COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP239 **Cir. Ct. No. 2015CV1647**

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

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

V.

BRYON R. HRIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL P. MAXWELL, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] Bryon Hrin appeals from a judgment affirming his municipal court conviction for operating a motor vehicle while intoxicated

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(OWI), first offense. He contends that the circuit court should have granted his motion for mistrial because the arresting officer mentioned that he administered a preliminary breath test (PBT). We disagree and affirm.

Background

¶2 Hrin was arrested for OWI, and the City of New Berlin issued a citation for the offense.[2] After he was found guilty in municipal court, Hrin appealed to the circuit court for a new trial before a jury.

¶3 At trial, Detective Michael Saddy testified that he observed Hrin unsafely change lanes through two roundabouts. He explained that Hrin "cut the corner" proceeding from the right lane into the left lane in both instances. Saddy testified that he had to tap his brakes because he thought he would collide with Hrin's vehicle. He then observed Hrin go from "the right-hand lane all the way over to the turn lane," and straddle the turn lane before making a turn. Saddy stopped Hrin and immediately observed signs of intoxication. Saddy smelled intoxicants inside the vehicle, and Hrin's eyes were bloodshot and glassy. Based on his observations, Saddy decided to administer the standard field sobriety tests. Hrin exhibited various signs of intoxication during the tests, and Saddy testified that he believed Hrin was intoxicated. Saddy also administered a PBT. He then arrested Hrin for OWI. After his arrest, Hrin submitted to an evidentiary breath test that indicated an alcohol concentration of .14g/200L.

¶4 During Saddy's direct examination at trial, the following interchange took place:

[2] Hrin was also cited for operating with a prohibited alcohol concentration (PAC).

> Q: After the field sobriety test, what did you do next?
>
> A: I administered a preliminary breath test, PBT.
>
> [Hrin's counsel]: Objection, Your Honor. We are going to have to take a break. Moving for a recess.

Based on the mention of the PBT, Hrin moved for a mistrial. He argued that "the case law makes it clear [the detective] can't talk about it," and "the fact is that testimony is beyond prejudicial and it's inadmissible and we can't go any further."

¶5 The court postponed ruling on the motion for mistrial until after the City's witnesses. During the rest of his testimony, Saddy made no further mention of the PBT. After testimony, the circuit court heard argument and denied Hrin's motion. The court first noted that the testimony was not inadmissible per se. It then denied the motion, explaining its reasoning as follows:

> I think that [WIS. STAT. §] 343.303 does not preclude the very slight testimony that was given and it was immediately addressed at sidebar. There was no further testimony about a PBT test. There's nothing even close to saying that [Hrin] failed the PBT test so I don't believe that a motion for a mistrial is appropriate.

Although the court offered to give a curative instruction, Hrin declined. Counsel reasoned that a curative instruction would "simply highlight the issue," and the prejudice could not be "cured" by an instruction.

¶6 The jury found Hrin guilty of OWI,[3] and he appeals.

[3] The jury also found Hrin guilty of PAC, but that citation was dismissed.

Discussion

¶7 Whether to grant or deny a mistrial is left to the circuit court's discretion. ***Jensen v. McPherson***, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 685 N.W.2d 603. The issue is "whether the claimed error was sufficiently prejudicial to warrant a new trial," and we will not reverse the court's decision except "on a clear showing of an erroneous use of discretion by the trial court." ***Id.*** The court properly exercises its discretion if it: (1) examines the relevant facts, (2) applies the proper legal standard, and (3) uses a rational process to reach a decision a reasonable judge could make. ***State ex rel. Robins v. Madden***, 2009 WI 46, ¶9, 317 Wis. 2d 364, 766 N.W.2d 542.

¶8 Hrin primarily takes issue with the circuit court's legal analysis—its conclusion that WIS. STAT. § 343.303 only prohibits the admission of the PBT result. Section 343.303, he argues, must be read broadly to exclude not only the results of the PBT, but the fact of its administration. Without a result, the fact that a PBT was administered was completely irrelevant, and revealing that fact improperly invited the jury to speculate that the results showed Hrin was over the limit. Thus, he insists, the circuit court erred by denying his motion for mistrial. We conclude the circuit court correctly interpreted the law and properly exercised its discretion in declining to order a mistrial.

