COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1488-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL P. SCHOENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 BROWN, P.J. Michael P. Schoenberg appeals from a conviction for unlawfully operating a motor vehicle while under the influence of an intoxicant, contrary to § 346.63(1)(a), STATS. His only contention is that the trial court gave an instruction regarding his blood sample which created a mandatory rebuttable presumption, thereby reducing the State's burden of proof in violation of his due process rights. In other words, what Schoenberg is arguing is

that a reasonable juror could understand the instruction to say that because the State had submitted evidence of a test which was over the limit, the State had proven its case and guilt *must* be found unless the defendant persuades the jury otherwise. We conclude that the instruction created a permissive, not a mandatory, presumption and affirm the judgment.

¶2 Schoenberg drove his motorcycle into a mulch finisher being pulled by a tractor. Though seriously injured, he left the scene, but not before the driver of the tractor was able to smell the odor of intoxicants coming from Schoenberg. A sheriff's deputy went to Schoenberg's residence and, as part of his investigation, asked Schoenberg if he had been drinking. Schoenberg confirmed that he had, but claimed that the consumption occurred after he had arrived home. The deputy placed Schoenberg under arrest for operating a vehicle while intoxicated. Schoenberg submitted to a blood test and the result was 0.25%.

¶3 At the conclusion of the jury trial, the trial court gave the following instruction over Schoenberg's objection:

> Evidence has been received that, within three hours after the defendant's alleged driving of a motor vehicle, a sample of the defendant's blood was taken. An analysis of the sample has also been received. If you are satisfied beyond a reasonable doubt that there was .10% or more by weight of alcohol in the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, or both, but you are not required to do so. You, the jury, are here to decide these questions on the basis of all evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged driving or that the defendant had a prohibited alcohol concentration at the time of the alleged driving, or both, unless you are satisfied of that fact beyond a reasonable doubt.

¶4 Before giving this instruction, the trial court entertained Schoenberg's proposed jury instructions which omitted all presumption and inference language from the instruction as well as what Schoenberg referred to as "the cloning of the effect of Wis. Stat. § 885.235." Schoenberg maintained that such language in the instruction was optional with the court and, in his view, it was error to include it. Schoenberg argued:

> Wis. Stat. § 885.235 merely states a *prima facie* standard, a standard which guides the court in determining whether evidence sufficient to go to the jury has been adduced and prevents, in cases where such evidence as is described in that statute has been introduced, from granting judgment of acquittal. It is not appropriate to provide information of that sort to the jury, for it creates a presumption. As a matter of law, presumptions are prohibited in criminal cases. ***Francis v. Franklin***, 471 U.S. 307 (1985).
>
> Moreover, the language derived from Wis. Stat. § 885.235 is coupled, in the pattern instruction, with language describing the presumption of accuracy afforded statutory tests. Though instructing in the phraseology of a permissive inference, i.e., 'may, but is not required to find,' the effect of this language, particularly when coupled with the description within the instruction of the operating of Wis. Stat. § 885.235 and the language in pattern instruction no. 140 concerning reasonable doubt indicating that the jury "is not to search for doubt," leaves the jury with only one possible conclusion from a test result which is above 0.10: guilt.
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> Taking the instructions as a whole, inclusion of the optional language of pattern 2669 effectively creates a mandatory rebuttable presumption of guilt flowing from the mere fact of test result and proof of operating. The instruction, moreover, provides no indication of what evidence might be sufficient to overcome that presumption. Hence, the presumption is not a disappearing presumption, but is one that remains throughout the case, despite the introduction of countervailing evidence.
>
> Therefore, were the pattern instruction to be given without the material which is optional deleted, the giving to the jury of that instruction would be prejudicial to both Counts, as a matter of law.

¶5 The trial court overruled the objection and gave the instruction quoted above. The jury returned a verdict finding Schoenberg guilty of operating while intoxicated and he appeals.

