COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1665-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANCIS P. HUGHES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

¶1 DEININGER, J.[1] Francis Hughes appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and with a prohibited alcohol concentration (PAC), contrary to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

STAT. § 346.63(1)(a) and (b). He claims the trial court erred in failing to obtain a personal waiver from him of his right to a jury trial. We agree. We also conclude that a new trial will not violate the constitutional prohibition against double jeopardy. Accordingly, we reverse the conviction and remand the case for a new trial.

BACKGROUND

¶2 Hughes was involved in a two-vehicle motor vehicle accident at approximately 6:00 p.m. on a July evening. Both drivers were injured as a result of the accident, and both were taken to a hospital for treatment. An Iowa County Sheriff's Deputy investigating the accident spoke with the other driver's father who said that Hughes had been drinking. The officer also noted a strong odor of intoxicants emanating from Hughes' vehicle. The officer went to the hospital, and asked Hughes if he had been drinking. Hughes said that he had one beer after work, and that he had left work at 12:30 p.m. The officer arrested Hughes for OMVWI. The other driver was cited for and was later convicted of crossing the centerline.

¶3 Hughes consented to an evidentiary test of his blood alcohol concentration, but due to his need for medical treatment, the blood sample was not drawn until just over three hours after the accident. A diagnostic blood test was performed by hospital personnel on blood drawn from Hughes approximately one hour after the accident, and the State obtained the result of the diagnostic test by subpoena. Hughes moved to suppress the results of both blood tests, but the court denied his motions.

¶4 The case was scheduled for a jury trial, but in correspondence to the court and again in open court, the prosecutor and defense counsel agreed to a court

trial on stipulated facts. Hughes neither signed the correspondence nor personally commented in court regarding the waiver of his right to a jury trial. The parties agreed that if Hughes were convicted, the State would recommend the minimum statutory penalties and would not object to a stay pending appeal. If the case were later remanded for a new trial, the State further agreed not to oppose Hughes's withdrawal of his waiver of a jury trial.

¶5 During the bench trial on stipulated facts, the State introduced the results of both the "legal" and diagnostic blood tests, together with a supporting affidavit from a chemist at the state hygiene lab evaluating the test results. The trial court convicted Hughes of OMVWI and PAC, and Hughes appeals the judgment of conviction.

ANALYSIS

¶6 Hughes first argues that he is entitled to a new trial because he did not personally waive his right to a jury trial. Although conceding that Hughes "did not himself sign the writing waiving the jury trial and did not make a statement himself in open court waiving that right," the State argues that Hughes in fact knowingly waived his right to a jury trial under the "totality of the circumstances." Because the law requires that a defendant personally waive the right to a jury trial, we reject the State's argument.

¶7 WISCONSIN STAT. § 972.02(1) addresses the waiver of the right to jury trial. The statute provides that criminal cases be tried by a jury, "unless the defendant waives a jury in writing or by statement in open court or under s. 967.08(2)(b) [proceedings conducted by telephone], on the record, with the approval of the court and the consent of the state." The Wisconsin Supreme Court requires strict compliance with the statute in order to waive the constitutional right

to a jury trial. ***State v. Livingston***, 159 Wis. 2d 561, 569-70, 464 N.W.2d 839 (1991). The court has overruled case law that once permitted counsel to effectively waive a jury trial on behalf of a criminal defendant. ***Krueger v. State***, 84 Wis. 2d 272, 281-82, 267 N.W.2d 602 (1978). The court in ***Livingston*** described what action is necessary for a defendant to validly waive the right to trial by jury:

> [W]e hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed.

Livingston, 159 Wis. 2d at 569-70.

¶8 The facts in ***Livingston*** are quite similar to those before us now. Prior to trial, the prosecution and defense counsel mutually consented in open court to waiver of trial by jury. Although the defendant was present in the courtroom at the time of the consent, he was addressed neither by his attorney nor by the court and made no comment at all concerning waiver of his right to a jury. The court concluded that this was insufficient to effect a waiver of jury trial. ***Id.*** at 565.

¶9 In this case, the prosecutor and defense counsel mutually consented in open court to a waiver of a jury trial. As in ***Livingston***, Hughes was present, but he did not say anything regarding the waiver of his jury trial right. The record also contains a letter from Hughes' counsel to the trial court, with a copy to, among others, Hughes and the assistant district attorney assigned to the case. The letter states in part as follows: "I [Hughes' trial counsel] have again discussed this case with [the] Assistant District Attorney … and Mr. Hughes. We have reached the following agreement. Mr. Hughes would waive his right to a jury trial, and the parties would proceed to have this case decided by the Court." The letter is signed by Hughes' trial counsel but not by Hughes himself.

