COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2480

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

COUNTY OF RACINE,

PLAINTIFF-RESPONDENT,

V.

ARIEL A. LENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Ariel A. Lenz appeals from a judgment of operating a motor vehicle with a prohibited alcohol concentration (PAC) in violation of the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Racine county ordinance adopting WIS. STAT. § 346.63(1)(b).[2] The trial court denied Lenz's motions challenging probable cause to arrest and seeking to negate the WIS. STAT. § 343.305(6)(b) presumption of admissibility of the Intoxilyzer 5000 test results at trial. We affirm the judgment.

¶2 The facts concerning probable cause to arrest were established at the April 26, 1999 motion hearing. Racine County Sheriff's Deputy Douglas Wearing testified that on January 17, 1999, at about 12:05 a.m., he observed Lenz operating a motor vehicle southbound in the northbound lane of Highway 36. Lenz traveled about a quarter mile, went past a median turnaround and went past the intersection of Highways K and 36 where there is a "do not enter sign on that side of the road." Wearing activated his emergency lights, stopped the vehicle, asked Lenz for her driver's license, noticed that "she was having a hard time locating it inside her wallet" and estimated that it took her "a minute, minute and a half" to locate the license. Wearing also stated that Lenz's speech was "slurry" and that he could definitely smell the odor of intoxicants. Wearing then asked Lenz to perform field sobriety tests.

¶3 Wearing asked Lenz to recite the alphabet. Lenz slurred some of the letters and stopped at the letter "P." She was asked to try the alphabet again, stopped at the letter "P" a second time and never finished. Lenz was then asked to perform the "thumb finger touch test." Lenz performed the test "fairly correctly" but did not follow Wearing's instructions. Wearing asked Lenz to count backwards from sixty-eight to forty-six. While Lenz started out okay, she stopped at sixty, asked Wearing if she was doing it right, paused, continued to fifty-four,

[2] The jury acquitted Lenz of operating a motor vehicle while intoxicated (OWI) in violation of the Racine county ordinance adopting WIS. STAT. § 346.63(1)(a).

repeated fifty-four, counted down to forty-seven and stopped. Wearing then asked Lenz to perform the preliminary breath test (PBT). She took the PBT and the result was 0.14%.

¶4 Lenz told Wearing that she had consumed a couple of drinks at a place she had just left. Wearing explained the results of the PBT and Lenz told the officer that if she was drunk it was the bartender's fault. Wearing then placed Lenz under arrest for operating a motor vehicle while intoxicated (OWI).

¶5 At the conclusion of Wearing's testimony, Lenz's defense counsel, Michael Witt, challenged the arrest because "based on the case I cited, the Court cannot consider the PBT."[3] The trial court agreed with Witt and disregarded the PBT results in determining probable cause for the arrest.[4] The trial court then found probable cause for the arrest of Lenz as follows:

> [Lenz] was driving down this highway on the wrong side for a quarter of a mile, went through intersections, and went through medians. Obviously that's a tipoff that her influence to drive a motor vehicle is impaired.

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[3] An identifying citation was never provided on the hearing record. However, Lenz's written motion referenced ***County of Jefferson v. Renz***, a 1998 court of appeals case, and the record establishes that defense counsel was referring to a published court of appeals case out of Jefferson county that was pending on a petition to review. We are satisfied that the case is ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998), *rev'd*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).

[4] In spite of prevailing on her motion to suppress the PBT results in the probable cause to arrest determination, Lenz argues in her reply brief that she has preserved her objection to the use of the PBT procedure for this appeal and that this court should address her arguments concerning the consequences to a person not consenting to a PBT under ***Renz***, 222 Wis. 2d at 424, which has now been reversed. Lenz poses an issue based upon hypothetical facts; however, this court will not decide an issue based on such facts. *See* ***Pension Management, Inc. v. DuRose***, 58 Wis. 2d 122, 128, 205 N.W.2d 553 (1973). In addition, the PBT issue is moot because it cannot have a practical effect on an existing controversy. *See* ***City of Racine v. J-T Enters. of Am., Inc.***, 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974).

> He pulls her over. She smells of alcohol. She fumbles around with her license and can't get her license out of the wallet. She indicates in the conversations to the officer that she was, had been drinking, and if she was drunk, it was the bartender's fault, and then fails the 3 tests that were given to her.
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> Not only does [the officer] have probable cause, [he] would be negligent in his duty if he didn't arrest the woman. The Court does find, obviously, there was probable cause for the officer to arrest and follow through with whatever he did.

¶6 Lenz first contends that: (1) there was insufficient probable cause for her arrest without consideration of the PBT results, and (2) the use of the PBT results here was an unlawful search. Lenz argues that while the facts may support a reasonable suspicion for the stop, they fail to support probable cause to arrest or to indicate that her ability to operate a motor vehicle was impaired. We disagree with the first contention and need not address the second contention because the trial court suppressed the PBT results.[5]

¶7 Lenz does not contest the reasonable suspicion for the stop. Our review, therefore, addresses only probable cause for the arrest. In ***State v. Pasek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971), probable cause to arrest was described as being "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." Further, the supreme court stated that "[i]t is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor

[5] We note, however, that the supreme court reversed the court of appeals ***Renz*** holding relied upon by Lenz to suppress the PBT results and has clarified when an officer investigating a probable OWI violation may request a PBT and rely upon its results. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (an officer does not need probable cause to arrest before requesting a PBT). The supreme court also pointed out that submission to a PBT is based upon consent, an established exception to the warrant and probable cause requirements. *See* ***id.*** at 311 n.14.

must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility" and that "[t]he quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case." ***Id.*** at 625.

