COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2002

Cornelia G. Clark
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. 01-3500 **Cir. Ct. No. 00-TR-13878**

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

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY R. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JAMES BOLGERT, Judge. *Affirmed.*

¶1 BROWN, J.[1] Bradley R. Taylor appeals his conviction of driving while intoxicated and the trial court order denying his motion to reopen. He acknowledges that no Wisconsin statute or appellate decision allows an insanity

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All other references to the Wisconsin Statutes are to the 1999-2000 version.

defense for traffic forfeiture actions but requests that this court make such law. We will not because it is beyond our powers as an error-correcting court to do so. He also argues that there was insufficient evidence to prove that he was driving while intoxicated. We disagree and affirm the conviction and order denying Taylor's postconviction motion to reopen.

¶2 Taylor was suspected of violating a domestic abuse injunction. An officer arrived at the scene and saw Taylor puncturing the tires of a car. The officer gave chase and Taylor escaped by getting into his car and driving away. Another officer pursued Taylor. This officer observed that Taylor was driving without his headlights and taillights on even though it was in the middle of the night. He also saw that Taylor was driving well over the speed limit—80 miles an hour at times—even though there was freshly fallen snow on the road. Taylor's vehicle got very close to driving off the right side of the road—to such extent that this driving behavior caused the vehicle to slide. Taylor eventually stopped and abandoned his vehicle; he was subsequently apprehended by other officers called to the scene. One of the officers noticed a strong odor of alcohol on Taylor's breath and slurred speech. Taylor also had difficulty standing. Another officer observed the same things plus bloodshot eyes. At the station house, Taylor was observed to be staggering and in need of being steadied. Taylor also repeatedly asked questions that had been answered before. He refused all requests to perform field sobriety tests and also refused to submit to a chemical test of his breath. He was arrested for violating the domestic abuse injunction, criminal damage to property and eluding an officer. All three of these charges were part of a criminal complaint. Separately, he was charged by uniform citation with violating the City of Sheboygan ordinances for driving while intoxicated.

¶3 Taylor was found not guilty by reason of mental disease or defect (NGI) with regard to the charges listed in the criminal complaint. At the OWI trial, Taylor presented no evidence that he was mentally ill. Rather, at the conclusion of the OWI trial, Taylor's counsel reminded the court that it had earlier presided over the criminal proceedings that had resulted in the NGI. The prosecutor responded that NGI is irrelevant to this kind of case where mens rea is not at issue. The court concluded that although Taylor was mentally ill, he was still guilty of OWI.

¶4 Taylor subsequently moved to reopen the conviction. He wanted to present an expert's opinion that the same mental illness which impacted the events leading to his criminal charges also impacted his ability to appreciate his driving conduct. The court denied the motion, stating that NGI did not apply to a forfeiture case. From the judgment and the order denying the motion to reopen, Taylor appeals.

¶5 Neither party disputes that the mental responsibility statute speaks to an insanity defense in the context of criminal conduct. The parties correctly state the law. The statute defining the mental responsibility of a defendant is found in WIS. STAT. § 971.15(1), which states, in pertinent part, that "[a] person is not responsible for *criminal conduct.*" (Emphasis added.) All Wisconsin cases that we have researched regarding this statute have been criminal cases. None are forfeiture cases.

¶6 Taylor asserts that "[i]t is time for the higher courts of Wisconsin to specifically allow the NGI defense in traffic forfeiture actions." As an error-correcting court, we are not primarily a law-developing or law-declaring court. That function is normally reserved for the supreme court. ***State v. Shumacher***,

144 Wis. 2d 388, 405, 424 N.W.2d 672 (1988). This is especially so with regard to the issue in this case. We note that in ***State v. Caibaiosai***, 122 Wis. 2d 587, 593-94, 363 N.W.2d 574 (1985), the supreme court suggested that OWI is akin to a strict liability offense such that the issue of mens rea is irrelevant. On the other hand, in ***Steele v. State***, 97 Wis. 2d 72, 96, 294 N.W.2d 2 (1980), the supreme court commented that an insanity defense had nothing to do with proving or disproving a specific intent and everything to do with a moral issue of whether we are going to hold a mentally ill person responsible for his or her conduct. Thus, this court has no clear-cut guidance from the published decisions of the supreme court which would help in deciding the issue here. If any expansion of the law is to take place where insanity defenses will be allowed in OWI cases in general, and in OWI forfeiture actions in particular, it will have to come from the supreme court. We also note that such a decision would be laden with policy determinations, another reason why this court is improperly equipped to decide the issue.

¶7 Next, Taylor claims that there was insufficient evidence of impairment. He argues that the smell of alcohol is impossible to quantify in terms of how much a person has actually had to drink and that there was no evidence proving whether the officers who smelled the alcohol were experienced in that regard. He dismisses the high rate of speed under slippery conditions as indicative of his insanity rather than any alcoholic impairment and posits that since he was able to keep his car on the road in such conditions, it was more evidence of skilled driving than impaired driving. He further observes that the evidence showed how he was able to abandon the car and run a considerable distance in deep snow before he was apprehended and asserts that this shows how he was physically fit rather than physically impaired.

¶8 For the reasons already stated, Taylor's mental state will not be considered by this court in regards to whether the mental state was the cause of his erratic driving. What we consider is his driving at a high rate of speed with headlights and taillights off, his crossing the center line, his nearly veering off the road at 80 miles per hour and sliding his car in the process, his slurred speech, his glassy eyes, his inability to walk without staggering and the strong odor of alcohol on his breath. All of those factors, taken together, are ample evidence that he was driving while intoxicated by clear and satisfactory evidence. Cases too numerous to mention allow for each of these factors to be considered in determining whether a person was intoxicated while driving.

By the Court.—Judgment and order affirmed.

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