COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0031

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

COUNTY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

v.

DALE H. CALLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

¶1 SNYDER, J.[1] Dale H. Callan appeals from a jury verdict of guilty to a forfeiture violation of operating an automobile while intoxicated (OAWI) contrary to the Waukesha county ordinance adopting WIS. STAT. § 346.63(1)(a).

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

Callan complains that the prosecutor impermissibly commented to the jury on Callan's failure to testify at trial and seeks reversal of the OAWI forfeiture judgment. We are not persuaded by Callan's arguments and affirm.

¶2 The relevant facts are undisputed. The arresting officer, Waukesha County Deputy Sheriff Paul J. Beal, was the only witness to testify before the jury. Beal testified that while he was driving westbound on County Highway I, Callan's eastbound truck crossed into his traffic lane causing Beal to deviate from his course of travel. Beal turned his squad car around, followed Callan's truck and observed the truck cross both the center line and fog line. Beal activated his emergency lights and siren to stop Callan's vehicle.

¶3 During the stop, Beal asked Callan to submit to field sobriety tests, including reciting the alphabet and the months of the year beginning with January and ending with December. Beal testified that Callan did not recite the alphabet correctly, failed to comply with Beal's instructions in reciting the months of the year and spoke in a very slow, delayed manner. Beal next asked Callan to perform the finger-to-nose test, and when Callan attempted the test, he started to fall over. Because the next two tests (one-leg stand and heel-to-toe walking) would be more difficult than the finger-to-nose test, Beal terminated the field sobriety testing "for safety reasons" and arrested Callan for operating while intoxicated.

¶4 During closing argument, Assistant District Attorney Robert Fletcher told the jury:

> The defendant never told the deputy of any other particular reason why he wouldn't be able to perform those tests, never gave specific reasons why he wouldn't be able to perform it. We never heard from the defendant as to why he wasn't able to perform those tests.

In addition, Fletcher stated, "It's also a massive coincidence there's been no testimony by the defendant to prove there's anything other than alcohol that would have impaired his ability."

¶5 Callan cites to the rule that a prosecutor violates a defendant's constitutional right against self-incrimination by commenting on the defendant's failure to testify in a criminal case, *see* ***State v. Spring***, 48 Wis. 2d 333, 338, 179 N.W.2d 841 (1970), but concedes that the rule does not apply in ordinary civil cases. A first OAWI offense is a forfeiture violation and "[c]onduct punishable only by a forfeiture is not a crime." WIS. STAT. § 939.12; *see also* ***State v. Albright***, 98 Wis. 2d 663, 673, 298 N.W.2d 196 (Ct. App. 1980); ***State v. Kramsvogel***, 124 Wis. 2d 101, 116, 369 N.W.2d 145 (1985).

¶6 Callan argues, however, that civil forfeiture actions are quasi-criminal proceedings, or hybrid proceedings having both civil and criminal characteristics, and that this court has said that a defendant retains his or her Fifth Amendment rights in a civil proceeding. *See* ***Village of Menomonee Falls v. Kunz***, 126 Wis. 2d 143, 148, 376 N.W.2d 359 (Ct. App. 1985).[2] Callan, however, ignores the ultimate holdings in ***Kunz*** that a forfeiture action is civil in nature, that Kunz was not criminally prosecuted and that the Fifth Amendment protection Kunz relied on did not apply to the forfeiture action. *See* ***id***. Callan's situation is indistinguishable from that of Kunz and his reliance on ***Kunz*** is misplaced. We

[2] Kunz was found guilty of a forfeiture violation of the Village of Menomonee Falls ordinance adopting WIS. STAT. § 346.63(1)(a) and argued that he was entitled to the protections afforded under the Fifth Amendment by ***Miranda v. Arizona***, 384 U.S. 436 (1966). The ***Kunz*** court held that ***Miranda*** did not apply to a routine traffic stop where the eventual prosecution is a civil forfeiture proceeding.

conclude that Callan's contention, that the prosecutor's comments to the jury violated his Fifth Amendment right to remain silent, is without merit.

¶7 In addition, Callan admits that the prosecutor could have called him adversely to testify, *see* ***Bayside v. Bruner***, 33 Wis. 2d 533, 537, 148 N.W.2d 5 (1967), but argues that the prosecutor should not have been allowed to comment on his silence because he was not called adversely. Callan cites to no authority in support of that argument and we know of none. Arguments unsupported by references to legal authority will not be considered. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (1977).[3]

By the Court.—Judgment affirmed.

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

[3] Because we conclude that Callan's right to remain silent was not violated by the prosecutor's comments to the jury in closing argument, we need not address the issues of waiver or harmless error.