COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 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.

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Nos. 96-3286-CR
96-3287-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM J. KUBACKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

BROWN, J. The jury found William J. Kubacki guilty of operating a motor vehicle while intoxicated and operating a motor vehicle after revocation. Although the jury returned a not guilty verdict on the charge of operating a motor vehicle with a prohibited alcohol concentration (PAC), at sentencing the trial court found that Kubacki's high blood alcohol concentration at

the time of arrest (greater than 0.20%) warranted treating the OWI conviction as an aggravated offense under the sentencing guidelines. On appeal, Kubacki argues that there was not sufficient evidence to support either the OWI or the OAR convictions or the imposition of an aggravated sentence. We disagree and affirm the judgments and the trial court's orders denying postconviction relief.

We begin our analysis by reviewing the evidence. The arresting officer testified as follows. The officer approached Kubacki at approximately 3:10 a.m. on December 27, 1995. He saw Kubacki kneeling by his truck, which was parked along the shoulder of Highway 11, in a rural part of Walworth county. Kubacki told the officer that he had been returning from Milwaukee to his home near Powers Lake when his truck broke down; he apparently ran out of gas. Kubacki reported that this had happened about a half hour earlier, at about 2:40 a.m.

The officer asked Kubacki for identification. Because it was very cold, the officer also asked Kubacki if he wanted to wait in his squad car while his license was being checked. Kubacki accepted.

After the officer called the information in, the dispatcher replied that Kubacki's license had been revoked and that Kubacki was currently outside the operating limits of his occupational license; Kubacki was only permitted to drive until 2:15 a.m. Kubacki, who overheard the dispatcher, at this point volunteered that he had not been driving the truck. He told the officer that his friend had been driving but had left the scene to get gas.

Because of the cold, the officer called for another officer to try to find Kubacki's friend. The dispatcher later replied that the friend could not be located, so the officer told the dispatcher to try to reach the friend at home. When

the dispatcher called, he found the friend at home, but the friend denied being with Kubacki that night.

After the dispatcher relayed this information to the officer, the officer began to ask Kubacki about what had actually happened that evening. Kubacki told the officer that he had been at another friend's house in Milwaukee where he had a "few beers." During this conversation, moreover, the officer observed that Kubacki showed some signs of intoxication, such as bloodshot eyes and a slight slurring of speech. He asked Kubacki to perform roadside sobriety tests.

The officer opined that Kubacki did not perform the tests very well and he therefore arrested Kubacki. The officer transported Kubacki to a local hospital for a blood test. The blood test was administered at 4:14 a.m., about one hour after the officer first approached Kubacki's truck and, according to Kubacki, about one and one-half hours after his truck broke down. The test indicated that Kubacki's BAC at 4:14 a.m. was 0.201%.

At trial, in addition to Kubacki's blood test results, the State introduced an expert from the State Laboratory of Hygiene. The expert suggested that the 0.201% result at 4:14 a.m. meant that Kubacki's BAC could be estimated at 0.230% at 2:40 a.m., when he reportedly ran out of gas.

Kubacki also testified. He explained that he had been in Milwaukee all day working on a machine that he uses in his landscaping business. Kubacki confirmed that he drank six beers while he was there. He also explained that he left Milwaukee at around 11:30 p.m., planning to go to his friend's house in Powers Lake. Further, he testified that when he left Milwaukee, he had a cooler in the back of his truck which was filled with nine cans of beer. Kubacki also

asserted that he ran out of gas about an hour later, contrary to his statements to the officer that he broke down around 2:40 a.m. He described how he first took a short walk down Highway 11, but did not find anything close by. Because it was late and very cold, he did not think he would be able to easily find a place to get gas and he decided to stay and wait for help.

While he was waiting, Kubacki said that he drank the nine beers that were in the cooler. Finally, in regard to the statement that he first gave the officer about there being a different driver, Kubacki said that he had simply "panicked and made up that story" after he heard the dispatcher radio the officer that Kubacki was beyond his operating limits.

Based on this evidence, the jury found Kubacki guilty of operating a motor vehicle while intoxicated and operating a motor vehicle after revocation, both as fourth offenses. The jury, however, found Kubacki not guilty of operating a motor vehicle with a PAC.

The only detail of sentencing pertinent to this appeal is the trial court's decision to treat the OWI conviction as an aggravated offense. It applied the highest level of the sentencing matrix which is triggered when the defendant yields a BAC of 0.200% or more. In doing so, the trial court rejected Kubacki's argument that it had to consider that the jury found him not guilty of the PAC charge, which would have required the court to conclude that his PAC was below 0.080%. *See* § 340.01(46m)(b), STATS.

Before we turn to Kubacki's arguments regarding the sufficiency of the evidence on the OWI and OAR convictions, we will address his claim that the jury's not guilty verdict on the PAC charge should affect our analysis of the OWI and OAR convictions. Kubacki suggests that we must construe the not guilty

verdict to mean that the jury "found" that "[h]e did not have a BAC level at or higher than .08 at the time he operated his truck." This is not correct.

