COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0910-FT

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

COUNTY OF OZAUKEE,

PLAINTIFF-RESPONDENT,

v.

PERRY P. LIEUALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County, KATHRYN W. FOSTER, Judge. *Affirmed.*

BROWN, P.J. This is an appeal of a conviction following a jury trial for operating a vehicle while intoxicated. Perry P. Lieuallen raises three issues. He first argues that venue of his jury trial was improperly transferred from Ozaukee county to Waukesha county. Second, he asserts that, in addition to the

breath test results, the County of Ozaukee also had the burden of submitting evidence in its case-in-chief showing that alcohol was consumed either before or during driving as a condition precedent to use of the statutory presumption that he drove while intoxicated. Third, he contends that the County failed to provide such evidence. We conclude that the venue issue was waived, that the County had no burden to submit evidence over and above the test results, that regardless, the County submitted such evidence, and that the evidence was sufficient to sustain the verdict. We affirm.

We address the venue issue first. The Ozaukee County District Attorney applied for a special prosecutor to handle this case inasmuch as Lieuallen is a practicing member of the Ozaukee county bar with at least some of his practice devoted to criminal law. Waukesha County District Attorney Paul Bucher accepted appointment as special prosecutor. The case was transferred to Waukesha County Circuit Court, Judge Kathryn Foster presiding. As a practicing attorney, presumably familiar with criminal procedure, Lieuallen was no doubt aware of his right to maintain that he should be tried before an Ozaukee county jury. And he was represented by counsel, who no doubt was also aware that such a claim could be made. But neither Lieuallen nor his counsel ever objected to a Waukesha County jury hearing his case. No reasons are expressed by Lieuallen explaining why we should grant him relief from waiver. His venue issue fails.

Next, Lieuallen complains that there was insufficient evidence to show that the County had met its burden of proof when it rested its case. The County's case was as follows: On April 30, 1998, at about 11:00 p.m., a sheriff's deputy was dispatched to the scene of a car in a ditch. Upon arriving at 11:11 p.m., the deputy observed Lieuallen standing at the rear of his vehicle. His shirt was untucked on one side and three buttons were open. The zipper on his pants

was open. After obtaining Lieuallen's driver's license, the deputy asked what had happened. Lieuallen replied that he had been driving home and was turning around when he went into the ditch. The deputy testified that he had driven by that location a half hour before the dispatch and did not see the car in the ditch at that time. The deputy detected the odor of intoxicants on Lieuallen's breath, his speech sounded slurred and his eyes appeared bloodshot. When asked if he had been drinking, Lieuallen replied "no."

When performing field sobriety tests, Lieuallen appeared to stumble towards the ditch line and the deputy had to grab his arm to keep him from falling over. The deputy started to explain the finger-to-nose test and informed Lieuallen to wait until the instructions were completed before performing the test, but Lieuallen started before the deputy had finished his explanation. The deputy had to start over. When Lieuallen finally performed the test, he failed. With the one-leg stand test, Lieuallen again began before instructions were completed and the deputy had to start over. He failed that test as well. In fact, Lieuallen told the deputy that he could not do it. He also failed the heel-to-toe test. The deputy placed Lieuallen under arrest for operating a motor vehicle while intoxicated.

At the county jail, an intoxilyzer test was performed with a result of .10%. When Lieuallen saw the result, he told the deputy "that's bad, that's bad. I'm going to have to stop doing this. I learned a valuable lesson tonight."

The deputy who administered the intoxilyzer test also testified. He told the jury how Lieuallen had said to him that he was an "expert" in blowing into the machine prior to the time that the procedure was explained to him. But when he blew into the machine, he had a hard time getting the mouthpiece to his mouth.

At one point when he tried to blow he actually started falling forward and if his shoulder had not hit the wall he would have fallen over onto the machine itself.

Lieuallen contends that the above evidence was insufficient to survive a motion for a directed verdict. He argues that to survive such a motion, the County must have made a prima facie showing that he consumed alcohol prior to or during the operation of a motor vehicle. He cites ***Village of Thiensville v. Olsen***, 223 Wis.2d 256, 588 N.W.2d 394 (Ct. App. 1998), *review denied*, 224 Wis.2d 266, 590 N.W.2d 491 (1999), for this proposition. He then claims that there was no evidence presented by the County on this issue, and, for that reason, the motion for a directed verdict should have been granted.

