

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP194

Cir. Ct. No. 2006TR210

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF BURNETT,

PLAINTIFF-RESPONDENT,

V.

KATHERINE E. LARSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
MICHAEL J. GABLEMAN, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Katherine Larsen appeals a judgment of conviction for operating while intoxicated, first offense. Larsen contends the trial

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

court erred by admitting the results of a breathalyzer test and expert testimony regarding the validity of the test. We conclude the trial court properly exercised its discretion in admitting the test results and the testimony and therefore affirm.

BACKGROUND

¶2 On December 29, 2005, Larsen drove her car off the road and into a ditch. Sheriff's Deputy Ryan Bybee responded to the scene and subsequently administered a breathalyzer test using an Intoximeter breath testing device. The test indicated Larsen had a blood alcohol concentration of .12%.

¶3 Larsen filed a motion in limine to preclude the State's expert from testifying regarding the validity of the test. The motion was denied. Larsen was found guilty after a jury trial.

DISCUSSION

¶4 The admissibility of evidence lies within the trial court's discretion. *State v. Volk*, 2002 WI App 274, ¶17, 258 Wis. 2d 584, 654 N.W.2d 24. We will uphold the trial court's ruling if it "examined the relevant facts, applied the proper standard of law and, using a rational process, reached a conclusion a reasonable judge could reach." *Id.*

¶5 If a "breath alcohol instrument's 'method[] of testing' has been recognized as accurate and complies with the specifications of WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § TRANS 311.04, it is afforded a presumption that its test results are accurate and reliable." *State v. Busch*, 217 Wis. 2d 429, 443, 576 N.W.2d 904 (1998). The presumption of accuracy allows the test results to be admitted without foundational testimony regarding the

machine's reliability and accuracy. *State v. Dwinell*, 119 Wis. 2d 305, 310, 349 N.W.2d 739 (Ct. App. 1984).

¶6 Larsen argues the results of the Intoximeter testing and testimony taken from the State's expert regarding the reliability of the machine should not have been admitted because the Intoximeter was not properly tested according to WIS. STAT. § 343.305(6). Section 343.305(6)(b)(3) requires the Intoximeter to be certified for accuracy by trained technicians "before regular use of the equipment and periodically thereafter at intervals of not more than 120 days."

¶7 Larsen misconstrues WIS. STAT. § 343.305(6)(b). At best, if the failure to test the Intoximeter after 120 days was a violation of the statute, then there may be no presumption of accuracy. This does not mean the test results or the State's expert's testimony are automatically inadmissible. Rather, the State must present evidence of the Intoximeter's reliability and accuracy.

¶8 The Intoximeter used to test Larsen's breath was tested on December 27, two days before Larsen's arrest. On February 4, the machine ceased functioning properly. The sheriff's department took the machine out of service until it was repaired. Therefore, the machine was not tested 120 days after December 27 as required by statute. However, the State's expert testified at the motion hearing that the Intoximeter conducted self-tests every time it was used, and the machine did not malfunction prior to February 4. The expert therefore concluded the machine functioned properly on December 29. The trial court found nothing in the record to indicate the machine was not in good working order on December 29 and denied the motion to exclude the evidence. The trial court examined the facts, applied the proper standard of law, and reached a reasonable conclusion. See *Volk*, 258 Wis. 2d 584, ¶17. Therefore, the trial court properly

exercised its discretion to admit the breath test results and the testimony of the State's expert.

By the Court.—Judgment affirmed.

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

