

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2417

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID R. BOWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

ROGGENSACK, J.¹ David Bowers appeals his conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) contrary to § 346.63(1)(b), STATS. Bowers contends that the Intoxilyzer 5000 used to test his breath was not entitled to a presumption of accuracy and reliability pursuant to

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

§ 343.305(6)(b), STATS., because it utilized new software which affected the analytical process. He also contends that even if the Intoxilyzer 5000 was entitled to be presumed accurate and reliable, he was denied due process because he was not permitted to attack the weight and credibility of the test result. The circuit court found the evidence established that the software changes did not affect the instrument's analytical processing, requiring recertification; therefore, it concluded the presumption of accuracy and reliability applied to Bowers's breath analysis. The circuit court permitted Bowers to attack the weight and credibility of the test result; however, the testimony Bowers attempted to elicit was excluded, due to inadequate foundation. We affirm the circuit court's decision on each issue.

BACKGROUND

On June 15, 1997, Troopers Jenswold and Zukowski stopped, detained and arrested Bowers for operating a motor vehicle while intoxicated (OMVWI) and with a PAC. Bowers submitted to a breath test which showed an alcohol concentration higher than the legal limit for intoxication. Prior to trial, Bowers filed a motion to suppress the breath test, on the ground that the Intoxilyzer 5000 used to test his breath was not entitled to a presumption of accuracy and reliability because of changes to the instrument's software, which he alleged affected its analytical processing.

At the suppression hearing, George Menart, Senior Electronics Technician for the Wisconsin State Patrol Chemical Test Program, testified that all the hardware in the Intoxilyzer 5000, except the phone-activated timer and the bleeder-register, was original equipment, and that the changes that were made did not alter the instrument's analytical process. He further testified that the new

software for the Intoxilyzer 5000 had been tested by the manufacturer. His testimony implied that instrument recertification was not necessary because no change had been made to the Intoxilyzer's analytical processing.

Based on Menart's testimony, the court found that the hardware changes did not affect the instrument's diagnostic function. The court also found that no evidence had been presented that the new software affected the analytical processing of breath samples. Therefore, it concluded that recertification, prior to according the results a presumption of reliability, was not necessary, and it denied Bowers's motion to suppress the breath test results.

On August 17, 1998, a trial was held, during which Jenswold, Zukowski and Bowers were the only witnesses. On cross-examination, Bowers's counsel attempted to elicit testimony from Jenswold about the technicalities of the Intoxilyzer's operation. Jenswold said that he did not know how the instrument conducted the breath analysis. Bowers also attempted to obtain testimony from Jenswold concerning what effect an unwarmed mouthpiece might have on the test results. The State objected to that line of questioning, arguing that Jenswold had already testified that he had no knowledge about the technical processes which occurred when the Intoxilyzer assessed a breath sample. Bowers argued that he was not trying to attack the reliability of the Intoxilyzer, rather he wanted to show that the test results were not accurate due to contamination by residual mouth alcohol. The circuit court sustained the State's objection as to that witness, concluding that the testimony could not come in through Jenswold because he stated that he did not know how the Intoxilyzer analyzed breath samples.

The jury subsequently found Bowers guilty of OMVWI in violation of § 346.63(1)(a), STATS., and operating a motor vehicle with a PAC in violation

of § 346.63(1)(b). The circuit court entered a conviction on the verdict regarding the § 346.63(1)(b) violation. This appeal followed.

DISCUSSION

Standard of Review.

The admission or exclusion of evidence is a discretionary determination which will not be reversed if there is a reasonable factual basis in the record for the circuit court's determination and it was based on a correct application of the law. *State v. Oberlander*, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 583 (1989).

Presumption of Accuracy and Reliability.

