

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 1997

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-1262

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THEODORE E. JEROME,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed.*

HOOVER, J. Theodore Jerome appeals a judgment convicting him of operating while intoxicated, contrary to § 346.63(1)(a), STATS., and operating with a prohibited alcohol concentration, contrary to § 346.63(1)(b), STATS. He asserts that the trial court erroneously exercised its discretion by not suppressing Intoxilyzer test results in response to the State's failure to respond timely to his motion for discovery and inspection of the Intoxilyzer machine. He further argues

that a videotape should be suppressed because the State was late disclosing its existence, and that the trial court erroneously exercised its discretion by not granting a continuance. This court concludes that Jerome's discovery motion was untimely and failed to demonstrate facts supporting cause to grant the requested relief. Further, the court properly exercised its discretion by concluding that Jerome suffered no prejudice as a result of the videotape's late disclosure. Therefore, this court affirms the trial court.

On October 11, 1996, Jerome was stopped and cited for OWI. He submitted to an Intoxilyzer 5000 test, reporting a value of .19% by weight. He was then cited for operating with a prohibited alcohol concentration.

On October 28, 1996, Jerome filed a motion for discovery and inspection of the Intoxilyzer. On March 10, 1997, he filed a motion in limine to prevent the State from introducing the results of the Intoxilyzer test on the grounds that he had not been provided adequate discovery. At the hearing, he contended that because a first OWI is a civil case, the rules of civil discovery, §§ 804.09 and 804.12, STATS., applied. He further argued that the criminal discovery statute, § 971.23, STATS., applied. Jerome argued that the State failed to provide him with maintenance reports on the testing machine and the simulator solution certification within thirty days as required by §§ 804.09 and 804.12, STATS. He therefore urged suppression of the evidence based on surprise. He further argued that a videotape of Jerome should be suppressed, as counsel was not made aware of its existence until shortly before trial. The trial court denied the motion. On March 11, 1997, a jury convicted him of both citations.

Whether to admit evidence and whether to grant a suppression motion that is not based upon constitutional grounds are issues addressed to the

sound discretion of the trial court. *State v. Morgan*, 195 Wis.2d 388, 416, 536 N.W.2d 425, 435 (Ct. App. 1995). This court will uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. *State v. Shanks*, 152 Wis.2d 284, 289, 448 N.W.2d 264, 266 (Ct. App. 1989).

Certain specific discovery sections supersede ch. 804, STATS., civil discovery rules. Section 801.01(2), STATS., defines the scope of civil discovery. It reads:

Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule.

For purposes of a civil OWI charge, § 345.421, STATS., replaces the general rules of civil discovery in §§ 804.09 and 804.12, STATS. It is the sole discovery procedure in civil traffic cases.¹

Section 345.421, STATS., is not self-executing. Rather, it requires that the defendant file a discovery motion within ten days of the alleged violation and show cause why the defendant should be allowed to inspect and test any devices used to determine a violation. *Id.* Jerome filed his discovery motion untimely, over two weeks after the alleged violation. Further, his motion simply stated that he believed the results were inaccurate; he failed to state any facts demonstrating cause to allow the inspection. Finally, Jerome did nothing to bring the unnoticed motion to a hearing. Defense counsel cannot file a late and deficient

¹ Further, § 971.23, STATS., a criminal discovery statute, is inapplicable in this case.

motion, fail to cause it to be heard, and then claim surprise. The trial court relied upon the proper legal standard and did not erroneously exercise its discretion.

Jerome also contends that the trial court erroneously exercised its discretion by failing to grant a continuance. It is well established that a continuance is not a matter of right. *Robertson-Ryan & Assocs. v. Pohlhammer*, 112 Wis.2d 583, 586, 334 N.W.2d 246, 249 (1983). Rather, the decision to grant or deny a continuance lies within the trial court's discretion. *Id.* A party must demonstrate prejudice in order for the court to grant a discretionary continuance. *See Allen v. Allen*, 78 Wis.2d 263, 275, 254 N.W.2d 244, 250 (1977) (superseded by statute on other grounds).

The record demonstrates that the court exercised a rational thought process when determining that Jerome suffered no prejudice and properly denied the continuance. The court concluded that any unfair prejudice could be cured by delaying the trial to provide the defense sufficient time to examine the video and documents.² In addition, it concluded that because the district attorney ordinarily does not send out maintenance reports on the Intoxilyzer machine and, because Jerome failed to make a timely request to examine the machine, the failure to mail maintenance reports did not constitute unfair prejudice. Finally, in reference to the video, the court determined that Jerome knew about the video, but apparently failed to tell his counsel about its existence. While defense counsel complained of not having police reports, which might have indicated the existence of a video, the court concluded that Jerome should have been aware of not having any police

² It determined that a half-hour was adequate because there was only one fact witness in the case, and the case was not complicated.

reports earlier.³ Further, and most importantly, Jerome failed to provide any compelling reason showing why he would be prejudiced by not receiving a continuance. Therefore, the court properly exercised its discretion by determining that Jerome demonstrated no prejudice and therefore properly denied the continuance.

By the Court.—Judgment affirmed.

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

³ A dispute existed as to whether Jerome received police reports. The district attorney's office contends it sent Jerome the reports; however, Jerome claims he never received them.

