COURT OF APPEALS DECISION DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP1842

Cir. Ct. Nos. 2006TR1053
2006TR1054

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

CITY OF SHAWANO,

PLAINTIFF-RESPONDENT,

V.

JON R. FORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

¶1 BRUNNER, J.[1] Jon Ford appeals a judgment of conviction for operating while intoxicated—first offense and operating with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

concentration—first offense. He argues the conviction should be reversed because (1) the real controversy has not been fully tried and (2) there has been a miscarriage of justice. We disagree and affirm.

BACKGROUND

¶2 On February 16, 2006, Ford received a citation for operating while intoxicated—first offense, and operating with a prohibited alcohol concentration—first offense. Ford was convicted of both offenses on May 18, 2007, following a jury trial.

¶3 At trial, officer Ryan Atkinson testified that he observed Ford fail to come to a complete stop at a stop sign. Atkinson stated he followed Ford's vehicle and observed it weave back and forth within its lane for two blocks. Atkinson then stopped Ford.

¶4 Atkinson testified that after the stop, he observed that Ford's eyes were bloodshot and watery and he could smell an odor of intoxicants coming from Ford. Atkinson then administered field sobriety tests. On the Horizontal Gaze Nystagmus test, Atkinson observed all six clues that indicated intoxication. Ford also failed the one-leg stand and the walk-and-turn tests. Atkinson transported Ford to the Shawano Medical Center where a blood test was performed. Atkinson testified that the blood test result indicated a blood-alcohol of .11%.

¶5 On cross-examination, Ford's counsel asked Atkinson if he had given Ford a preliminary breath test. Atkinson indicated he had. Ford's counsel then asked, "And that test result was .08 percent, wasn't it?" The County objected and the court ruled the information inadmissible.

¶6 Patrick Harding, a supervisor of the toxicology section of the Wisconsin State Laboratory of Hygiene, testified that everybody is impaired significantly at an alcohol concentration of .08% and above. At .11%, the individual is even more impaired.

DISCUSSION

¶7 Ford asks us to use our discretionary reversal power under WIS. STAT. § 752.35. We may reverse a judgment by the trial court in one of two situations: "whenever the real controversy has not been fully tried; or … whenever it is probable that justice has for any reason miscarried." ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). We exercise our discretionary reversal power only sparingly and in exceptional cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶8 In this case, the parties agree that the results of the preliminary breath test should not have been admitted. Ford, however, contends that this error entitles him to a new trial. We may exercise our discretionary reversal power under the first part of WIS. STAT. § 752.35 when "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). This is not such a case.

¶9 The issue of Ford's intoxication was not clouded. The jury had ample evidence of Ford's intoxication. Atkinson testified that Ford failed the field sobriety tests. Additionally, the admissible blood-alcohol test indicated a result of .11%, higher than the preliminary breath test and above the legal limit. Further, after Ford's counsel stated the preliminary breath test result was .08%, the court

instructed the jury to ignore the statement because the test was not admissible in court. Neither party made any further reference to the preliminary breath test. The jury is presumed to follow the court's instructions and Ford provides no reason to believe it did not do so in this case. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

¶10 Ford also argues we should use our discretionary reversal power because justice has miscarried. The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. ***Wyss***, 124 Wis. 2d at 735. As indicated above, there was ample evidence of Ford's intoxication even without the improperly admitted evidence. This is simply not the type of exceptional case that calls for reversal.

By the Court.—Judgment affirmed.

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