to support the admission of the test—required if the three-hour showing is not met. He also claims that without the admission of the breath test result, the evidence was not sufficient to establish that Wilt operated a motor vehicle while under the influence. Because the evidence without the breath test result is sufficient to support the trial court finding that Wilt was guilty of OWI and because the trial court did not allude to the breath test in support of its finding, we affirm.

¶2 City of Mequon Police Officer Tyler Gaidish testified to the following facts at the bench trial. On May 12, 2010, at approximately 11:44 p.m., Gaidish was dispatched to an accident scene on Port Washington Road and Homestead Trail. When Gaidish arrived, approximately ten minutes after being dispatched, he observed a vehicle in the ditch on the west side of the roadway, facing eastbound, with severe damage to the front end. The driver’s side airbag was deployed. Gaidish described the accident as “a one-car accident versus guardrail.” A man, who Gaidish later identified as Wilt, was standing in the rain under an umbrella outside the driver’s side door of the vehicle. Gaidish approached Wilt in order to identify if he had any injuries. Wilt told Gaidish that he was not injured at all and that he wanted to speak further about the incident.

¶3 While speaking further about the incident to Wilt, Gaidish observed that Wilt had “glassy, bloodshot eyes, as well as a moderate odor of alcohol” and was “[v]ery confused [and] slightly disoriented.” It “took several questions ... to identify how [Wilt] ended up there and ... what the incident was at hand.” Wilt told Gaidish that he was driving the vehicle, he was the only person involved, and

he was the only one around when the vehicle went into the ditch. Wilt said he was trying to get home and that his vehicle struck the guardrail; however, Wilt did not remember what happened next and just remembered Gaidish coming up to the scene.

¶4 Gaidish asked Wilt where he was coming from. Wilt responded, acting “very confused in nature.” Wilt initially stated he was coming from work. He later stated that he went out for a few drinks with work associates. Gaidish repeated the question and Wilt backtracked, again stating that he was at work. Wilt then changed his answer back to that he was coming from having a few drinks. Finally, after multiple attempts to get a straight answer, Wilt said he was coming from Crazy Horse, a gentlemen’s club on National Avenue. He then related that he consumed three glasses of wine approximately three hours prior to the accident.

¶5 During this questioning, Gaidish observed Wilt’s “noticeable swaying ... to the point that he even stumbled off to his right side, taking several small steps to catch his balance.”

¶6 Gaidish called for backup and due to the nature of the damages to the vehicle and the inclement weather, Gaidish requested that Wilt drive with him back to the Mequon police department to conduct further investigation. Gaidish testified that he wanted to investigate the possibility that Wilt was operating while impaired. He told Wilt he was not under arrest at that time but that he wanted to conduct tests at the police station. Wilt agreed.

¶7 At the station, Gaidish administered standard field sobriety tests. When first explaining the tests to Wilt, Gaidish asked Wilt whether there were any issues or conditions or anything that might preclude him from performing the tests

as he should. Wilt told Gaidish that he had multiple sclerosis (MS) for the past eleven years but it has not impacted his ability to drive a motor vehicle. Wilt further told Gaidish that he was willing to take the tests and he “wasn’t aware of how [the MS] would impair him.” Gaidish also knew at the time from running a check on Wilt’s driver’s license that he had no license restrictions.

¶8 At this point, Gaidish administered the horizontal gaze nystagmus test to Wilt. There are six clues that indicate a high probability that the individual’s blood alcohol content is .08 percent or higher. Gaidish observed all six clues.

¶9 Before the next test—the walk-and-turn test—Gaidish obliged Wilt, who said he had some issues where he needed to sit down for a moment. Thereafter, Gaidish began the test. He recalled that Wilt had a hard time standing in the starting position. Gaidish said he needed to demonstrate the task multiple times. Wilt exhibited “multiple indicators of impairment” exhibiting five of the eight clues of impairment.

¶10 After the walk-and-turn test, Gaidish administered the one-leg stand. Out of the four clues that could be observed, Gaidish observed three. Only two clues are needed to indicate impairment; Wilt failed the one-leg stand.

¶11 Gaidish then administered a modified test called the alphabet test. Gaidish testified that because Wilt had informed him that he had MS, he wanted to provide Wilt with an opportunity to take a test that does not involve balance or coordination. He advised Wilt to say the alphabet between two different letters without singing it or skipping any letters. Wilt agreed and stated that he could do the task. But instead of properly performing the task, Wilt “bounced around” and used multiple letters not in the fashion as demonstrated. Gaidish testified that he

did ask Wilt his educational background and though he did not recall what Wilt said about his education, he remembered that Wilt told him he was president of a company.

¶12 Gaidish also administered a second modified test, a counting task. On this test, Wilt performed as demonstrated.

¶13 Gaidish then gave Wilt an Intoximeter breath test, the result of which indicated a prohibited blood-alcohol concentration (PAC) of 0.15 percent. Wilt was issued two citations, one for operating while under the influence contrary to WIS. STAT. § 346.63(1)(a), a second for operating with a prohibited alcohol content in violation of § 346.63(1)(b).

¶14 At the bench trial, Wilt's counsel objected to admitting the breath test evidence. The court denied the objection and allowed it in. With regard to Wilt's MS, the trial court asked Gaidish if Wilt "exhibit[ed] any kind of symptomatology" that Gaidish "would have noticed objectively if [Wilt] hadn't told [Gaidish that he had MS?]" Gaidish answered: "Nothing, Your Honor." The court determined that the MS was a nonfactor explaining that

what's important in my mind is that Mr. Wilt indicated he could do these tests, despite having the MS. So I really, more or less, put that issue off to the side and look at this as anybody else, because there's no way for us to know, other than Mr. Wilt telling us, if those conditions impair his ability to do the tests on a normal day.

