COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1568-CR **Cir. Ct. No. 2002CT5112**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. STUEMPFIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Michael J. Stuempfig appeals from a judgment entered after a jury found him guilty of operating a motor vehicle while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

intoxicated (second offense), contrary to WIS. STAT. § 346.63(1)(a) (2003-04).[2] He claims that his arrest was unlawful, that the trial court erroneously exercised its discretion in admitting the Intoximeter result, and that his due process rights were violated. Because probable cause existed, because admitting the test result via the assisting officer, and because there was no violation of Stuempfig's due process rights, this court affirms.

BACKGROUND

¶2 On May 5, 2002, at about 3:15 a.m., Police Officer Eric Miller observed a vehicle being driven by Stuempfig. The vehicle was southbound on Port Washington Road when it came to a stop, although there was no traffic signal requiring the stop. Miller decided to follow the vehicle, and clocked it at fifty-two miles per hour in a thirty-five mile per hour zone. Miller stopped the vehicle for speeding.

¶3 Stuempfig told the officer he was lost and Miller smelled the odor of alcohol. When asked if he had been drinking, Stuempfig stated he had had four beers. Miller also observed that Stuempfig's eyes were bloodshot. Miller asked Stuempfig to recite the alphabet, which he did so correctly, without any slurred speech.

¶4 Miller then called for backup to assist him with field sobriety tests, and learned that Stuempfig's driving privileges had been revoked. Miller asked

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Stuempfig to exit the car to perform field sobriety tests. Miller stated that Stuempfig stumbled out of the car.

¶5 The first test performed was the HGN test, which examines the involuntary jerkiness of the eyes that is caused by alcohol in a person's system. Miller stated that when Stuempfig performed this test, all six clues indicating intoxication were present. Miller then asked Stuempfig to perform the walk-and-turn test and the stand-on-one-leg test. Miller noted that Stuempfig passed both tests, though not perfectly. Miller then asked Stuempfig to use the portable breath test, which came back with a result of .125. Stuempfig was then arrested. Stuempfig was taken to the police station for the Intoximeter test.

¶6 Stuempfig was charged with operating a motor vehicle while intoxicated and pled not guilty. His motion to suppress the evidence based on an illegal arrest was denied. There were repeated delays and adjournments with respect to the trial in this case. On the trial date, June 23, 2003, Stuempfig requested an adjournment due to an ill relative. The State advised that the officer who had performed the Intoximeter test would no longer be available as a witness after thirty days as he was moving out of the state. The parties agreed to take his deposition to preserve his testimony. Shortly thereafter, the State indicated that a deposition would not be necessary as it did not intend to use the Intoximeter test result at trial.

¶7 On the next trial date of September 9, 2003, the State indicated it was going to use the Intoximeter test result and introduce it through the testimony of the arresting officer who was present in the room when the test was performed. Stuempfig objected, arguing that he had released his expert based on the State's earlier representation. The trial court adjourned the trial.

¶8 On April 1, 2004, the trial court conducted a hearing on Stuempfig's motion, which claimed that the State's change of position on the Intoximeter testimony violated due process. The trial court found that the change of position did not prejudice Stuempfig and would allow the evidence. The case was tried to a jury on May 2–4, 2005. The jury found Stuempfig guilty.

DISCUSSION

¶9 Stuempfig raises several challenges, which will be addressed in turn. The standards for review on these issues are as follows. A trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous. *See* ***Olen v. Phelps***, 200 Wis. 2d 155, 160, 546 N.W.2d 176 (Ct. App. 1996). Whether probable cause exists for an arrest is a question of law, reviewed independently. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Due process is a question of law that this court decides independently. *See* ***State v. Littrup***, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991). Evidentiary determinations are reviewed under the erroneous exercise of discretion standard. *See* ***Boodry v. Byrne***, 22 Wis. 2d 585, 589, 126 N.W.2d 503 (1964).

A. Preliminary Breath Test.

¶10 Stuempfig claims the police officer did not have probable cause to request him to take a preliminary breath test. This court is not persuaded. A police officer may request a preliminary breath test if he/she has probable cause to believe the subject was operating a motor vehicle under the influence of intoxicants. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Probable cause in this context is defined as "greater than the reasonable suspicion … but less than the level of proof required to establish probable cause for arrest." ***Id.*** Here, the record demonstrates that this standard was satisfied.

