

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-2931

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

CARL J. BOCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

ROGGENSACK, J.¹ Carl Bock appeals a circuit court order which affirmed his municipal court convictions for operating a motor vehicle while intoxicated (OMVWI) and with a prohibited alcohol concentration (PAC). He claims that he was prejudiced by the automatic admission of an intoxilyzer report

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

obtained from an unapproved testing device. However, even if the report in this case may not have been entitled to a presumption of accuracy, we conclude that there was sufficient evidence to convict and sentence Bock on the OMVWI count, and thus no prejudice occurred.

BACKGROUND

On January 28, 1996, at approximately 10:30 p.m., City of Madison Police Officer Susan Armagost was on routine patrol when she observed a Ford truck, traveling at what she considered to be a high rate of speed, attempt to make a right turn. The truck crossed three lanes of traffic and went onto a snow bank on the median, then returned to the road. Armagost followed, and tried to match her speed to that of the truck to get an estimate of its speed, but the truck was still pulling away from her when she reached 60 mph in a 30 mph zone. She also observed the truck hit the snow bank on the left side two more times as a passenger appeared to be moving around in the front seat, possibly distracting the driver. She then activated her lights and pulled the truck over.

When the driver, Bock, exited his vehicle, Armagost detected a strong odor of intoxicants on his breath and observed that his speech was slurred. He could not stand upright or walk without swaying. Bock admitted that he had three beers at one bar and a gin and tonic at another. Armagost asked Bock to perform the horizontal gaze nystagmus test, the walk and turn test, the one leg stand test, and the alphabet test. She noticed that Bock kept interrupting her while she was giving the directions for each of the tests, that he was unable to keep his balance while standing heel to toe and had to separate his feet back into a normal standing posture, and that his recitation of the alphabet was not completely understandable after the letter G. Based on the field sobriety tests, she arrested

Bock and took him to the police station, where a chemical intoxication test was administered with his consent. The test was performed using an Intoxilyzer Model 768, and showed an alcohol level of .13. Armagost issued Bock municipal citations under Madison General Ordinances § 12.64(1)(a) and (b), based upon § 346.63(1), STATS., for first offense OMVWI and PAC violations.

Bock challenged the citations and the admission of the intoxilyzer report on the basis that the model used had not been approved by the Department of Transportation. However, his suppression motion was denied and, after a trial to the municipal court, Bock was found guilty on both counts. The court reasoned that Bock's erratic driving, coupled with his odor of intoxication and his poor performance of the sobriety tests, comprised clear, satisfactory and convincing evidence that his driving was impaired by alcohol. Citing Bock's blood alcohol level among other factors, the court then suspended Bock's license for six months, imposed a fine of \$540.25 plus a \$15 witness fee, and ordered mandatory alcohol assessment and points, apparently on the OMVWI count.² The defendant appealed under the record review provisions of § 800.14, STATS. The circuit court affirmed the OMVWI count without commenting on the PAC count or the intoxilyzer issue. Both the municipal and circuit court decisions were entered before this court's decision regarding the admissibility of test results obtained using unapproved instruments in *State v. Baldwin*, 212 Wis.2d 245, 569 N.W.2d 37 (Ct. App. 1997).

² There is some confusion on this point in the record, because the municipal court did not specify the charge under which it was sentencing in its order; however, the assessment form which the court signed two days later checked a box for "Operating While under the Influence."

DISCUSSION

Standard of Review.

The application of § 346.305(6)(b), STATS., and WIS. ADM. CODE § TRANS 311.04, which deal with the approval of chemical testing methods for determining a driver's blood alcohol content, present questions of law which this court reviews *de novo*. *Baldwin*, 212 Wis.2d at 254-55, 569 N.W.2d at 41. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial. *State v. Patricia A.M.*, 176 Wis.2d 542, 557, 500 N.W.2d 289, 295 (1993).

Intoxilyzer Results.

As part of Wisconsin's Informed Consent Law, § 343.305(6)(b), STATS., requires the Department of Transportation to "approve techniques or methods of performing chemical analysis of the breath." Department regulations in effect at the time of Bock's chemical breath test provided that "[o]nly 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." WIS. ADM. CODE § TRANS 311.04(1). As of January 28, 1996, the list of devices approved for use in Wisconsin included the Intoxilyzer Model 5000, the Intoxilyzer Model 1400, and the Intoxilyzer Model 000568. The Intoxilyzer Model 768, the device used to test Bock's breath, was not on the approved list.

From an evidentiary standpoint, "[t]he evaluation and approval of the breath test instrument are the prerequisites to clothing the instrument with a presumption of accuracy." *Baldwin*, 212 Wis.2d at 260, 569 N.W.2d at 43. Absent approval of a specific device by the chief of the department's chemical

testing section, the prosecution must “affirmatively prove compliance with accepted scientific methods as a foundation for the admission of the test results.”

Id. This may require a new trial at which the state must establish the scientific accuracy of the device used as a foundation for the admissibility of its results. *Id.* at 264 n.14, 569 N.W.2d at 45 n.14.

Harmless Error.

If we were to conclude that admission of the intoxilyzer report was error, that conclusion need not necessarily lead to a new trial, however, because evidentiary errors are subject to a harmless error analysis. *Baldwin*, 212 Wis.2d at 253-54, 569 N.W.2d at 40. Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A “reasonable possibility” is one which is sufficient to undermine confidence in the outcome of the proceeding. *Patricia A.M.*, 176 Wis.2d at 556, 500 N.W.2d at 295. The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. *Dyess*, 124 Wis.2d at 547 n.11, 370 N.W.2d at 232 n.11.

If the admission of the breathalyzer test results was error, the City met its burden of proving it was harmless error, in this case. In order to gain a conviction on the OMVWI charge, the City needed to prove only two elements: “(1) that the defendant was driving or operating a motor vehicle, and (2) that the defendant was under the influence of an intoxicant at the time he or she was driving or operating the motor vehicle.” *State v. Gaudesi*, 112 Wis.2d 213, 220, 332 N.W.2d 302, 305 (1983); Madison General Ordinances § 12.64(1)(a). The City had to prove each of these elements by clear, satisfactory and convincing

evidence. See *Monroe County v. Kruse*, 76 Wis.2d 126, 130, 250 N.W.2d 375, 377 (1977).

There is no dispute that Bock was driving the truck. As to the second element, the testimony established that Bock smelled strongly of intoxicants, slurred his speech, was unable to maintain his balance or properly recite the alphabet, and was unable to make a right turn or stay within his lane of traffic. See *Gaudesi*, 112 Wis.2d at 221, 332 N.W.2d at 305 (“[E]rratic driving may be evidence that the defendant is under the influence of an intoxicant.”). Thus, although the intoxilyzer report would have been relevant to the OMVWI count as well as the PAC, there was sufficient evidence of intoxication without the report that our confidence in the outcome of the case remains intact. Therefore, we conclude that if it were error to admit the PAC report without laying a proper foundation, it was harmless error in regard to the OMVWI conviction and the penalties imposed.

CONCLUSION

Regardless of whether Bock’s intoxilyzer test should not have been admitted without some foundational evidence of its accuracy, the City still produced sufficient evidence to support Bock’s conviction and sentence for OMVWI. There is not a substantial likelihood that a new trial would produce any different result. Therefore, his conviction and sentence are affirmed.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. See RULE 809.23(1)(b)4., STATS.