¶8 If under the existing facts there are reasonable grounds to believe that the person stopped has violated OWI laws, the officer may arrest the person under WIS. STAT. § 345.22 or § 968.07(1)(d).[6] "After probable cause for arrest exists, the PBT is not really needed 'for the purpose of deciding whether or not the person shall be arrested.'" ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 305-06, 603 N.W.2d 541 (1999) (quoting WIS. STAT. § 343.303). Examination of the record demonstrates that the officer had a substantial amount of reliable, factual information, without the PBT results, indicating to a reasonable police officer that Lenz had probably violated the statute prohibiting driving while under the influence of an intoxicant. Lenz's contention that probable cause does not exist in the absence of the PBT results fails. We agree with the trial court and affirm its order denying the probable cause for arrest motion.

¶9 We next turn to Lenz's contention that the Intoxilyzer 5000 machine used to test her breath was not entitled to the presumption of accuracy and reliability afforded by WIS. STAT. § 343.305(6)(b).[7] The Intoxilyzer test yielded a

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[6] WISCONSIN STAT. § 345.22 provides that "[a] person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation." WISCONSIN STAT. § 968.07(1)(d) provides that an officer may arrest a person when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime."

[7] WISCONSIN STAT. § 343.305(6)(b) states in relevant part:

(continued)

result of 0.16% and was performed at a Racine County Sheriff's Department substation over an hour following Lenz's traffic stop. Lenz contends that the machine had lost its evidentiary presumption on January 17, 1999, because it was not certified after software changes. Lenz called George Menart, a senior electronic technician employed by the Wisconsin State Patrol, to testify in support of her motion in limine.

¶10 Menart identified the machine as a Model 5000 placed into service about 1984 to 1985 and stated that when a machine is placed into service the original certification of the machine is done by using a formal testing protocol. The machines are also subjected to a less extensive 120-day maintenance certification. Menart stated that twenty-two software revisions to the periodic maintenance certification have been approved over the past fourteen to fifteen years, and that those revisions were made to this machine. While the machines are constantly tested through the certification process, after the software revisions were made there was no recertification of the machines.

¶11 On cross-examination, Menart stated that the machine used in analyzing Lenz's breath sample was operating correctly on February 24, 1999, and had been certified as operating correctly on February 3, 1999, and November 25, 1998. Based upon Menart's review of the "Intoxilyzer ticket," he opined that

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> The department of transportation shall approve the techniques or methods of performing chemical analysis of the breath and shall:
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> ....
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> 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 ....

Lenz's test was "a good test."[8] He further testified that the Intoxilyzer 5000 analytical process, the "analytical bench," has not changed in all the years that the machine has been in use.[9]

¶12 Lenz argued to the trial court that because the twenty-two software changes had affected the analytical process of the machine, the test results were not automatically admissible into evidence and the trier of fact should hear evidence as to the test results's accuracy and reliability. Citing ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998), the trial court denied Lenz's motion on the basis that "I don't think there is any showing here that the science that would make the testing procedure reliable or unreliable has changed at all, and obviously the certification process ... back in 1984 and '85 when this machine was entered ... would still be applicable to this machine."

¶13 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 trial court's determination and the ruling was based on a correct

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[8] We cannot determine what the "Intoxilyzer ticket" is from the record. The trial court overruled an objection to the question on the basis of relevance, and Menart then testified, using the item, as follows:

> Based on the results, it passed diagnostic. We have very tight correlation between the first subtest and the second one. Difference of 4,000. We have a simulator calibration check, standard check in the middle of it at a very acceptable range, .096. The simulator solution was at proper temperature, 34.1. Solution itself, 9807. We have more than enough on the deprivation period. I would say yes, we have a good test.

[9] Lenz contends for the first time in her reply brief that the Intoxilyzer 5000 "analytical bench or analytical system" terms used by her own expert witness, Menart, are not the same as the "analytical process" terms used in ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998). Lenz failed to argue this point in the trial court or raise it in her main brief, and we will not address it here. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

application of the law. *See* ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). The use of the Intoxilyzer 5000 is an approved method of testing pursuant to WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § TRANS 311.04[10] and is generally afforded a presumption of accuracy and reliability. *See* ***State v. Disch***, 119 Wis. 2d 461, 475, 351 N.W.2d 492 (1984); ***Busch***, 217 Wis. 2d at 442-43.

¶14 In ***Busch***, the 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. *See* ***Busch***, 217 Wis. 2d at 435. Because software changes to the machine did not change the analytical processing, the court concluded that the instrument was entitled to a presumption of accuracy and reliability. *See* ***id.*** at 438.

¶15 Here, Menart testified that the software changes had not affected the machine's analytical processing and that the chief of the chemical test section never ordered recertification. Based on Menart's testimony, the trial court found that the software changes had not altered the machine's analytical process. Because the trial court's finding of fact is not clearly erroneous, *see* ***State v.***

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[10] WISCONSIN ADMIN. CODE § TRANS 311.04 states in relevant part:

> **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.

Pitsch, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985), and its conclusion is consistent with ***Busch***, we conclude that the trial court's decision denying the defense motion in limine was not an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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