

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0770-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. BIGNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pepin County: DANE F. MOREY, Judge. *Affirmed.*

¶1 CANE, C.J. Richard Bignell appeals from his conviction after a jury trial for operating a motor vehicle with a prohibited blood alcohol

concentration, second offense, contrary to WIS. STAT. § 346.63(1)(b).¹ The sole issue on appeal is whether the Intoxilyzer test results are inadmissible as a matter of law because there was no second accuracy test conducted on the Intoxilyzer machine within 120 days as required by WIS. STAT. § 343.305(6)(b).² This court concludes that the test results are admissible and therefore affirms the order denying Bignell's motion to suppress and the conviction.

¶2 The relevant underlying facts are undisputed. On June 27, 1999, Bignell was arrested for operating his motorcycle while intoxicated and with a prohibited blood alcohol concentration. The jury acquitted him of the OWI charge, but found him guilty of the remaining charge. At trial, Bignell moved to suppress evidence of the Intoxilyzer test results, which showed his blood alcohol concentration at .11%. The basis for his motion was that the DOT had not tested the Intoxilyzer equipment for its accuracy within 120 days after its last test for accuracy in March 1999. The State conceded that because of remodeling in the sheriff's department and a planned change in the Intoxilyzer equipment to be used, the machine used to test Bignell was not subsequently tested for accuracy.

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

² WISCONSIN STAT. § 343.305(6)(b) in relevant part requires:

(b) The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

1. Approve training manuals and courses throughout the state for the training of law enforcement officers in the chemical analysis of a person's breath;
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3. Have training technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers ... at intervals of not more than 120 days.

¶3 The trial court denied Bignell's motion, concluding, "There is no requirement in the law that it has to be maintained after and before. Only that it has to be maintained with a schedule. Otherwise, you would have the problem that you have to be there every day to maintain it." Obviously, the trial court was indicating correctly that the department need not test the Intoxilyzer machine before and after each time a person is tested. At the postconviction hearing on Bignell's motion for reconsideration, the trial court also indicated that the weight and credibility to be given to the test results was a matter for the jury's determination.

¶4 Where the correctness of a trial court's evidentiary ruling is questioned on appeal, the appellate scope of review is limited to whether the trial court erroneously exercised its discretion. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Furthermore, Bignell's challenge concerns the application of the certification requirements of WIS. STAT. § 343.305(6)(b)3, to the facts of this case, a question of law which this court reviews de novo. *See Graziano v. Town of Long Lake*, 191 Wis. 2d 813, 817, 530 N.W.2d 55 (Ct. App. 1995).

¶5 The law is well settled that noncompliance with the procedures set forth in the implied consent law "does not render chemical test evidence otherwise constitutionally obtained inadmissible." *See State v. Zielke*, 137 Wis. 2d 39, 41, 403 N.W.2d 427 (1987). Bignell does not argue that his breath sample was obtained by unconstitutional means. His entire appeal is based on his argument that because the machine was not retested within 120 days of the March test, the test results are not admissible as a matter of law. This court disagrees.

¶6 Tests by recognized methods, such as speedometer, Breathalyzer and radar, do not need to be proved for reliability in every case. *See State v. Trailer Serv., Inc.*, 61 Wis. 2d 400, 408, 212 N.W.2d 683 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. *See id.* at 408. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. *See id.*

¶7 The *Trailer Service* case was subsequently followed by *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981), which determined that compliance with administrative code procedures was not required as a foundation for the admissibility of Breathalyzer results. *See id.* at 674. In that case the court noted that "an attack on the qualifications of the operator, the methods of operation or the accuracy of the equipment is a matter of defense and goes to the weight to be accorded to the test and not to the test's admissibility." *Id.* at 675 n.6.

¶8 A review of the case law addressing the requirements for the admissibility of Intoxilyzer test results leads this court to conclude that the mandatory aspects regarding automatic admissibility relate only to the procedures for administering the test, *see* WIS. STAT. § 343.305(6)(c), not to the requirements that the DOT certify the accuracy of the machines at regular intervals. *See* WIS. STAT. § 343.305(6)(b). As stated in *Wertz*, this holding does not limit the power of the trial court, under proper circumstances, to refuse to admit the results of a test because the objecting party has convinced the court that the accuracy of the test is so questionable that its results are not probative. *See Wertz*, 105 Wis. 2d at 674-75. That, however, did not happen here.

¶9 Viewing this issue of admissibility most favorably to Bignell, if the procedures under WIS. STAT. § 343.305(6)(b) were not complied with, there at best may be no presumption of the Intoxilyzer machine's accuracy and reliability. It does not mean that the test results are therefore automatically inadmissible, however. In those circumstances, prosecutors who wish to rely upon the breath test results are required to present evidence of the instrument's reliability and accuracy.

¶10 Here, it was undisputed that the Intoxilyzer machine had been tested and determined to be operating accurately by the department two months before it was used to test Bignell's breath. It was also undisputed that a qualified operator performed the breath test and that the machine had been working properly during the administration of the test. Nor is there any contention that the Intoxilyzer was not tested previously at the required 120-day intervals. Simply put, the machine was not retested any time after Bignell's test because it was removed from the sheriff's department in anticipation of replacement. Based on this evidence, the trial court reasonably exercised its discretion by admitting the breath test results. Therefore, the denial of Bignell's motion to suppress this test result was proper and the conviction is affirmed.

By the Court.—Judgment and order affirmed.

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

