COURT OF APPEALS
DECISION
DATED AND FILED

JULY 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3684

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

COUNTY OF GREEN LAKE,

PLAINTIFF-RESPONDENT,

v.

DONALD L. PETERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: RICHARD O. WRIGHT, Judge. *Affirmed.*

ANDERSON, J. Donald L. Peters appeals from his conviction for operating a motor vehicle while intoxicated and with a prohibited alcohol concentration contrary to GREEN LAKE COUNTY, WIS., ORDINANCE § 287-84. Peters contends that the Intoxilyzer 5000 used to test his breath was not entitled to a presumption of accuracy and reliability pursuant to § 343.305(6)(b), STATS., because it utilized new software which affected the analytical process. The circuit court found that the evidence established that the software changes did

not affect the instrument's analytical processing, which would require recertification; therefore, it concluded that the presumption of accuracy and reliability applied to Peters' breath analysis. We affirm the circuit court's decision on this issue.

On October 19, 1997, Peters was arrested for operating a motor vehicle while intoxicated and with a prohibited alcohol concentration. He submitted to an Intoxilyzer 5000 breath test which showed an alcohol concentration of .17 grams of alcohol per 210 liters of breath.

Peters filed a motion in limine to preclude the prima facie evidentiary use of the breath test results. He argued 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 motion hearing, George Menart, Senior Electronics Technician for the Wisconsin State Patrol Chemical Test Program, testified that the Intoxilyzer 5000 used for Peters' breath test did not require recertification because no change had been made to the Intoxilyzer 5000's analytical processing. He further testified that the new software for the Intoxilyzer 5000 had been added over the years and that the Department of Transportation (DOT) relied on the software's manufacturer for testing of the product. He added that the DOT would only require the machine to be resubmitted for testing if the changes to it affected its analytical system.

Based on Menart's testimony, the court 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 accuracy and reliability, was not necessary, and it denied Peters' motion.

After a jury trial, Peters was found guilty on both counts. Peters appeals.

Peters 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., and WIS. ADM. CODE § TRANS 311.04, and it is generally afforded a presumption of accuracy and reliability, *see* ***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), Peters 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 and the fact that the DOT relied on the software manufacturer's testing of its product to determine whether it affected the machine's analytical processes.

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. *See* ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 583 (1989).

In ***Busch***, 217 Wis.2d at 435, 576 N.W.2d at 906, our supreme court concluded that an Intoxilyzer 5000 was entitled to a 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 a presumption of accuracy and reliability. *See* ***id***. at 448, 576 N.W.2d at 911-12.

Peters contends that software changes made to the Intoxilyzer 5000 preclude a presumption of accuracy and reliability. Menart, the same DOT representative who testified in ***Busch***, testified that the software changes to the Intoxilyzer 5000 used to test Peters' breath 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 evidence that 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 (1985); § 805.17(2), STATS., and its conclusion is consistent with the supreme court's holding in ***Busch***, it did not err by applying a presumption of accuracy and reliability to the Intoxilyzer 5000 used to analyze Peters' breath sample.

Peters also objects that the deputy who testified at trial about Peters' breath test was not qualified to lay an evidentiary foundation for the breath test results as required by § 343.305(6)(b), STATS. Because we determine that the State presented evidence that the deputy who administered the test was certified at the time of the test and Peters provides no evidence to the contrary, we need not address this argument further. As a result, we affirm.

By the Court.—Judgment affirmed.

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