The not guilty verdict on the PAC charge means only that the jury was not convinced beyond a reasonable doubt that the State proved this charge. Indeed, the trial court and this court can consider that the not guilty verdict may have resulted from "leniency, mistake, or compromise." *See* ***State v. Thomas***, 161 Wis.2d 616, 631, 468 N.W.2d 729, 735 (Ct. App. 1991). Hence, the not guilty verdict does not carry weight in the separate analysis of whether there was sufficient evidence to sustain the guilty verdicts that the jury did reach. *See* ***id.*** at 630, 468 N.W.2d at 734-35.

We now turn to Kubacki's specific allegation that there was insufficient evidence to convict him of operating a motor vehicle while intoxicated. The two basic elements that the State must prove to obtain a conviction on this charge are that the defendant was driving a motor vehicle and that the defendant was "under the influence of an intoxicant" at that time. *See* ***State v. Burkman***, 96 Wis.2d 630, 644, 292 N.W.2d 641, 647-48 (1980), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The phrase "under the influence" means that alcohol impaired the driver's ability to operate his or her vehicle. *See* WIS J I—CRIMINAL 2663.

When we review whether the evidence sufficiently established the elements of a charge, and thus whether the jury's verdict should stand, we test whether the evidence was so lacking in probative value that no reasonable juror could have found guilt beyond a reasonable doubt; otherwise, we affirm. *See* ***State v. Wagner***, 191 Wis.2d 322, 331-32, 528 N.W.2d 85, 89 (Ct. App. 1995).

We conclude that there was sufficient evidence to support this verdict. Kubacki's admissions provided two basic facts about that night to the jury: one, that he consumed fifteen beers, and two, that he operated his vehicle. Although Kubacki argues that the timing of these events was disputed, the blood test and related expert testimony support one conclusion that his BAC was at 0.230% when his truck reportedly broke down. Based on this evidence, the jury could rationally conclude that he was alcohol impaired while he was driving. And pursuant to ***Thomas***, we give no weight to the jury's not guilty verdict regarding the PAC charge in arriving at this conclusion.

Kubacki's next argument concerns the conviction for operating after revocation. The State alleged that Kubacki violated two restrictions of his occupational license: one, he was driving beyond the authorized times, and two, he violated the restriction which required "absolute sobriety."

His appeal is specifically directed at the "absolute sobriety" restriction. Kubacki argues that this phrase is ambiguous.

At the postconviction hearing, we observe that the trial court resolved this legal question by turning to the dictionary. It found that "absolute sobriety" meant completely sober. Kubacki was not to consume "any alcohol" before driving.

We adopt the trial court's reasoning as our own. This phrase is not ambiguous. Moreover, the evidence which supported the guilty verdict on the OWI charge equally supports the charge that Kubacki violated this restriction of his occupational license.

Kubacki's last argument is aimed at the trial court's decision to sentence him under the guidelines for committing an aggravated offense. He argues that the trial court misused its sentencing discretion when it reached this conclusion about the gravity of the offense. *See* ***State v. Kennedy***, 190 Wis.2d 252, 257, 528 N.W.2d 9, 11 (Ct. App. 1994). He specifically argues that the court placed "undue emphasis" on two things when it found that he committed an aggravated offense. They are: (1) that he was uncooperative and (2) that he had a BAC greater than 0.200%.

In support of these contentions, Kubacki points to the arresting officer's testimony which showed that Kubacki did not *physically* resist. Moreover, he rekindles his argument that the jury's not guilty verdict on the PAC charge should have been interpreted as a factual finding that his BAC was not above 0.080% while he was driving. He concludes that the trial court therefore sentenced him according to "its desire to replace a jury's conclusion with its own." *See* ***State v. Bobbitt,*** 178 Wis.2d 11, 18, 503 N.W.2d 11, 15 (Ct. App. 1993).

We hold, however, that there was ample evidence in the record to support the trial court's sentencing decision. With regard to whether Kubacki was cooperative, we join the trial court's conclusion that Kubacki's original story (as the trial court termed it, "cock-and-bull" story) about there being another driver demonstrated that Kubacki did not cooperate with the arresting officer.

With respect to Kubacki's allegation concerning his BAC, we acknowledge that ***Bobbitt*** warns a sentencing court not to substitute its own judgment for the jury's. Nonetheless, ***Bobbitt*** also recognizes the basic principle that "'[i]nformation upon which a trial court bases a sentencing decision ... need not ... be established beyond a reasonable doubt ....'" *See* ***id***. at 17, 503 N.W.2d at

14 (quoted source omitted). As we have explained above, the record supports a finding that Kubacki operated his vehicle while his BAC was above 0.200%. Even though the jury may not have been convinced beyond a reasonable doubt about this issue, there is enough evidence to support the trial court's finding that his BAC was high enough to make Kubacki's OWI conviction an aggravated offense under the sentencing guidelines.

By the Court.—Judgments and orders affirmed.

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