COURT OF APPEALS
DECISION
DATED AND RELEASED

August 9, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3318

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

CITY OF NEW BERLIN,

Plaintiff-Respondent,

v.

THOMAS W. KOEPPEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed and cause remanded with directions.*

BROWN, J. Thomas W. Koeppen appeals his jury conviction for driving a vehicle while intoxicated. *See* § 346.63(1)(a), STATS. We reverse because evidence that a handgun was found in the trunk of his car was irrelevant and, even if it had any probative value, its prejudice outweighed the probative value.

The facts are as follows. A New Berlin police officer was dispatched to a home where an unidentified person had telephoned a death threat to, and later driven past, the home. The officer stationed his vehicle near the home to watch for a small, dark-colored vehicle described by the complainant. Shortly thereafter, the officer observed a red Fiero drive past the location. Believing that it might be the vehicle containing the person making the threats, the officer followed the Fiero.

The officer estimated that the Fiero was traveling fifteen to twenty miles per hour over the speed limit and observed that the driver failed to obey a stop sign. The officer stopped the vehicle and recognized Koeppen from prior contacts. He asked Koeppen to produce a driver's license and, after fumbling through his wallet, the license was produced. During questioning about Koeppen's speed and his running the stop sign, the officer noted Koeppen's glassy eyes, slurred speech and a moderately strong odor of alcohol. Based upon his observations, the officer asked Koeppen if he would voluntarily perform field sobriety tests.

Koeppen responded that he would like to tape record the dialogue surrounding the tests. The officer agreed to allow Koeppen to do so if Koeppen had a tape recorder available. Koeppen then went to the trunk, opened it, fumbled through it for a few seconds and abruptly closed it without obtaining a tape recorder. He then performed the tests, which the officer opined were unsatisfactory. The officer then placed Koeppen under arrest and another officer, who had arrived on the scene as a backup, conducted a search of the

vehicle incident to arrest. The search of the trunk revealed the tape recorder in plain view. The search also revealed a .32 caliber handgun lying next to the recorder, also in plain view.

Koeppen was then transported to the police department where he consented to a chemical test of his breath. However, the intoxilyzer detected an interference and would not yield a valid test result. Koeppen was then asked to submit to a blood test and he agreed. The blood test result came back below the legal limit.

Prior to trial, Koeppen brought a motion in limine seeking to prevent the City from eliciting any testimony about the gun on the grounds that it was irrelevant and prejudicial. The City opposed the motion and the trial court denied the motion in limine. Following is a complete accounting of the trial court's ruling:

> THE COURT: … Certainly the facts in the case that the issues of this event are as correctly stated by the defense but in light of [the] fact that apparently we have a refusal and also in light of the fact that it is always an element of event, the judgment as jury will be instructed necessarily to safely operate a motor vehicle. Mental understanding of an individual is always in issue. Whether or not Mr. Koeppen fully intended to look for a gun as opposed to tape recording I guess only Mr. Koeppen knows but there certainly are a number of facts here. Again the situation that the defendant went into the trunk as part of the investigative process if you will as opposed to this being simply a. Stop [sic] the defendant gets out of the vehicle and does the test, does nothing in relation to the trunk I think crosses the bounds of irrelevancy into a solid area of relevancy and it is the sequence of events that the

> court is hanging its hat so to speak to make that determination and I think under those circumstances the prosecution is entitled to present that testimony and have the jury raise whatever inference they wish from that situation. I also find again because of the nature of the incident here that it's not unduly prejudicial to the defendant and therefore would meet the criteria under [§] 904.12 [, STATS.,] and I will not grant the defendant's motion in limine as I perceive it here and in respect to that particular evidentiary or testimonial issue.

Both Koeppen and the City write that it is difficult to discern the reasoning process of the trial court by this statement. However, the City distills from the decision three reasons for the ruling. First, the evidence goes to Koeppen's state of mind at the time of the incident. Second, the unique sequence of events makes the evidence relevant. Third, the evidence is important to the nature of the defense.

In determining whether the trial court erroneously exercised its discretion in denying the motion in limine, the record must reflect the trial court's "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.,*** 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). Although this court also has some difficulty understanding the court's "reasoned application," our duty is to search for reasons to sustain the trial court's discretionary decision. *See* ***Looman's v. Milwaukee Mut. Ins. Co.,*** 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968).

We assume, therefore, that state of mind was one of the reasons employed by the trial court in support of its denial of the motion. Koeppen was

allegedly intoxicated. Perhaps the trial court reasoned that intoxicated persons often exhibit signs of volatility and ill will that they do not possess when sober. As such, a jury should be free to infer a mental state of ill will, and therefore intoxication, from the fact that Koeppen intentionally sought to open the trunk to his car where a handgun was located.

If that was the reasoning of the trial court, we disagree. It does not necessarily follow that an intoxicated person exhibits ill will as a mental state of mind. To state the premise that way is more of a general subjective assessment than an objective fact. The assumption, without more, is simply unprovable. As such, it is not probative.

Even if the evidence were somehow probative to state of mind, the prejudice resulting to Koeppen would outweigh the probative value. There was evidence that the officers initially came to the area to search for a person who had made death threats. The danger that the jury might connect Koeppen to this circumstance is very real. In addition, evidence that Koeppen had a handgun in his trunk tends to show that he is a dangerous person for reasons other than his alleged drunk driving. We conclude that the evidence could not have been admitted under a state of mind theory.

We have searched for other reasons to support the trial court's decision and cannot find any. We are confident that the trial court erroneously exercised its discretion in allowing the handgun testimony to be admitted.

The remaining question is whether the error was harmless. We are satisfied that it is not. Koeppen tested at below the presumed limit for intoxication. While the officer testified to Koeppen's fumbling with his wallet, his failing sobriety tests and his inability to find a tape recorder that was in plain view, we are convinced that the test result, at least, makes Koeppen's defense a genuine one. Therefore, we are not confident about the reliability of the outcome. We reverse and remand with directions that further proceedings take place which are not inconsistent with this opinion.

By the Court. – Judgment reversed and cause remanded with directions.

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