COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2000

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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1071-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAULA OLTROGGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Paula Oltrogge appeals a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI). She presents three issues for review: (1) whether she is entitled to a new trial because her guilt was determined by a jury of only six persons; (2) whether the

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c).

trial court erred when it excluded a blood alcohol concentration (BAC) "wheel" that Oltrogge offered into evidence; and (3) whether the court could consider Oltrogge's prior OMVWI conviction when revoking her operating privilege for refusing a breath test, even though the State had not introduced a certified record of her prior conviction at the refusal hearing.

¶2 We conclude that: (1) because she failed to object to the six-person jury at or before trial, Oltrogge is not entitled to a new trial; (2) the trial court did not erroneously exercise its discretion when it excluded the BAC wheel from evidence; and (3) because the trial court never entered an order revoking Oltrogge's operating privilege for refusing the breath test, Oltrogge's final claim of error is moot. In sum, we reject all of Oltrogge's arguments and affirm the judgment of conviction.

BACKGROUND

¶3 A Village of McFarland police officer arrested Oltrogge for OMVWI and transported her to the McFarland police station. After reading the contents of an "informing the accused" form to her, the officer asked Oltrogge to submit to a chemical test of her breath. The parties dispute what transpired next, but the net result was that the officer issued Oltrogge a notice of intent to revoke her operating privilege for refusing to submit to a breath test. At the refusal hearing, the officer testified that Oltrogge "stated [that] she would not submit to the breath test by stating no." Oltrogge, however, testified that after being asked to submit to chemical testing, she "hesitated for a minute … collected [her] thoughts, and … said yes." Oltrogge also testified that the officer refused to allow her to take the test.

¶4 After hearing the testimony, the trial court found the officer's account to be "far more plausible" and determined that Oltrogge had in fact refused to submit to chemical testing. The State then moved the court to revoke Oltrogge's operating privilege under WIS. STAT. § 343.305(10)(b) for a period of two years based on Oltrogge's refusal and a previous OMVWI conviction.[2] Oltrogge objected on the grounds that the State had introduced no evidence of a prior OMVWI conviction. In response to the objection, the court stated that it would "give [the State] time to file a certified copy of the previous conviction" and would postpone imposing a two-year revocation until a certified copy of the conviction was filed with the court. The record, however, contains no revocation order based on Oltrogge's refusal to submit to a breath test.

¶5 A jury trial was conducted two weeks after the refusal hearing. Prior to voir dire, the court informed the parties that the jury would be comprised of six members.[3] When the court asked, "[A]ny problem with that?" both parties answered "No."

¶6 Oltrogge attempted during the trial to introduce a BAC "wheel" into evidence. The device is produced and distributed by the Department of Transportation (DOT), Office of Transportation Safety. By aligning a dial to match one's body weight with "the number of drinks consumed hourly," the wheel estimates a person's BAC after each hour of drinking, for up to six hours.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] At the time of Oltrogge's trial, WIS. STAT. § 756.096(3)(am), 1995-96, required that juries in misdemeanor cases "consist of 6 persons." Three weeks after Oltrogge's trial, the supreme court decided in ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), that § 756.096(3)(am) was unconstitutional.

Oltrogge asserted that the BAC wheel was relevant to her defense because it suggested that, based on her weight and the number of drinks she claims to have consumed, her blood alcohol level was below the legal limit at the time of her arrest. This information, Oltrogge insisted, showed that she had "no basis … to refuse the test," and it was thus relevant to her "consciousness of guilt," which the State sought to establish by presenting evidence of her refusal to the jury. She admitted, however, that she had not used the BAC wheel at any time on the evening of her arrest.

¶7 The court initially admitted the wheel into evidence and permitted Oltrogge to refer to it during her testimony. At the instructions conference, however, the State moved to strike both the wheel and Oltrogge's testimony based upon it. The court determined that the wheel was neither relevant nor reliable, and granted the State's motion to strike.

¶8 The jury found Oltrogge guilty of OMVWI. At her sentencing hearing, the State filed a certified copy of Oltrogge's driving record which showed that she had previously been convicted of OMVWI. Among other penalties for the second-offense OMVWI conviction, the court revoked Oltrogge's driving privileges for twenty-eight months.[4] Oltrogge appeals the judgment of conviction.