¶10 The record in this case thus contains no showing that Hughes at any time personally waived the right to a jury trial, either in open court or in writing. The State argues, without citation to legal authority, that we should apply a "totality of the circumstances" test, and that under such a test, Hughes waived his right to a jury trial. We acknowledge that Hughes was present in court when his trial counsel waived his right to a jury trial. While that may once have been sufficient to find a waiver under Wisconsin law, that is no longer the case. The supreme court emphasized in ***Livingston*** that "[t]he record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed." ***Livingston***, 159 Wis. 2d at 569-70.

¶11 The State also argues that no inference or presumption is needed in this case because Hughes' counsel explicitly stated in his letter to the court that he had discussed the case with Hughes, and that Hughes agreed to waive the right to a jury trial. But again, that is not a proper substitute for Hughes himself saying in writing or in open court that he agreed to the waiver. *See* ***Livingston***, 159 Wis. 2d at 570 ("[T]he ultimate question is what the defendant wants—a court trial or a

jury trial; it is his decision, no matter what advice he has received."). The State asserts that a "rigid mechanistic application of ***Livingston*** would serve none of the purposes" set out in the opinion in that case. We disagree and conclude instead that we must require strict compliance with this rule in order to protect a defendant's constitutional right to a jury trial.

¶12 Finally, the State contends that because the jury trial waiver was part of a plea agreement, we should apply contract law principles and conclude that Hughes got the benefit of his bargain. Although a defendant can bargain away his or her constitutional right to a jury trial, it must be accomplished in the manner set forth in WIS. STAT. § 972.02. Contract law cannot be used to breathe life into a jury trial waiver that does not otherwise meet legal requirements. The statute and controlling case law specifically provide that, to effectuate a waiver of right to a jury trial, Hughes must personally do so in an affirmative manner. He did not. Accordingly, we reverse and remand this case for a new trial.

¶13 Hughes next contends that there was insufficient evidence to support his conviction for OMVWI and PAC. Although we conclude that Hughes is entitled to a new trial, we agree with Hughes that double jeopardy considerations require us to address his claim of insufficient evidence. ***State v. Rushing***, 197 Wis. 2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995).[2] "The standard for reviewing

[2] The supreme court explained in ***State v. Ivy***, 119 Wis. 2d 591, 610, 350 N.W.2d 622 (1984):

> [W]here a defendant claims on appeal from a conviction that the evidence is insufficient to sustain the conviction, the appellate court is required to decide the sufficiency issue even though there may be other grounds for reversing the conviction that would not preclude retrial. If the appellate court concludes that there is insufficient evidence to sustain the conviction, it ordinarily would be precluded by the Double Jeopardy Clause from ordering a new trial even though a new trial might

(continued)

the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** Under this standard, we conclude that there was sufficient evidence to convict Hughes of OMVWI and PAC.

¶14 First, we consider the elements of the crimes at issue. Hughes was charged with OMVWI and PAC contrary to WIS. STAT. § 346.63(1)(a) and (b), respectively. It is undisputed that he was operating a motor vehicle at the time of the alleged offenses. Because this is Hughes' fourth offense, a blood alcohol concentration of 0.08 or higher constitutes a prohibited level. WIS. STAT. § 340.01(46m)(b). Similarly, a blood alcohol concentration of 0.08 or higher is prima facie evidence of his being under the influence of an intoxicant at the time of the offense. WIS. STAT. § 885.235(1g)(cd).

¶15 We agree with Hughes that the odor of alcohol emanating from his vehicle, standing alone, would not be sufficient evidence to convict him of either OMVWI or PAC. We thus focus our inquiry on the two blood test results presented to the trial court: one is a diagnostic test performed about an hour after the accident, and the other is a "legal" test performed just over three hours after the accident. Diagnostic blood test results are generally admissible in the context of an OMVWI case, and they are not subject to informed consent requirements. *See* ***City of Muskego v. Godec***, 167 Wis. 2d 536, 546, 482 N.W.2d 79 (1992).