¶6 While this may be the first case where a defendant has claimed that *this* particular instruction creates a mandatory rebuttable presumption, a prior case from our supreme court regarding a predecessor instruction controls our result. The instruction that was the focus of the supreme court's attention in ***State v. Vick***, 104 Wis.2d 678, 312 N.W.2d 489 (1981), was in all material respects like the one at bar. The only appreciable difference between the instruction at issue in ***Vick*** and the instruction at issue here is that the ***Vick*** instruction did not tell the jury that it was "not required to find" guilt based only upon the test.

¶7 One of the issues in ***Vick*** was whether the instruction regarding the test created a mandatory presumption or a permissive presumption. The supreme court explained a permissive presumption as one where the trier of fact is left free to credit or reject the test and which does not shift the burden of proof. A mandatory presumption, on the other hand, tells the jury that it *must* find the elemental fact upon proof of the basic fact (here: the driver was intoxicated because the test was 0.10% or over). The mandatory presumption holds unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *See* ***id***. at 688, 312 N.W.2d at 494.

¶8 Vick argued to the court that because the jury was not instructed that it could reject the presumption, the instruction could not be viewed as a valid permissive presumption. *See* ***id.*** at 689, 312 N.W.2d at 495. The supreme court disagreed. It found the instruction to be permissive. The supreme court wrote:

> First, the language "then you may, on this evidence alone [breathalyzer test results], find that [defendant] was under the influence of an intoxicant," is clearly permissive. Second, the language is qualified by the immediately succeeding sentence, detailing: "But, you should so find only if you are satisfied beyond a reasonable doubt from all the evidence in this case, that the defendant, at the time of the alleged operation of a vehicle, was under the influence of an intoxicant as defined by these Instructions …." [T]he use of the word "may," coupled with the immediate qualifying instruction, "you should so find only if," as well as subsequent qualifying instructions distinguish our case from the constitutional infirmities found in [another case].

Id. at 697, 699, 312 N.W.2d at 499. The "subsequent qualifying instructions" referred to by the supreme court consisted of the instructions on the presumption of innocence, the State's duty to prove every element of the crime beyond a reasonable doubt, and the jury's duty to accord evidence such weight as it deserves and to draw its own conclusions and inferences from the evidence presented. *See* ***id.*** at 686, 312 N.W. 2d at 493.

¶9 Like the instruction before the supreme court in ***Vick***, the instruction used in this case does not say to the jury that it *must* find from the test results alone that the defendant was under the influence; it says the jury "may" so find. And like the instruction in ***Vick***, the instruction used here qualifies the above language by telling the jurors that they "should not find" guilt "unless you are satisfied of that fact beyond a reasonable doubt." Finally, like the trial court in ***Vick***, the trial court in this case gave the same "subsequent qualifying instructions."

¶10 We really need not go further since it is evident that the holding in ***Vick*** controls the result here. But we will anyway. Since ***Vick***, the instruction has been amended to say exactly what Vick argued was absent from the instruction given in his case. Now, the instruction has an immediate qualifier after the sentence allowing the jury to find from the sample alone that the defendant was

under the influence of alcohol. And now, the instruction informs the jury "you are not required to do so." WIS. J I—CRIMINAL 2669. If the instruction was good enough to pass muster in the supreme court before the addition of this phrase, it certainly passes muster now. In fact, our court, in ***State v. Schleusner***, 154 Wis.2d 821, 454 N.W.2d 51 (Ct. App. 1990), held just so in a case involving a permissive inference instruction given in failure to pay child support actions.

¶11 In his reply brief, Schoenberg appears to change the issue from one of questioning whether the statute on its face creates a mandatory presumption to one of whether the instruction should only be given if a necessary foundation has first been established that the test was taken by qualified personnel. If this is now the issue, it comes too late. The question presented in the brief-in-chief was this: "Whether the trial court can create a mandatory presumption in a criminal case, thus denying the defendant-appellant his due process rights?" Moreover, in the trial court, the issue was whether the instruction, on its face, created a mandatory presumption. It was never argued that because the State's witness was not qualified to speak to the blood test results the instruction somehow becomes a mandatory presumption. And even in the reply brief, Schoenberg has not explained the connection between an allegedly unqualified witness testifying about the blood test and the language in the instruction itself. We will not discuss this further.

By the Court.—Judgment affirmed.

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