[4] The clerk's minutes for the sentencing hearing indicate that defense counsel made no objection to a sentence based on second-offense penalties. The penalties Oltrogge faced for the conviction were also enhanced because she had with her a minor passenger under the age of sixteen at the time of the offense. *See* WIS. STAT. § 343.30(1q)(b)3 and 4m, 1995-96. Oltrogge does not claim that the trial court erred in imposing a twenty-eight month revocation.

ANALYSIS

¶9 Oltrogge contends first that she is entitled to a new trial because the jury that found her guilty of OMVWI was comprised of six persons. She bases her contention on ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998). The supreme court determined in ***Hansford*** that WIS. STAT. § 756.096(3)(am), 1995-96, which mandated that "[a] jury in misdemeanor cases shall consist of 6 persons," was unconstitutional. The court concluded that the Wisconsin Constitution guarantees the right to a twelve-person jury in criminal cases. *See* ***id.*** at 241. Oltrogge asserts that her right to a twelve-person jury was violated, that ***Hansford*** should be applied retroactively, and that she is entitled to a new trial with a twelve-person jury.

¶10 We have already considered whether the ***Hansford*** decision should be applied retroactively to cases in which a misdemeanor defendant was tried by a jury of six. *See* ***State v. Zivcic***, 229 Wis. 2d 119, 598 N.W.2d 565 (Ct. App. 1999). We concluded that the ***Hansford*** holding "applies only to those cases where the issue was raised before the trial court." ***Id.*** at 124. That is, only those appellants who have "preserved the issue" are entitled to a new trial based on the ***Hansford*** decision. ***Id.*** We reiterated in ***Zivcic*** the "general rule" that "except for unusual circumstances, even constitutional issues must be raised in the trial court before they must be considered on appeal." ***Id.*** at 125.

¶11 Oltrogge contends that her case presents one of those "unusual circumstances" in which a constitutional issue can be raised on appeal even if the issue was not preserved in the trial court. Specifically, Oltrogge asserts that the right to a twelve-person jury is so fundamental that it cannot be waived simply by failing to object. The right to have twelve jurors decide one's case, Oltrogge

argues, can only be waived personally by a defendant, on the record, which did not occur in this case.

¶12 We recognize of course that some constitutional rights are so fundamental that they must be waived personally by a criminal defendant, and that the right to a jury trial is one of these rights. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569-70, 464 N.W.2d 839 (1991). Oltrogge urges us to conclude that because the "fundamental right" to a jury trial discussed in ***Livingston*** necessarily refers to a twelve-person jury, a defendant's personal, on-record waiver is also necessary in order to permit a criminal case to be tried to a jury of six persons instead of twelve. However, we decline to extend the holding of ***Livingston*** on the present facts, and we conclude instead that this case is squarely governed by our holding in ***Zivcic***. Oltrogge's right to object to a six-person jury was waived when neither she nor her trial counsel objected to the number of jurors empanelled to hear her case.[5]

¶13 Oltrogge next argues that the trial court erred when it refused to admit the BAC wheel into evidence and struck Oltrogge's testimony regarding the wheel. In reviewing evidentiary issues, we recognize that "[t]he decision to admit or exclude evidence lies within the discretion of the trial court." ***Hennig v. Ahearn***, 230 Wis. 2d 149, 178, 601 N.W.2d 14 (Ct. App. 1999). "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised

[5] If Oltrogge wished to challenge her counsel's failure to object to a six-person jury, she could have done so by claiming that her trial counsel was ineffective on that basis. *See, e.g.,* ***State v. Albright***, 96 Wis. 2d 122, 133, 291 N.W.2d 487 (1980). But Oltrogge has not requested postconviction relief grounded on a claim of ineffective assistance of counsel, and accordingly, we decline to address the issue.

its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). Our inquiry is limited to asking "whether appropriate discretion was in fact exercised," and we will uphold a trial court's discretionary determination if we find that there was a reasonable basis for it. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶14 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The threshold for establishing relevance in Wisconsin is low. *See* ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). Nonetheless, "[t]he issue of relevancy 'must be determined by the trial judge in view of his or her experience, judgment, and knowledge of human motivation and conduct.'" ***Pharr,*** 115 Wis. 2d at 344 (citation omitted). The record indicates that the trial court did not erroneously exercise its discretion in determining that the BAC wheel was not relevant to Oltrogge's defense.[6]

¶15 The trial court decided to exclude both the BAC wheel and the testimony which referred to it after concluding that the wheel had no bearing on the issue of whether Oltrogge in fact refused the officer's request to take a breath