¶16 Hughes objects to the trial court's reliance on the result of the diagnostic test and the supporting expert affidavit because, according to Hughes,

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otherwise have been warranted because of an error in the trial court proceedings.

the expert based her conclusions on assumptions for which there is no support in the record.[3] This issue is raised for the first time on appeal, and we need not review it. ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 171, 288 N.W.2d 129 (1980). Hughes made no objection or argument regarding deficiencies in the expert's assumptions or calculations in the trial court.[4] In fact, it was Hughes' counsel who moved the affidavit and test results into evidence as "stipulated facts." Both parties presented the evidence to the court as items the court could consider in making its decision. Defense counsel made no other comment or argument regarding the "stipulated facts" in the record. Hughes cannot now, for the first time on appeal, argue that it was improper for the court to rely on this evidence.[5]

¶17 Moreover, we note that the assumptions Hughes claims were unsupported by evidence in the record relate only to the expert's extrapolation of the test results back to the time of the accident. Her conversion of the "serum ethanol concentration," reported for the diagnostic test, to "whole blood ethanol concentration" did not rely on any assumptions regarding the timing or amount of alcohol Hughes had consumed, but only on "accepted distribution ratios." The

[3] In her affidavit, the expert converted the diagnostic test result from serum-based to whole blood-based results (0.13 to 0.11—0.12, respectively). Next, the expert assumed that either (1) Hughes was "post-absorption," or (2) he still had one drink in his stomach at the time of the accident. She then calculated his blood alcohol concentration as of the time of the accident under both assumptions (0.124 or 0.09, respectively).

[4] In pretrial motions, Hughes challenged the diagnostic blood test on the grounds that the hospital where the test was performed did not possess a permit for conducting informed consent blood tests. He also attacked the issuance of the subpoena to obtain the diagnostic test result. The trial court denied these motions, and Hughes does not renew these claims on appeal.

[5] In support of his argument, Hughes cites ***Novitzke v. State***, 92 Wis. 2d 302, 284 N.W.2d 904 (1979). However, in ***Novitzke***, the defendant had objected to the allegedly improper hypothetical at trial. ***Id.*** at 305.

diagnostic test, after conversion, yielded a "whole blood ethanol concentration to a reasonable degree of scientific certainty of 0.11—0.12 g/100 ml." This sample was drawn within three hours of Hughes' driving, and no expert extrapolation to the time of driving was required to establish that Hughes was OMVWI and PAC at the time of the accident. *See* WIS. STAT. § 885.235(1g).

¶18 Hughes might well be able to undermine the weight or credibility of the expert's calculations and conclusions by presenting competing expert testimony, or by establishing facts in the record to refute the reasonableness of the State expert's assumptions. Hughes did neither at the trial. In view of his "stipulation to the facts" presented to the trial court, we conclude that those facts were sufficient to allow the trial court to find Hughes guilty of OMVWI and PAC.[6]

¶19 Because the diagnostic test result alone is sufficient evidence to convict Hughes of OMVWI and PAC, we do not address his objections to the admissibility of the legal blood test. Hughes asserts a lack of probable cause for

[6] Hughes insists in his reply brief that because the expert's conversion of the serum concentration to whole blood concentration was necessary in order for the court to consider the diagnostic test result, we must also look at the assumptions the expert used to make other calculations in her affidavit. We fail to see why. Even so, however, we note that her two assumptions were apparently intended to account for two possibilities with respect the circumstances at the time Hughes drove—either all of the alcohol he had consumed had been absorbed into his bloodstream by then, or, some alcohol still remained in his stomach, which then entered his bloodstream during the ensuing hours. We do not conclude that it was improper for the trial court to infer from the expert's affidavit that Hughes' blood alcohol level at the time of driving was at least 0.08, and possibly higher. We reject Hughes' suggestion that, in order to support the expert's opinion, it would have been necessary for the State to show how much alcohol Hughes had consumed and when. That type of evidence is rarely available, at least in a precise or reliable way. (We acknowledge that Hughes said that he had consumed only one beer in the six hours between his leaving work and the time of the accident. But, contrary to his assertion, there *is* evidence in the record tending to show that he consumed more than one drink prior to the accident: his blood alcohol concentration of 0.11 or 0.12 an hour later, and 0.079 three hours later. It was not unreasonable for a trier of fact to infer from these test results that Hughes has consumed considerably more than one beer prior to the accident.)

his arrest and that his consent to the "legal" test was coerced. Neither would affect the admissibility of the diagnostic test result. We therefore do not address these issues at this time.

CONCLUSION

¶20 For the reasons discussed above, we reverse the appealed judgment and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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