**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 7, 1997

**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. 96-3054**

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

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**CITY OF OSHKOSH,**

**PLAINTIFF-RESPONDENT,**

**v.**

**GAIL L. PALECEK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

BROWN, J. Gail L. Palecek was convicted of operating a motor vehicle while intoxicated. She raises two issues: whether the trial court misused its discretion by determining that certain statements she made to officers were relevant and not unfairly prejudicial and whether admission of evidence regarding her refusal to answer questions subsequent to being advised of her

***Miranda***[1] rights constitutes reversible error. Because we hold that the trial court did not misuse its discretion in admitting her statements and because prior published case law establishes that ***Miranda*** is inapplicable to civil forfeiture proceedings, we affirm.

Palecek was stopped because of erratic driving and the investigating officer determined that she was driving while intoxicated. At the scene of the stop, Palecek began crying and told officers that she was going to commit suicide. After being placed in the squad car, she asked the arresting officer for a hug. At the station, Palecek continued to make comments about harming herself or killing herself. Palecek took the breath test and failed it. Attendant to the procedure employed when a person fails a breath test, the arresting officer proceeded to fill out an "alcohol influence report." This report, in part, consists of questions asked by the arresting officer and blank spaces to record the person's responses to the questions. The form contains a ***Miranda*** warning which was read to Palecek. She refused to answer further questions, telling the officer that she would hire an attorney.

Prior to trial, Palecek filed a motion in limine seeking to exclude various statements she had made and also seeking to exclude testimony regarding her failure to answer questions subsequent to being informed of her ***Miranda*** rights. The trial court analyzed each of the statements separately for relevancy and unfair prejudice. It admitted some statements and not others. The trial court also ruled that the jury would be able to hear evidence that Palecek refused to answer questions on the "alcohol influence report" following the giving of

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

***Miranda***. The jury returned a verdict of guilty for operating while under the influence and Palecek appeals.

Whether to exclude evidence lies within the sound discretion of the trial court. *See* ***State v. Jackson,*** 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994). A proper exercise of discretion consists of the court applying the relevant law to the applicable facts in order to reach a reasonable conclusion. *See* ***id.*** The record shows that the trial court employed a mental reasoning process from the facts of record and its conclusions were based on a logical rationale founded on proper legal standards.

The trial court began by laying out what it believed to be the threshold test for relevancy in this instance. It observed that the jury would have to answer the question, "Was she under the influence?" The court then logically determined that Palecek's state of mind and her judgment were relevant considerations for a jury in its quest to determine whether Palecek was driving while under the influence.

After setting forth the legal standard, the trial court then weighed the relevancy of each challenged statement in seriatim fashion. The court determined that Palecek's statement that she would kill herself if arrested for OWI went to her state of mind and would be relevant. In like fashion, the trial court also found that Palecek's statement that she would be in her grave if the officers did not let her go was also relevant. So too was the request that Palecek be allowed to hug the officer at the same time she was threatening ill-will upon herself deemed relevant to how her mental state was affected by her intoxication. The trial court also allowed Palecek's statement to the officers that she had money and would pay for

a lawyer and her statement that the officers would come across her dead corpse in a few days.

The trial court would not allow her statement that her cousin would not accept responsibility for her if she was released from custody. The trial court could not understand how that was relevant to her state of mind. Further, the trial court would not allow evidence concerning how the officers executed an emergency detention procedure in response to her suicide threats or evidence that she toyed with the medical equipment while at the hospital. The trial court further determined that all of the relevant evidence was not unfairly prejudicial except for the protective custody evidence which it found to be unfairly prejudicial.

Despite the obvious exercise of a logical reasoning process placed on the record by the trial court, Palecek asserts that the trial court nonetheless misused its discretion. Palecek argues that the statements would not help the jury determine whether she was under the influence. Rather, the statements were nothing more than "a purely emotional reaction to the shock and trauma of being arrested for Operating a Motor Vehicle While Intoxicated." Thus, the statements lacked relevancy. She also claims that even if the evidence was minimally relevant, it was unfairly prejudicial. We disagree. While she could certainly argue to the jury that her statements were simply a reaction to the shock of being cited for OWI (and she did so argue), an alternative reasonable inference is that these statements were indicative of Palecek's intoxication—her alcohol-induced state caused her to react in such an unbalanced manner. There was no misuse of discretion here.

The other issue is framed by Palecek this way. She recognizes that ***Miranda*** only applies to criminal proceedings. But, without citing authority, she

argues that the "rationale for the exclusionary rule in criminal cases can be applied to certain civil cases as well." She contends that the rationale of ***Miranda*** is that a jury in a criminal case will be biased if it hears that a defendant has relied on his or her right to remain silent and has refused to answer questions from an officer. She complains that the same danger exists in her case, civil or not.

But the answer is found in a previous case of this court which Palecek has not bothered to cite. In ***Village of Menomonee Falls v. Kunz,*** 126 Wis.2d 143, 147-48, 376 N.W.2d 359, 361-62 (Ct. App. 1985), we observed that the Fifth Amendment requires that no person may be compelled in any *criminal* case to be a witness against himself. We held that Kunz did not incriminate himself because he was not criminally prosecuted. In this case, we agree that evidence of Palecek's silence, after being told she had the right to remain silent, might not have sat well with the jury. However, the Fifth Amendment was not designed to protect her from the jury's consideration of her silence in a civil proceeding. Palecek's argument fails under the Fifth Amendment.

While Palecek might be arguing that hers is not a Fifth Amendment assertion but a due process one (she made this due process argument before the trial court), she does not discuss this theory on appeal or give any authority in support. We deem that a due process theory, if any there is, was abandoned on appeal.

*By the Court.*—Judgment affirmed.

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