[6] The trial court also determined that the BAC wheel evidence was not reliable. The wheel bears the following disclaimer: "Note: The … Wheel is only a guide and not for legal use. Calculations are based on averages. Individual variances may occur." The trial court also noted that the wheel does not take into account the rate at which alcohol is absorbed into a person's bloodstream or the rate at which it is eliminated from a person's body. The trial court thus concluded that the wheel is "not an accurate tool for measuring blood alcohol" and "should not be relied upon in a court of law." We do not address the correctness of this conclusion inasmuch as we conclude that the court did not err in its determination that the BAC wheel was not relevant to Oltrogge's defense.

test. Oltrogge claims that the wheel was "clearly relevant" because it suggests that, based on the number of drinks that Oltrogge testified she had consumed, her blood alcohol concentration was below the legal limit at the time of her arrest. From this, Oltrogge argues that the wheel tends to make it more probable that she knew she was not legally intoxicated at the time she was asked to submit to a breath test, and thus that she did not refuse the breath test because she had no reason to do so. We agree with the trial court, however, that the wheel didn't have "anything to do with the refusal" because Oltrogge didn't use the wheel on the night she was arrested:

> Mrs. Oltrogge admits she never saw the wheel until today, so the wheel has no bearing on why she didn't refuse. Whatever she knew about her level of intoxication at that time is in evidence and can be argued in terms of the refusal. The wheel does not add to that at all.

¶16 Oltrogge points to our holding in ***State v. Hinz***, 121 Wis. 2d 282, 360 N.W.2d 56 (Ct. App. 1984), which she claims required the trial court to admit the BAC wheel into evidence. In ***Hinz***, we concluded that the trial court erred when it refused to admit a DOT blood alcohol chart used to train breath examination specialists, which the defendant had offered in an attempt to refute the results of his breathalyzer test. The trial court in ***Hinz*** determined that the blood alcohol chart was relevant to the defendant's case, but excluded the chart after determining that, without expert testimony to explain it, the chart's probative value was outweighed by the danger of confusion of the jury. *See* ***id***. at 285. We concluded, however, that the blood alcohol chart, like a DOT stopping distance chart, was sufficiently reliable and straightforward to be admitted into evidence without expert testimony. *See* ***id*** at 286-88.

¶17 We conclude that Oltrogge's reliance on ***Hinz*** is misplaced. The trial court here determined that the BAC wheel was *not* relevant to her defense, and was thus inadmissible for that reason. *See* WIS. STAT. § 904.02. In ***Hinz*** the trial court determined that the DOT blood alcohol chart *was* relevant to the defendant's case, but excluded it after weighing the chart's probative value against the danger of confusing the jury. *See* WIS. STAT. § 904.03. Our analysis in ***Hinz*** is thus of no assistance in our present review of the trial court's determination that the BAC wheel lacked relevance to Oltrogge's defense. As we have discussed, that determination was not an erroneous exercise of discretion.

¶18 Finally, Oltrogge contends that the trial court erred in revoking her operating privilege for two years on the basis of her refusal to take the breath test and her prior conviction for OMVWI. Specifically, Oltrogge cites the State's failure to introduce proper evidence of the prior conviction at the time of the refusal hearing.

¶19 If a court determines following a refusal hearing under WIS. STAT. § 343.305 (9) that the refusal was improper, the court must revoke the defendant's operating privilege "according to the number of previous suspensions, revocations or convictions." Section 343.305(10)(b). Under § 343.305(10)(b)3, "if the number of convictions, suspensions and revocations within a 10-year period equals 2, the court shall revoke the person's operating privilege for 2 years." Oltrogge argues that, at the time of her refusal hearing, there was no evidence in the record to support a two-year revocation instead of the one-year revocation applicable absent a prior OMVWI conviction.

¶20 The difficulty with Oltrogge's claim of error, however, is that there is nothing in the record before us to indicate that the trial court ever entered a

revocation order based on her refusal to take the breath test. In fact, the State acknowledges as much in its response brief, and requests that we "order the trial court to enter a two-year revocation for the refusal to run concurrent with the 28 month revocation" imposed upon Oltrogge's conviction for OMVWI. We decline to do so inasmuch as the State has not cross-appealed the trial court's failure to enter a revocation order on the refusal. By the same token, we can grant no relief to Oltrogge from an order that was not entered.

CONCLUSION

¶21 For the reasons discussed above, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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