

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 28, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP478-CR

Cir. Ct. No. 2008CT2726

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MEGAN M. MATHEWS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Megan Mathews appeals a judgment convicting her, after a jury trial, of operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant, as a second offense. She argues that she was deprived of her constitutional right to present a defense when the circuit court excluded certain evidence relating to the body's absorption and elimination of alcohol. I reject her argument and affirm the judgment.

Background

¶2 Mathews was pulled over for speeding at 1:46 a.m. This traffic stop led to charges for operating a motor vehicle while under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b), each as a second offense.

¶3 At trial, Mathews testified that she began drinking sometime between 12:15 and 12:30 a.m. She had a rum drink, then a second rum drink about 25 or 30 minutes later, then a vodka shot immediately before driving. Mathews estimated that she drank the vodka shot 10 or 15 minutes before being stopped.

¶4 The jury heard evidence that Mathews submitted to a breathalyzer test at 2:52 a.m. The result showed a blood alcohol concentration of 0.08, the applicable legal limit.

¶5 The circuit court admitted a blood alcohol chart from a department of transportation publication called "Basic Training Program for Breath Examiner Specialist." The chart showed estimated blood alcohol concentration as a function of body weight and number of drinks consumed. The court denied Mathews' request to admit additional explanatory portions of the publication. The court did, however, allow a police officer to testify generally that alcohol levels in the body

increase as the body absorbs alcohol and decrease as the body metabolizes alcohol. In addition, the jury received the following instruction regarding the blood alcohol chart:

A chart showing estimated alcohol concentrations has been received in evidence and may be considered in arriving at a verdict. This chart is prepared by the Department of Transportation and shows estimated concentrations of alcohol as determined by comparing the number of drinks consumed with the weight of the person who consumed them. The chart has a formula for determining the amount of alcohol burned up over time by the drinker. The estimates in the chart are based on estimates of the results under average circumstances. The actual alcohol concentration in any particular case will depend on many factors including the metabolic rate of the person which is the rate at which the body burns up alcohol[,] [t]he actual alcohol content of the drink, the amount of food in the person's stomach, and other factors.

The jury found Mathews guilty of both charges and, as noted above, she was convicted of the operating while under the influence charge.

Discussion

¶6 Mathews frames the issue as whether the circuit court erroneously exercised its discretion by excluding evidence, but the substance of her arguments makes it apparent that the dispositive issue is whether the exclusion of the evidence denied her the constitutional right to present a defense. This presents a question of “constitutional fact” that is reviewed *de novo*. *State v. Jensen*, 2007 WI App 256, ¶9, 306 Wis. 2d 572, 743 N.W.2d 468.

¶7 For shorthand, I will refer to the portions of the department of transportation publication that Mathews sought to admit as the “explanatory material.” Mathews characterizes this material as “explaining the basic principles of the body’s rate of absorption and elimination of alcohol.” It includes, among

other information, a discussion of alcohol absorption rates, factors that may affect those rates, and average reported elimination rates.

¶8 Mathews argues that *State v. Hinz*, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984), establishes that defendants are entitled to put on evidence relating to the body's elimination of alcohol over time. *Hinz* is not controlling, however, because the explanatory material Mathews sought to admit contains more extensive information than what was addressed in *Hinz*. See *id.* at 284-85 & n.2. Here, the circuit court did not bar all information relating to the body's elimination of alcohol over time.

¶9 Similarly, Mathews argues that it was critical for the jury to know that the body absorbs and eliminates alcohol over time because only then could the jury fully understand her defense: that her 0.08 blood alcohol concentration at 2:52 a.m. did not prove beyond a reasonable doubt that she was over the legal limit at 1:46 a.m.² Yet, it is apparent that, even without the explanatory material, the jury would have understood that the body absorbs and eliminates alcohol over time. As already indicated, the jury heard general testimony from a police officer that alcohol levels in the body increase as the body absorbs alcohol and decrease as the body metabolizes it. In addition, the jury was instructed that the blood alcohol chart was not conclusive, but rather that various factors may affect actual blood alcohol concentration. During closing arguments, Mathews made these points and appealed to the jurors' common experience in arguing that her 0.08

² At one point in her briefing, Mathews states the time of her test as 2:42 a.m., but she acknowledges elsewhere that it was 2:52 a.m.

blood alcohol concentration at 2:52 a.m. did not prove that she was over the legal limit when she was stopped at 1:46 a.m.

¶10 Mathews also argues that the explanatory material would have demonstrated that she was still absorbing alcohol at 1:46 a.m. and, therefore, that her blood alcohol concentration at 1:46 a.m. was lower than the 0.08 result obtained from her breathalyzer test at 2:52 a.m. Mathews points out that the explanatory material states a general rule that “[w]hen drinks are consumed successively over time, the peak alcohol level is usually attained 20 to 30 minutes after the last drink.”

¶11 This general rule would not have assisted Mathews because it includes the proposition that, after the peak is obtained, blood alcohol concentration declines. Applying the rule, the facts here indicate that Mathews took the breathalyzer test after more than 30 minutes of declining concentration.

¶12 More specifically, Mathews testified that she had her last drink approximately 10 or 15 minutes before 1:46 a.m., the time she was stopped for speeding. Applying the general rule that peak alcohol concentration occurs 20 to 30 minutes after the last drink, it is true that Mathews might still have been absorbing alcohol at 1:46 a.m., but it would also be true that she reached her peak alcohol level shortly afterward—sometime between 1:51 a.m. and 2:06 a.m.—and that thereafter, for about 46 minutes or more, her alcohol level declined. Thus, application of the rule does not show that her blood alcohol concentration was lower at 1:46 a.m. than at 2:52 a.m. Indeed, applying the rule might imply the contrary, namely, that Mathews’ blood alcohol concentration was higher.

¶13 In sum, Mathews provides no persuasive reason to conclude that the circuit court's exclusion of the explanatory material denied her the constitutional right to present a defense.

By the Court.—Judgment affirmed.

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