¶11 Officer Miller observed suspicious driving, then smelled the odor of intoxicants from Stuempfig, noticed Stuempfig had bloodshot eyes and saw him stumble when he exited his vehicle. Miller also testified that Stuempfig failed the HGN test. Based on these facts, this court cannot say that probable cause did not exist.

B. Probable Cause to Arrest Without Breath Test.

¶12 Stuempfig next argues that without the breath test, there was not probable cause to arrest him for OWI. This court need not address this argument because it has concluded that the preliminary breath test was not illegally obtained. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

C. Due Process/State's Change in Position.

¶13 Stuempfig's next argument is that his due process rights were violated when the trial court allowed the admission of the Intoximeter test results, through the testimony of the arresting officer, after the State had earlier represented that it would not be presenting that evidence to the jury.

¶14 The trial court conducted proceedings on this issue and concluded that the evidence was admissible. Although this court can understand Stuempfig's frustration with the State's change in position, this court agrees with the trial court's determination that he was not harmed by the change in position.

¶15 Stuempfig argues that the State's change in position prejudiced him because he released his expert witness on the Intoximeter issue after the State indicated it would not be using that evidence. As the State points out, however, any prejudice he suffered was cured by Stuempfig's ability to hire an expert and

have that expert testify at his trial. This court agrees that if Stuempfig would have been forced to go to trial without being able to rehire an expert on this issue, the trial court should have refused to allow the State to introduce this evidence. "Once a defendant has relied upon a prosecutorial promise in any way and the state does not fulfill its promise, the promise is to be held enforceable against the state." ***State v. Bond***, 139 Wis. 2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987).

¶16 However, under the facts as presented in this record, Stuempfig was not prejudiced by the State's change in position as to the admission of the Intoximeter. Stuempfig was advised in September that the State intended to introduce this evidence. The trial did not occur until May of the following year. At the trial, Stuempfig called an expert witness on the Intoximeter issue and therefore did not suffer any harm based on the State's change in strategy. Accordingly, there was no violation of due process, and the change in position was not fundamentally unfair.

C. Admission of Intoximeter Results Through Arresting Officer.

¶17 Stuempfig also contends that the trial court erroneously exercised its discretion in allowing the arresting officer to testify regarding the Intoximeter results in place of the officer who actually performed the test. This court cannot conclude that the trial court's evidentiary decision in this regard constituted an erroneous exercise of discretion.

¶18 Stuempfig asserts that the trial court should not have allowed the testimony because Wisconsin courts have permitted an officer who was a qualified operator and who conducted the actual test to testify as to the Intoximeter result. *See* ***City of West Allis v. Rainey***, 36 Wis. 2d 489, 153 N.W.2d 514 (1967).

Whereas, in the instant case, the officer who testified about the results was not the officer who actually conducted the test.

¶19 The trial court conducted a hearing on this issue, and called Officer Miller to provide testimony under oath before making a decision. In making the ruling to admit the evidence, the trial court reasoned:

> I think the primary issue here is whether or not the test is reliable, and what variables may have occurred to make it less reliable that only the person who administered the test will be in a position to know about.
>
> In this case, I do find that Officer Miller was within six to six-and-a-half feet of Officer Jones at the time the test was administered.
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> I further find that Officer Miller was not exclusively observing Officer Jones and the defendant at that time, and that he testified that he was involved in his own data entry at that time. I'm satisfied if any problems had arisen during the testing process, which would have led Officer Jones to verbalize anything, that Officer Miller would have heard those verbalizations.
>
> I also think it's relevant that the defendant was cooperative throughout the entire observation and testing process, minimizing the possibility that he did something covert to attempt to frustrate the process or lead to an incorrect result. I think it's established that the Intoximeter is essentially run by internal self-monitoring and validation, really a subject of very little outside incident but for the breath sample.
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> ….
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> So I think on balance that it is reliable to the extent that it can be admitted, and the jury can decide whether or not the absence of Officer Jones is relevant to how much weight the test should be given; and based on all those factors, I will find it admissible through the testimony of Officer Miller.

¶20 The trial court, then, determined that Miller was qualified to operate an Intoximeter, and that he was present during the time Officer Jones was

administering the test to Stuempfig. The trial court reasoned that if there had been any problems with the testing, Miller would have observed them. The trial court also noted that this testimony being admitted via Officer Miller instead of Officer Jones would go to the weight of the evidence, which could be assessed by the jury.

¶21 In addition, when Officer Miller testified at trial, he laid a foundation from his personal observation and his experience that the Intoximeter was working properly and the test was properly administered. Based on the foregoing, we cannot conclude that the trial court's determination constituted an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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