

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2000

Cornelia G. Clark
Acting 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. 99-2557-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH NEU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Kenneth Neu appeals from a judgment of conviction for operating a motor vehicle while intoxicated pursuant to WIS. STAT.

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

§ 346.63(1)(a). The judgment followed a jury's guilty verdict.² Neu was convicted as a repeat offender.

¶2 On appeal, Neu contends that the trial court erroneously permitted the State to use evidence of his prearrest silence as part of its case-in-chief contrary to the rule of *State v. Fencl*, 109 Wis. 2d 224, 238, 325 N.W.2d 703 (1982). We uphold the court's ruling because the evidence was not used to imply Neu's guilt. Neu also argues that the State improperly cross-examined him about his prearrest silence. We hold that the cross-examination was proper because Neu testified on his own behalf. We affirm the judgment.

¶3 Neu first argues that the State's questioning of the arresting officer about the horizontal gaze nystagmus test during the State's case-in-chief violated his right to prearrest silence. Neu quotes the following exchange between the prosecutor and the officer:

Q. Did you ask the defendant or did the defendant indicate to you whether or not he had any eye disorders?

Mr. Jensen: Well, I'll object to that form of the question because I think it's a comment on the defendant's silence at that point if he was asked.

The Court: ... Objection's overruled.

Mr. Langholtz:

Q. Did the defendant indicate to you whether or not he had any eye disorders?

A. He did not.

Q. Pardon me?

A. He did not indicate he had any eye disorders.

² A companion charge of operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(1)(b) was dismissed.

Neu contends that this exchange violated the *Fencl* holding that “the protections of the Fifth Amendment do extend to pre-*Miranda*, prearrest silence.” *Id.* at 236.

¶4 However, upon reading the State’s response brief, we learn for the first time that the passage quoted by Neu is actually from the State’s *redirect* examination of the arresting officer.³ On direct examination, the officer had testified that Neu had failed the horizontal gaze nystagmus test. Then, on *cross-examination* of the officer, Neu’s attorney put the following question to the officer:

Q. Now, during the course of your training on this [test], you were trained that there are certain ophthalmologic problems that will interfere with the person’s ability to perform the test; correct?

A. That’s correct.

Thus, it was Neu, himself, who first suggested that his failure of the test might be due to an eye problem. As such, the purpose of the State’s redirect questioning of the officer was not to use Neu’s silence to imply guilt, *see id.* at 238, but rather to rebut the very inference which Neu had injected into the trial via his cross-examination of the officer. We uphold the trial court’s evidentiary ruling.

¶5 Neu also argues that the State improperly cross-examined him about his prearrest silence. But to prevail on this argument, Neu must overcome *State v. Sorenson*, 143 Wis. 2d 226, 258, 421 N.W.2d 77 (1988), which “allow[s] probative comment on a defendant’s pre-*Miranda* silence when the defendant elects to testify on his or her own behalf.” To avoid *Sorenson*, Neu argues that the trial court’s error in allowing the redirect testimony we have previously discussed compelled him to testify. But we have held that the trial court did not err.

³ We caution Neu’s attorney to be more forthright and accurate in the future.

¶6 Moreover, nothing in the record supports Neu’s claim that he took the stand as a result of the trial court’s evidentiary ruling. Neu’s testimony on direct examination described his various physical problems in an attempt to explain why he failed the field sobriety tests—not why he failed to reveal these problems to the officer. The State’s cross-examination of Neu was proper.

¶7 We uphold the trial court’s evidentiary rulings and we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