Bowers claims that the circuit court erred in applying the presumption of accuracy and reliability to the breath analysis obtained from the Intoxilyzer 5000. Although use of the Intoxilyzer 5000 is an approved method of testing, pursuant to § 343.305(6)(b), STATS.², and WIS. ADM. CODE § TRANS 311.04³, and it is generally afforded a presumption of accuracy and reliability, *see*

² Section 343.305(6)(b), STATS., states in relevant part:

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 ... before regular use of the equipment and periodically thereafter at intervals of not more than 120 days;

³ WIS. ADM. CODE § TRANS 311.04 states in relevant part:

(continued)

State v. Disch, 119 Wis.2d 461, 475, 351 N.W.2d 492, 499 (1984); *State v. Busch*, 217 Wis.2d 429, 442-43, 576 N.W.2d 904, 909 (1998), Bowers contends that the presumption does not apply to the Intoxilyzer 5000 in question because of software changes made to the instrument after its initial certification.⁴

In *Busch*, 217 Wis.2d at 435, 576 N.W.2d at 906, the supreme court concluded that an Intoxilyzer 5000 was entitled to the presumption of accuracy and reliability if the instrument retained its analytical process, despite alterations made to the machine following its initial certification. Because hardware changes to the Intoxilyzer 5000 did not change the analytical processing, the court concluded that the instrument was entitled to the presumption of accuracy and reliability. *Id.* at 438, 576 N.W.2d at 907.

Bowers contends that software changes made to the Intoxilyzer 5000 preclude the presumption of accuracy and reliability. Menart, the same Department of Transportation (DOT) representative who testified in *Busch*,

Approval of breath alcohol test instruments.

(1) Only 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;

(2)(a) All models of breath testing instruments and ancillary equipment used shall be evaluated by the chief of the chemical test section.

(b) The procedure for evaluation shall be determined by the chief of the chemical test section.

(3) Each type or category of instrument shall be approved by the chief of the chemical test section prior to use in this state.

⁴ Bowers concedes that the hardware changes to the Intoxilyzer 5000 did not change the instrument's internal processing.

testified that the software changes to the Intoxilyzer 5000 used to test Bowers did not require recertification because the software was tested by the manufacturer, and instrument recertification is necessary only when a change affects the machine's analytical processing. Based on Menart's uncontradicted testimony, the circuit court found that there was no testimony the software changes had altered the instrument's analytical process. Because the circuit court's finding of fact on this issue is not clearly erroneous, *see State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS., and its conclusion is consistent with the supreme court's holding in *Busch*, it did not err by applying the presumption of accuracy and reliability to the Intoxilyzer 5000 used to analyze Bowers's breath sample.

Credibility of Breath Test.

Bowers also contends that even if the Intoxilyzer 5000 in question is afforded a presumption of accuracy and reliability, he is still entitled to a new trial because the circuit court did not permit him to attack the weight and credibility of the breath test results.

The results of a presumptively accurate breath test can be questioned at trial, but such questioning goes to the weight to be given the testimony, not to its admissibility. *Disch*, 119 Wis.2d at 476, 351 N.W.2d at 500. Due process is afforded by the cross-examination of witnesses and the inspection of the instrument, and while the test results are *prima facie* correct and statutorily admissible, “[i]mpeaching factors which may result from cross-examination of those who have performed the tests go to the weight of the evidence or the credence to be given to the witnesses by the factfinder.” *Id.* at 463, 351 N.W.2d at 494.

Bowers contends that at trial he was attempting to attack the weight and credibility of the breath test results. Contamination of breath samples due to an unwarmed mouthpiece may have been a valid argument; however, Jenswold was not the proper witness from which to elicit such testimony because Jenswold testified that he did not know how the Intoxilyzer performed its analytical functions. Without establishing a foundation that Jenswold had knowledge of the scientific workings of the Intoxilyzer, Jenswold was not the proper witness from which to elicit testimony impeaching the test results, and the circuit court properly sustained the State's objection to it.

CONCLUSION

The circuit court's finding that software changes to the Intoxilyzer 5000 did not affect the instrument's analytical processing was not clearly erroneous; and, in the absence of evidence establishing an analytical processing change, the presumption of reliability applied to the breath analysis obtained from the Intoxilyzer 5000. Furthermore, even though Bowers was entitled to attack the weight and credibility of the test result, he was bound by the rules of evidence in mounting this attack. Because the witness, from whom he sought to elicit testimony, did not have the necessary technical knowledge, Bowers was unable to lay a foundation sufficient to permit its receipt. Therefore, the circuit court properly sustained the State's objection. Accordingly, we affirm the judgment and the order of the circuit court.

By the Court.—Judgment and order affirmed.

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

