

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2000

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. 00-1121-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. EMERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ David A. Emery appeals from a judgment entered after he pled no contest to operating a vehicle while intoxicated, second

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

offense, contrary to WIS. STAT. § 346.63(1)(a) (1997-98).² He claims the trial court erred when it reversed its evidentiary ruling during trial. Because Emery entered a no contest plea, he waived his right to raise this issue on appeal. Therefore, this court affirms.

I. BACKGROUND

¶2 On July 17, 1999, at approximately 1:00 p.m., Emery was involved in a motor vehicle accident. While driving his car at the intersection of 20th Street and Teutonia Avenue, he was rear-ended. Police were called. The police officers observed that Emery had bloodshot glassy eyes and they smelled a strong odor of alcohol on his breath. No field sobriety tests were administered at the scene because Emery advised the officers he was handicapped and needed a cane to walk.

¶3 Emery was taken into custody and transported to the police station at 3:28 p.m. There was some dispute about what time Emery was asked to submit to a breathalyzer test. The record reflects that the required twenty-minute observation period commenced at 4:15 p.m., and Emery was marked as a refusal at 4:39 p.m. One police officer testified that Emery would not have been asked to submit to the test until after the observation period.

¶4 Before trial, Emery raised the issue of excluding the refusal evidence on the basis that it was not conducted within the statutorily required three-hour time period. *See* WIS. STAT. § 885.235(3). The trial court found that Emery was not read the informing the accused form until after 4:09 p.m., which was not

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

within the three-hour time period. The trial court ruled that, as a result, the State failed to meet its burden in establishing that a refusal occurred and precluded the State from introducing any evidence relating to the refusal.

¶5 During the trial, Emery's counsel asked Police Officer Thomas Jones: "Was [Emery] asked to perform any other testing there [at the station], field testing?" The officer responded: "Not field testing." The State requested a sidebar, raising the issue that this question improperly invaded into the area of testimony that was excluded. The trial court agreed and ruled that it would allow the State to ask questions about what happened at the station.

¶6 After lunch that day, Emery entered a no contest plea. Judgment was entered. He now appeals.

II. DISCUSSION

¶7 Emery contends that his counsel's question about testing at the station did not violate "the letter or the spirit of the court's instructions or rulings." He contends that the trial court's ruling did not preclude testimony regarding Emery's actions or conduct at the station. Rather, the ruling excluded only questions relating to the refusal to take the breath test at the station. This court need not even address the merits of whether the trial court's evidentiary ruling was erroneous because when Emery entered his no contest plea, he waived the right to raise the evidentiary ruling on appeal.

¶8 Under *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983), once a no contest plea is accepted, the defendant waives his or her right to appeal nonjurisdictional issues as a matter of law. "[T]he only public policy exception to the rule of waiver is the legislatively created one in respect to motions

to suppress, and the intent or reservation of the defendant at the time of entering a plea is irrelevant in respect to preserving a right to appeal.” *Id.* at 126. Emery does not argue that the evidentiary ruling operated as a motion to suppress. Although it is not uncommon to combine suppression motions with refusal hearings in these types of cases, that did not occur here. This case does not involve a motion to suppress. The issue raised involved an evidentiary ruling, which Emery waived when he entered his plea.

By the Court.—Judgment affirmed.

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