The court ultimately found Wilt guilty of OWI. It made no finding in regard to the PAC charge, which was dismissed. Wilt appeals.

¶15 Wilt argues that the trial court erred in admitting the breath test result where there was no showing that the test was administered within the three-

hour limit as required by WIS. STAT. § 885.235(3) and where there was no expert testimony to support the admission of the test—required if the three-hour showing is not met. He also claims that without the admission of the breath test result, the evidence was not sufficient to establish that Wilt operated a motor vehicle while under the influence. Within this argument, Wilt seems to contend that the evidence regarding his poor performance of the field sobriety tests is explained by his MS.

¶16 We first readily dispose of Wilt’s breath test argument. We have read the entire transcript of the trial. The trial court rendered its finding of guilt on the OWI charge without any reliance on the breath test result. Only after finding Wilt guilty of OWI did the court refer to the PAC charge. And, even though it noted that it would have also found Wilt guilty of the PAC charge if it were not a moot point, it made no finding on the PAC charge. Because the court found Wilt guilty of OWI *and did not rely on or even allude to the breath test* in support of that finding, we need not address Wilt’s argument that the breath test was erroneously admitted.² See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground).

¶17 Wilt next argues that without the admission of the breath test result, the evidence was not sufficient to establish Wilt operated a motor vehicle while under the influence. We do not agree. The undisputed facts—relied on and reiterated by the trial court in its decision—contradict this contention.

² Because we do not address Wilt’s breath test argument, we need not address the City’s response arguments to the breath test issue (i.e., we do not address the City’s arguments that (1) the evidence allows for the inference that the test was administered within three hours of driving and (2) the breath test was nonetheless admissible under WIS. STAT. § 885.235(4)).

¶18 In determining the sufficiency of the evidence, “[o]ur task as a reviewing court is 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). The burden of proof in municipal ordinance cases, that involve acts made criminal by statute, is “clear, satisfactory and convincing evidence.” *Id.* at 22. Finally, we view facts in the light most favorable to sustain the judgment and where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the fact finder. *See State v. Forster*, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144.

¶19 To support his insufficiency argument, Wilt makes three general contentions.

¶20 First, Wilt claims that the City failed to establish when he drove his motor vehicle. We reject this claim because though an exact time of driving may not have been established, the facts demonstrate that it was certainly more likely than not that Wilt had been driving while under the influence. Gaidish testified that he arrived about ten minutes after being dispatched to the accident. Upon arrival, Gaidish found Wilt alone and standing next to a vehicle in a ditch with severe damage. Wilt told Gaidish he was driving alone and had gotten into a one-car accident on his way home. Wilt changed his story as to where he was coming from several times and finally admitted he was coming from a gentlemen’s club where he had consumed three glasses of wine about three hours earlier. Wilt smelled of alcohol, had bloodshot and glassy eyes, appeared confused and was unsteady on his feet.

¶21 Second, Wilt seems to be averring that his poor performance on the field sobriety tests is explained or excused by his MS.³ The facts do not bear this out. There were no restrictions on Wilt’s driver’s license; Wilt verbally confirmed to Gaidish that his MS did not impact his ability to drive; Wilt told Gaidish he was willing to take the field sobriety tests; Gaidish gave Wilt two nonbalance-related tests in order to accommodate his MS; and the trial court asked Gaidish if Wilt “exhibit[ed] any kind of symptomatology” that Gaidish “would have noticed objectively if [Wilt] hadn’t told [Gaidish that he had MS?]” Gaidish answered: “Nothing, Your Honor.” The bottom line: there is simply no evidence to demonstrate that Wilt’s MS affected his ability to perform the field sobriety tests.

¶22 Third, Wilt contends that Gaidish gave “limited testimony concerning the field sobriety tests” leaving the court “to speculate as to what Mr. Wilt was asked to do and what Mr. Wilt did wrong.” Again, we do not agree. Gaidish’s testimony did not leave the trial court, nor does it leave this court with a need to speculate as to what Wilt was asked to do and what he did wrong. Gaidish’s testimony gave sufficient explanation of the tasks Wilt was asked to perform and what Wilt did to fail four out of five of the field sobriety tests.

¶23 Proof of impairment was sufficient and established by clear, satisfactory and convincing evidence: Gaidish arrived ten minutes after being dispatched to a one-car accident. Gaidish saw Wilt standing next to a vehicle on the side of the road in a ditch with severe front end damage. Wilt appeared to be confused, was unsteady on his feet, had bloodshot, glassy eyes and smelled of

³ In Wilt’s brief, he complains that “[d]espite Mr. Wilt advising Gaidish that he had been diagnosed with MS, Gaidish pushed forward and had Mr. Wilt perform field sobriety tests.”

alcohol. Wilt admitted to driving the vehicle, said he was “trying to get home,” changed his story several times and finally admitted that he was coming from a gentleman’s club where he had consumed three glasses of wine three hours prior. Gaidish gave Wilt every accommodation during the investigation: he allowed Wilt to perform the field sobriety tests inside due to the rain and, even though Wilt told Gaidish he could perform the standard balance tests, Gaidish administered two nonbalance tests in case the MS was a factor in performing the balance tests. Wilt ultimately failed four out of the five field sobriety tests he was asked to perform. And, there was no evidence from Wilt at the time or during his testimony at trial to show that the MS affected his ability to perform the tests.

¶24 We are satisfied that the evidence is sufficient to show that Wilt was under the influence of an intoxicant rendering him incapable of safely driving at the time he drove his vehicle into a guardrail and landed it in a ditch.

By the Court.—Judgment affirmed.

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

