COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 18, 1995

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.

NOTICE

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

No. 95-0015-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EVA M. BAKKEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

MYSE, J. Eva Bakken appeals a judgment of conviction for operating while intoxicated, second offense, contrary to § 346.63(1)(a), STATS., and operating with a blood alcohol concentration in excess of 0.1%, contrary to § 346.63(1)(b). Bakken contends that: (1) the trial court erred by failing to suppress a statement she made to the investigating officer that she had not consumed any intoxicating beverages prior to being stopped; (2) the trial court erred by refusing to permit Bakken to introduce evidence regarding the procedure used by the State of Colorado for drawing blood samples; and (3) she is entitled to a new trial in the interest of justice. This court rejects Bakken's arguments and affirms the judgment.

On May 4, 1994, officer Scott Kuehn, an Eau Claire County deputy sheriff, performed a traffic stop on Bakken's car after noticing that she was driving erratically. Kuehn walked to the side of Bakken's vehicle and requested that she exit the car. As Bakken exited her vehicle, Kuehn detected the odor of alcohol emanating from Bakken. Bakken, however, denied that she had consumed any intoxicants. Despite Bakken's denial, Kuehn requested Bakken to perform a series of field sobriety tests. Bakken failed to perform the tests in a satisfactory fashion. Kuehn then administered a preliminary breath test to Bakken, which revealed an alcohol concentration of .12%. Based on her performance on the field sobriety tests and her preliminary breath test, Kuehn placed Bakken under arrest and transported her to the hospital. At the hospital, Bakken consented to the withdrawal of a blood sample. The sample was then forwarded to the State Laboratory of Hygiene where it was determined that Bakken's blood alcohol level was .199%.

Prior to trial, Bakken filed a motion to suppress all statements she made at the scene, arguing that the statements were taken in violation of her ***Miranda*** rights.[1] At the hearing on the motion, the following colloquy occurred:

> MR. RAJEK [defense counsel]: Well, if the state's willing to stipulate there were no statements taken from the witness. Apparently, on the Informing the Accused there was none. I would wonder if there were any other statements of an inculpatory nature that the state intends to use at trial that were taken in this case. The report doesn't speak to that so I'm really in the dark as to whether or not there were.
>
> THE COURT: Any statements you're concerned about, Mr. White?
>
> MR. WHITE [district attorney]: Not unless they're in the report, and if there aren't any, then there are none.
>
> THE COURT: Do you know if there are any statements in the report?

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

MR. WHITE: To be honest with you, I don't. My review of it doesn't show any, but I didn't do the pretrial. I don't believe there are any.

MR. RAJEK: Then if there's no statements of the defendant intended to be introduced, then we don't need to take up that portion of the motion.

The hearing then continued with the testimony of Kuehn on the issue of probable cause. Kuehn testified as to the circumstances surrounding his stop and arrest of Bakken, including her statement that she did not consume any intoxicating beverages. Bakken did not object. At the conclusion of the hearing, the trial court found that there was probable cause for Bakken's arrest and scheduled the matter for trial.

At trial, Kuehn again testified regarding the facts surrounding his stop and arrest of Bakken. Kuehn recounted Bakken's statement that she did not consume any intoxicating beverages. Bakken objected and requested to be heard outside the presence of the jury. Bakken argued that the statement should be suppressed because the State failed to inform her that it would use the statement at the suppression hearing. The trial court denied Bakken's request, but offered to provide her with a suppression hearing on the issue whether the statement was taken in violation of her ***Miranda*** rights. Bakken accepted the court's offer. At the conclusion of the hearing, however, the court found that Bakken was not in custody at the time she made the statement and denied the motion. The trial then proceeded, and Bakken was ultimately found guilty of operating while intoxicated, second offense, contrary to § 346.63(1)(a), STATS., and operating with a blood alcohol concentration in excess of 0.1%, contrary to § 346.63(1)(b). Additional facts will be set forth in the opinion.

Bakken contends that the trial court erred by failing to suppress her statement to Kuehn that she did not consume any intoxicating beverages. Bakken asserts two grounds upon which the statement should be suppressed. Because both grounds involve questions of law, this court reviews Bakken's allegations of error without deference to the trial court. ***Schlomer v. Perina***, 169 Wis.2d 247, 252, 485 N.W.2d 399, 401 (1992).

Bakken first contends that the trial court erred by holding a suppression hearing during the trial to determine the admissibility of her statements. Bakken contends that under § 971.31(3), STATS., the admissibility of statements challenged by pretrial motion must be determined before the trial commences. Accordingly, because she filed a pretrial motion to suppress her statements and because the admissibility of these statements was not determined before trial, Bakken contends that the trial court erred by failing to suppress the statements. This court is not persuaded.

Bakken cites no authority to support the proposition that a trial court is without competence to determine the admissibility of a statement during trial where a party challenges the statement in a pretrial motion. Further, the record demonstrates that the trial court provided Bakken with a full and complete opportunity to challenge the admissibility of the statement. Thus, although the hearing was held during trial, Bakken suffered no prejudice.

Finally, this court notes that although the statute speaks in terms of a pretrial determination of the admissibility of statements challenged by a motion in advance of trial, the statute does not mandate that the admissibility determination be made pre-trial, nor does it provide a penalty in the event the determination is not made before trial. *See* ***State v. Perry***, 181 Wis.2d 43, 53, 510 N.W.2d 722, 725 (Ct. App. 1993) (lack of a penalty is indicative of the legislature's intent that the statute be construed as directory rather than mandatory). Section 971.31(3), STATS., provides: "The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial."

The language of this statute does not preclude a trial court from making admissibility determinations during trial when a statement is challenged by a motion before trial. Furthermore, a statute prescribing the time in which the trial court must act is discretionary, unless the statute denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation. ***Perry***, 181 Wis.2d at 53, 510 N.W.2d at 725.

