

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2001

Cornelia G. Clark
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. 00-2863

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHAD T. MAXON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 BROWN, P.J.¹ Chad T. Maxon appeals his trial court conviction for operating a motor vehicle while under the influence of an intoxicant. He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

presents three issues: First, he claims that there was not probable cause to stop and arrest him. Second, he asserts that there was not a sufficient foundation for the introduction of the breathalyzer test. Third, he contends that there was not sufficient evidence for a jury to convict him. We disagree on all of these issues and affirm.

FACTS

¶2 On September 11, 1999, at about 9:00 p.m., Officer Thomas Hausner, who has training and certification in Standard Field Sobriety Testing, observed a vehicle without any license plates. Hausner then proceeded to pull the vehicle over to check the registration. The vehicle had tinted windows making it difficult for Hausner to see the Illinois registration sticker in the back window. Hausner then approached the driver's side of the vehicle. The officer smelled a strong odor of alcohol on Maxon's breath and his speech was somewhat thick-tongued and slurred. Hausner asked the driver, who later was identified as Maxon, if he had been drinking. Maxon replied that he had had a couple of beers, but nothing since 4:00 p.m. Hausner then asked Maxon to step out of the vehicle so he could perform sobriety tests. The first test performed was the horizontal gaze nystagmus test. Hausner observed six clues during this test indicating that Maxon was under the influence. Next, Hausner asked Maxon to recite the alphabet, which he was unable to do on both attempts. The third test was the walk-and-turn test. Maxon did not step heel-to-toe, as instructed, raised his arms and stepped off the line, all indicating that he was under the influence. The final test performed was the one-legged stand. Maxon did count to thirty and complete the test; however, he raised his arms during it.

¶3 Hausner then placed Maxon under arrest for operating while intoxicated. Maxon was taken to the sheriff's office. Hausner used his watch, not the intoxilyzer machine, to time the required twenty-minute observation period. The test card only showed a sixteen-minute observation period. He then administered the breathalyzer test. Maxon scored a 0.16% on the breathalyzer test, well above the legal limit. Maxon was then issued a second citation for operating with a prohibited alcohol concentration. On September 21, 1999, the breathalyzer machine was disabled and replaced by another machine. A jury convicted Maxon of operating while intoxicated and he appeals.

DISCUSSION

¶4 The first issue is whether the original stop was unlawfully extended by the officer. Maxon argues that, even though the officer might have had a valid reason to initially stop the vehicle because it had no license plates, there was a valid registration sticker displayed in the back window of the car. Maxon argues that once the officer observed this sticker, the stop should have ceased. However, the trial court determined that there was no testimony that Hausner had actually seen the registration sticker in the back window of the car. In addition, the windows of the car were tinted, making it extremely difficult for him to see the registration sticker.

¶5 Moreover, the officer's testimony was that, even if he had seen the registration sticker, he would have needed to examine it and make sure that it was valid and then check with the driver to confirm. This is consistent with *State v. Griffin*, 183 Wis. 2d 327, 329, 515 N.W.2d 535 (Ct. App. 1994), which held that "the absence of a registration plate, and reasonable inferences that can be drawn from that fact, constitutes reasonable suspicion sufficient to justify an

investigatory stop of a motor vehicle.” If the officer had not conducted the stop, he would have had no way of knowing if the registration was valid, since he had not seen the registration sticker in the back window.

¶6 Maxon relies on *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994), in asserting that once the officer observed the temporary registration sticker, the purpose of the stop had been satisfied, making the arrest invalid. In *McSwain*, the officer testified that the sole purpose of the stop was to check the registration of the vehicle and that he had already verified that the registration sticker was in fact valid when he approached the vehicle’s driver. *Id.* at 560. However, that is not the situation in this case. The trial court made a finding of fact that Hausner could not remember if there was a registration sticker, or if he had observed or validated it. Since this finding of fact was made, *McSwain* does not apply to the facts of the case.

¶7 Furthermore, the *McSwain* case also states that the officer could approach the vehicle and explain to the driver the reason for the stop, even when a valid registration sticker is observed. *Id.* at 562. Even if the officer had seen the registration sticker, he still would have had just reason to approach Maxon and explain the reason for the stop. When he did approach the vehicle, he smelled alcohol on Maxon’s breath and heard his speech was somewhat slurred. The officer then had a reasonable suspicion that an illegal activity was occurring—driving while under the influence. This suspicion justified the extension of the stop to discover if Maxon was operating under the influence. *Id.* at 561.

¶8 The second issue in this appeal is whether there was sufficient foundation for the introduction of the results of the breathalyzer test. Maxon claims that the fact that the required twenty-minute observation period was not

met and that the breathalyzer machine was not certified for accuracy within 120 days after it was used makes the results of the test inadmissible. This argument is contrary to the holding in *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981), where this court held that factors such as waiting the twenty-minute observation period and certification of the breathalyzer go to the weight of the evidence, not to the admissibility of the results of the test. *Id.* at 677. The court in *Wertz* concluded, “breathalyzer tests carry a ‘prima facie presumption of accuracy,’ and the question of how accurately the test was performed goes to the weight to be given to the test, not to its admissibility.” *Id.* at 674. These are factors for the jury to consider when evaluating the accuracy of the test results, but they do not make the results of the test inadmissible. *Id.* at 677. The trial court properly determined that the results of the test were admissible.

¶9 The third issue of this appeal is whether the evidence was sufficient for the jury to convict Maxon. A trained officer smelled alcohol on the breath of Maxon. He had somewhat slurred speech and was thick-tongued. He failed several of the sobriety tests administered during the stop. He admitted that he drank some beer that day. There was also the breathalyzer test, which confirmed that Maxon indeed was under the influence of alcohol. Taken together, this is clearly sufficient evidence for a reasonable jury to conclude that Maxon was operating a vehicle while under the influence of alcohol. The decision of the trial court is affirmed.

By the Court.—Judgment affirmed.

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

