COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1456-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT F. STRERATH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Scott F. Strerath appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration, second offense, contrary to WIS. STAT. §§ 346.63(1)(b) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

346.65(2)(c),[2] and from an order denying his motion for a new trial. Strerath contends that the trial court erred in instructing the jury on the WIS. STAT. § 885.235 evidentiary presumption of intoxication when the blood alcohol evidence was obtained involuntarily. In addition, Strerath complains that the blood sample was not drawn by a person authorized to do so under WIS. STAT. § 343.305(5)(b). We affirm the judgment of conviction and the order denying the motion for a new trial.

BACKGROUND

¶2 On May 2, 1997, Strerath was arrested for operating a motor vehicle while intoxicated and transported to Waukesha Memorial Hospital for a blood draw. The arresting officer requested that Strerath submit to a blood test; Strerath stated that he was afraid of needles and did not want to watch the process. The officer treated Strerath's response as a refusal to submit to an implied consent chemical test, a blood sample was taken from him, and a notice of intent to revoke was issued based on the refusal.

¶3 Strerath challenged the State's contention that he had refused to submit to the test as required by WIS. STAT. § 343.305(3)(a). After a refusal hearing, the trial court concluded: "I find there is no refusal. I decline to take any action against the defendant's license in this proceeding today." At trial, Strerath's defense counsel acknowledged, "[t]he court made a finding that [Strerath] did not refuse" to provide the blood sample.

[2] A jury also found Strerath guilty of operating a motor vehicle while intoxicated, second offense, in violation of WIS. STAT. § 346.63(1)(a), which was deemed a nullity in the judgment.

¶4 At trial, the State introduced the blood alcohol analysis report (Exhibit 2) indicating that Strerath's blood alcohol concentration was 0.187% by weight. Strerath objected to the admission of Exhibit 2 on the basis that the document lacked foundation and evidentiary escort. The trial court admitted the exhibit into evidence. The jury returned guilty verdicts to the OWI and BAC charges on August 18, 1999. Strerath moved for a new trial on January 11, 2000, alleging that the State failed to establish a proper foundation for admitting the blood test results because no evidence was presented to establish that the person who drew his blood was qualified under WIS. STAT. § 343.305(5)(b). On February 10, 2000, the trial court denied the motion.

DISCUSSION

¶5 We first address Strerath's contention that Exhibit 2 should not have been admitted into evidence because the trial record does not foundationally establish that a qualified person drew the evidentiary blood. The admissibility of evidence lies within the sound discretion of the trial court. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). We review a discretionary decision of the trial court by examining the record to determine if the court logically interpreted the facts and applied the proper legal standard. ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995).

¶6 Exhibit 2 indicates that the blood specimen was collected by Carrie Gnacinski. Gnacinski did not appear at trial and personally establish that she was a person authorized to withdraw blood under WIS. STAT. § 343.305(5)(b), which reads in relevant part:

> Blood may be withdrawn from the person arrested for [an OWI] violation … to determine the presence or quantity of alcohol … in the blood only by a physician, registered

> nurse, medical technologist, physician assistant or person acting under the direction of a physician.

Officer Robert Melo testified that he requested that a Waukesha Memorial Hospital technologist obtain the blood specimen from Strerath and that Gnacinski, who Melo identified as a "lab technologist," responded. Melo observed the drawing of the blood sample by Gnacinski, after which the sample was turned over to him, sealed and mailed to the State Laboratory of Hygiene. Whether § 343.305(5)(b) requires the person withdrawing the blood to appear and personally testify that he or she is qualified to do so presents a question of statutory interpretation. We review such questions de novo. ***State v. Wilson***, 170 Wis. 2d 720, 722, 490 N.W.2d 48 (Ct. App. 1992). We consider matters outside of the statutory language only if the statute is ambiguous. ***State v. Kenyon***, 85 Wis. 2d 36, 49, 270 N.W.2d 160 (1978).

¶7 We are not persuaded that Gnacinski was statutorily required to appear at Strerath's jury trial and testify that she was a medical technician. While WIS. STAT. § 343.305(5)(b) unequivocally requires that Gnacinski be qualified to withdraw blood, it does not specifically address the manner of establishing that qualification. Nor does the statute expressly require the personal attendance of the person drawing the blood as a witness. Thus, we look to the evidence to determine if the "qualification" requirement is satisfied.

¶8 We conclude that Gnacinski's status was sufficiently established by Melo's uncontested testimony that he requested the blood draw at a medical facility, that he requested that a qualified technician draw the blood and that Gnacinski, a person Melo identified as a lab technician, responded to that request. Because a sufficient evidentiary foundation existed to establish that Strerath's blood sample was drawn by a qualified person, we hold that the trial court's

admission of the test results into evidence was not an erroneous exercise of discretion. Strerath's objection would travel to the weight of the test evidence rather than to its admissibility. ***State v. Disch***, 119 Wis. 2d 461, 463, 351 N.W.2d 492 (1984).

¶9 We now address Strerath's concerns about the trial court's approval of the statutory evidentiary presumptions. The trial court read jury instruction WIS JI—CRIMINAL 230, incorporating the WIS. STAT. §§ 343.305(5) and 885.235 statutory presumptions of admissibility of the blood alcohol evidence, to the jury.[3] Strerath contends that it was error to instruct the jury on the statutory presumption of admissibility because the blood sample was not obtained under the implied consent statute. However, Strerath successfully argued in the trial court that he had not refused to submit to the implied consent law.

¶10 Strerath is judicially estopped from asserting here that the statutory presumptions attending the admission of implied consent blood alcohol evidence are invalid because he refused to comply with the implied consent statute. The doctrine of judicial estoppel bars a party from taking inconsistent positions in judicial proceedings. ***In re H.N.T.***, 125 Wis. 2d 242, 253, 371 N.W.2d 395 (Ct. App. 1985). A party cannot advocate a certain position in the trial court

[3] The trial court's instructions, based upon WIS JI—CRIMINAL 230, read as follows:

> Evidence has been received that, within three hours after the defendant's alleged operating of a motor vehicle, a sample of the defendant's blood was taken. An analysis of the sample has also been received. If you're satisfied beyond a reasonable doubt that there was .10 percent 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 operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so.

(compliance with WIS. STAT. § 343.305) and a contrary position on appeal (refusal to comply with § 343.305). ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987). The trial court's jury instructions were consistent with its ruling that Strerath had not refused Officer Melo's request for a blood sample and therefore were not in error.

By the Court.—Judgment and order affirmed.

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