Here, the statute does not deny the trial court the power to make an admissibility determination during trial where the motion challenging the statement is made prior to trial. Further, this court's reading of the statutory language does not indicate that the time period was intended to be read as a limitation on the trial court's power. This court therefore concludes that § 971.31(3), STATS., does not restrict a trial court from determining at trial the admissibility of a defendant's statement even though the statement was challenged by a pretrial motion. However, even if such a restriction is found in the statutory language, the statute is permissive and not mandatory. Accordingly, the statute, while suggestive, did not compel the trial court to make its admissibility determination pretrial. For the foregoing reasons, this court rejects Bakken's contention and concludes that the trial court did not err by refusing to suppress the statement despite the fact that its admissibility determination was made during trial.

As a corollary argument, Bakken contends that because the State did not advise her at the pretrial hearing that it intended to use the statement at trial, she did not have a sufficient opportunity to challenge the admissibility of the statement. Therefore, she contends that she was a victim of unfair surprise and that the trial court erred by permitting the State to use the statement at trial. This argument is without merit. The record of the motion hearing shows that while the State indicated it did not know of any statements that it would use at trial, this representation was at best an equivocal response based on the State's preliminary understanding.

Further, immediately after Bakken withdrew her suppression motion, Kuehn testified as to Bakken's statement that she did not consume any intoxicating beverages during the probable cause hearing. Bakken was present during Kuehn's testimony and made no objection to the State's use of the statement. Finally, this court notes that Bakken was given a full and complete opportunity to contest the admissibility of the statement at trial. Given these circumstances, there is no basis for Bakken to claim that she suffered unfair surprise or that she did not have a fair opportunity to address the admissibility of the statement prior to the court's determination. Therefore, despite the representations made by the State at the pretrial hearing, this court concludes that the trial court did not err by refusing to suppress Bakken's statement.

Bakken next contends that the trial court erred by failing to suppress the statement because it was taken in violation of her ***Miranda*** rights. A trial court's decision whether to suppress a statement as being obtained in violation of a defendant's ***Miranda*** rights will be upheld on review unless the decision is contrary to the great weight and clear preponderance of the evidence. ***Schultz v. State***, 82 Wis.2d 737, 747, 264 N.W.2d 245, 250 (1978). After reviewing the record, this court concludes that the trial court's denial of the defendant's motion to suppress was sufficiently supported by the evidence.

In ***State v. Leprich***, 160 Wis.2d 472, 477, 465 N.W.2d 844, 845 (Ct. App. 1991), this court reiterated the long accepted rule that ***Miranda*** warnings are only required where there is a custodial interrogation. In this case, however, Bakken was not in custody, nor was she being interrogated. As our supreme court noted in ***State v. Swanson***, 164 Wis.2d 437, 447, 475 N.W.2d 148, 152 (1991), a person temporarily detained during a traffic stop is not in custody for purposes of ***Miranda***. Further, general questions that are investigatory rather than accusatory in nature are not subject to ***Miranda***. ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 845-46. Here, the record shows that Bakken's statement was made prior to the time she was placed under arrest and that it was made as a result of Kuehn's preliminary investigation. Consequently, because Bakken was not in custody at the time she made the statement, the trial court properly denied Bakken's motion to suppress the statement.

Bakken next contends that the trial court erred by admitting evidence of two partially filled cans of beer found under the right passenger seat of Bakken's car at the time of her arrest. No objection was made at trial to the admissibility of this evidence. Failure to object to a claimed error at trial constitutes a waiver for purposes of appeal. ***State v. Romero***, 147 Wis.2d 264, 274, 432 N.W.2d 899, 903 (1988). Accordingly, this court declines to address the merits of this argument.

Bakken further argues that the trial court erred by excluding evidence pertaining to the procedures used in Colorado for taking blood samples. At trial, Bakken argued that blood alcohol tests in Wisconsin are scientifically unreliable because cotton swabs containing alcohol are used to clean the defendant's arm prior to taking the sample. To demonstrate the detrimental effect that alcohol swabs have on the scientific reliability of blood alcohol tests in Wisconsin, Bakken sought to introduce evidence that Colorado

uses swabs that do not contain alcohol. The trial court, however, found that while Bakken could introduce evidence to show that the method used in Wisconsin was flawed, the procedures used in other states were not relevant and Bakken could not introduce this evidence at trial.

On appeal, Bakken contends that the trial court erred by excluding this evidence because it demonstrates that the procedure used in Wisconsin for drawing blood is scientifically unreliable. Reliability, however, is not a predicate for the admissibility of scientific evidence in Wisconsin. *See* ***State v. Walstad***, 119 Wis.2d 483, 517-18, 351 N.W.2d 469, 486-87 (1984). Rather, scientific evidence need only be relevant to be admissible in Wisconsin. ***Id.*** at 518-19, 351 N.W.2d at 487. Thus, because Bakken offered the evidence of the procedure used for drawing blood in Colorado for the sole purpose of demonstrating the unreliability of Wisconsin's procedure and because the Colorado procedures had no other relevance, the trial court properly concluded that the evidence was irrelevant. Evidence that Wisconsin's procedure for drawing blood may contaminate the results was relevant and was not excluded by the trial court. Bakken was permitted to attack Wisconsin's procedure, attempt to prove the claimed contamination and otherwise challenge the weight to be accorded the blood test results.

Finally, Bakken contends that the interest of justice demand that she receive a new trial. However, the record in this case shows that the issues were fully and fairly tried, and there is no reasonable possibility that justice has miscarried. Accordingly, there is no basis upon which this court can rely to order a new trial in the interest of justice. The judgment of conviction is therefore affirmed.

By the Court.—Judgment affirmed.

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