First of all, Lieuallen misreads ***Thiensville***. The publishable aspect of that case was not that the government has the burden to prove, over and above admission of the breath test result, how a driver consumed alcohol prior to or during operation of the vehicle. The court made no such holding. Rather, the holding was that when a trial court sits as the finder of fact, it can reconsider the factual findings and conclusions drawn from those findings on its own motion even when the parties or the court have not previously considered the issue. *See* ***id.*** at 257, 262, 588 N.W.2d at 395, 397.

Lieuallen observes that in ***Thiensville*** there was evidence that Olsen had consumed alcohol before driving. Lieuallen seizes upon the following language in the opinion to support his understanding of the case.

> Perhaps had the testimony been that Olsen had not one drop of alcohol while watching the Packers, and had there been no testimony of alcohol on Olsen's breath five minutes after he was seen driving his car, the trial court may never have felt the need to reconsider its original decision.

Id. at 264, 588 N.W.2d at 397-98. Lieuallen argues that this language stands for the legal proposition that "if there is evidence of alcohol consumption prior to the operation of a motor vehicle, Sec. 885.235, STATS., relieves the prosecution from producing an expert witness to lay a proper foundation for admissibility of the breath alcohol test." Lieuallen asserts that, in his case, "there is no evidence that there was any consumption of alcohol prior to or during the operation of a motor vehicle."

The language relied upon by Lieuallen must be read in the context of the entire opinion. In ***Thiensville***, Olsen's defense was the same as Lieuallen's—that the alcohol was consumed after the driving had ceased. Originally, the trial court had determined that there was only one issue for the court—a factual one—whether Olsen drank the alcohol before or after driving. *See* ***id.*** at 259, 588 N.W.2d at 396. The trial court resolved that issue in favor of Olsen on grounds that the only testimony about when the alcohol had been consumed came from the defendant and the Village had offered no competing evidence to countermand Olsen's testimony. The trial court therefore found Olsen not guilty. But just days later the trial court reconsidered its decision on its own motion. It reasoned that it had not given any weight to the presumption established by the breath test result. The trial court correctly determined that once a sufficient breath test result has been documented, the presumption is that the driver consumed alcohol prior to or during operation of the vehicle. Thus, what the trial court was saying was that it was wrong to have ruled that the Village presented no evidence to counter Olsen's testimony. The Village had presented the test result. After correcting itself, the trial court went on to make a *finding of fact* that Olsen's testimony did not rebut the presumption. *See* ***id.*** at 260, 588 N.W.2d at 396. The trial court then found Olsen guilty.

The language in ***Thiensville*** to which Lieuallen refers was simply an observation by the appellate court that had Olsen's testimony been different the trial court may well have decided that his story was enough to rebut the statutory presumption. The passage was inserted to drive home the point that once the trial court had given due weight to the statutory presumption, the ultimate question of whether Olsen's testimony overcame the presumption was simply a question of fact for the trier of fact. Moreover, the success or failure in overcoming the presumption depended upon the strength of the defense's case.

In no way can ***Thiensville*** be construed to hold that the government has the burden to prove, *in addition to* the test results, that the driver consumed alcohol before or during operation of the vehicle. In fact, ***Thiensville*** stands for just the opposite.

Having now properly stated the law, the final question is whether the evidence, considered in totality, shows that Lieuallen successfully overcame the statutory presumption. We conclude that there was sufficient evidence from which a jury could determine that Lieuallen did not successfully rebut the presumption. The arresting officer testified that he had driven by the area just a half hour prior to the dispatch and did not see Lieuallen's car in the ditch. The obvious inference from this testimony is that Lieuallen had driven into the ditch in the half hour before the dispatch. The jury therefore could have disbelieved Lieuallen's story that he went into the ditch at about 10:00 p.m. The jury could also have believed that the deputy's testimony discredited Lieuallen's explanation that he walked to his home five minutes away, broke out a bottle of Glen Livet scotch, had one glass and walked back to his vehicle by 11:11 p.m. Add to this Lieuallen's statement to the officer after failing the breath test that it was "bad, bad," that he was going to have to "stop *doing* this" and that he had "learned a

valuable lesson." (Emphasis added.) The jury could easily have construed Lieuallen's statements as an admission that he was operating his vehicle while intoxicated. This court has no problem determining that the jury could find that Lieuallen drank alcohol prior to or during operation of his vehicle.

By the Court.—Judgment affirmed.

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