¶9 WISCONSIN STAT. § 343.303 provides that "[t]he result of the preliminary breath screening test shall not be admissible in any action or proceeding" except for certain limited purposes not relevant here. The court's conclusion that § 343.303 only precludes evidence of the "result" of the PBT is correct as a matter of statutory interpretation—a question of law we review de novo. *See* ***State v. Holcomb***, 2016 WI App 70, ¶4, 371 Wis. 2d 647, 886 N.W.2d

100. Unless it is ambiguous, we begin and end our analysis with the plain language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The text of the statute rebuts Hrin's reading of the provision. The plain language of the current version of § 343.303 prohibits only the admission of the "result," not the fact a PBT was administered.

¶10 Had the legislature wished to prohibit any mention of the fact a PBT was administered as well, it could have written the statute to prohibit it. We know this because the previous version of the statute did just that. The 1979-1980 version provided that "[n]either the results of the preliminary breath test *nor the fact that it was administered* shall be admissible in any action." WIS. STAT. § 343.305(2)(a) (1979-80) (emphasis added). However, this statute was amended in 1981; the new version dropped the language prohibiting the fact of administration, leaving only the prohibition on admission of the result. *See* 1981 Wis. Laws, ch. 20, § 1568b.[4] The clear case law Hrin referenced in making his objection was based on this entirely different and perfectly clear previous version of the statute. *See* ***State v. Albright***, 98 Wis. 2d 663, 675, 298 N.W.2d 196 (1980). The present statutory language is clear: WIS. STAT. § 343.303 prohibits the result of a PBT, not the fact of whether it was administered.[5]

[4] The amended provision was substantively identical to the current version and provided "[t]he result of the [PBT] shall not be admissible in any action or proceeding." 1981 Wis. Laws, ch. 20, § 1568b.

[5] Hrin also argues that we must reverse the circuit court because it improperly relied upon two unpublished cases. However, the court's conclusion was ultimately based upon the correct legal conclusion that WIS. STAT. § 343.303 does not prohibit mentioning the fact a PBT was administered. The mere fact it cited to unpublished cases does not change the correctness of its statutory analysis.

(continued)

¶11 This does not end the inquiry, however. The circuit court still must determine whether admission was so prejudicial that a mistrial is warranted. Hrin argues that the mention of the PBT is irrelevant and improperly undermined his defense that his alcohol concentration did not exceed the legal limit until after he was arrested. Mentioning the PBT, he claims, invited the jury to speculate that he was over the limit at the time of his arrest, not merely when the evidentiary breath test was administered later.

¶12 We are unprepared to say as a matter of law that the administration of a PBT is always irrelevant and therefore inadmissible. It could, for example, serve as relevant background information—explaining the sequence of events that led to Hrin's arrest. This is not to say evidence that a PBT was administered can never be prejudicial. It certainly could—maybe it often is—and in the right case, perhaps enough so to warrant a mistrial.

¶13 The court's decision to grant a mistrial is discretionary, and to be made "in light of the whole proceeding." ***Jensen***, 275 Wis. 2d 604, ¶29. The record here reflects the circuit court's appropriate analysis of the totality of the evidence—including the ample evidence of intoxication—and the effect of the casual reference to the PBT on the overall outcome. The court specifically noted that no further mention of the PBT was made and nothing in evidence indicated the result of the PBT. It reasonably concluded that the "very slight" mention of

---

In his brief-in-chief, Hrin cites to our unpublished one-judge decision in ***State v. Knapp***, No. 2009AP1463-CR, unpublished slip op. (WI App Apr. 22, 2010), without any explicit indication that it is an unpublished opinion. Although unpublished authored decisions issued after July 1, 2009, are citable as persuasive authority, "[a] party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." WIS. STAT. § 809.23(3)(c). Hrin did not file or serve a copy of the decision with either his brief-in-chief or his reply brief.

the PBT was sufficiently innocuous. Hrin obviously disagrees with this conclusion, but it is a reasonable one grounded in a correct view of the law. We see no error in the circuit court's discretionary decision to deny the motion for mistrial.

By the Court.—Judgment affirmed.

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