

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 15, 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. 95-0244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD C. BENTS,

Defendant-Appellant.

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

CANE, P.J. Richard Bents appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant. The sole issue on appeal is whether the trial court erred by refusing to allow Bents to testify that he had successfully passed a preliminary breath test as his explanation for refusing to furnish a sample of his blood for chemical analysis as required under § 343.305, STATS. Because the trial court reasonably exercised its discretion, the judgment is affirmed.

Officer Jeffrey Wilson observed Bents's vehicle drive past him with a defective headlight, a loud muffler and a cracked tail lens. After stopping the vehicle and making some initial observations of Bents, the officer requested

Bents to perform some field sobriety tests, which he did with mixed results. Bents then submitted to a preliminary breath test, which yielded a result of .09%. The officer placed Bents under arrest for OWI and then transported him to the county jail where Bents refused to submit a sample of his blood for chemical analysis, arguing that he had already complied with the breath test and demanding to see the regulations relating to such tests.

At the jury trial in response to the State's evidence of Bents's refusal to furnish a blood sample for chemical analysis, Bents attempted to explain his refusal. Specifically, he wanted to testify that he had submitted to a preliminary breath test with a result of less than .10% and therefore felt he had complied with the necessary alcohol test. The trial court prohibited this testimony, but did permit him to testify that he refused the test because the officer refused to show him the breath alcohol regulations.

Generally, whether evidence is admissible is a matter for the trial court's discretion. See *State v. Jenkins*, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." *Id.* (citing *Lievrouw v. Roth*, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990) (citations omitted)). Because an unexplained refusal to submit to an alcohol test may allow a jury to infer that the refusal arose out of a consciousness of guilt, evidence of a defendant's reason for the refusal is relevant and admissible. *State v. Bolstad*, 124 Wis.2d 576, 585, 370 N.W.2d 257, 261-62 (1985). Also, failure to afford the defendant an opportunity to rebut this inference of guilt constitutes error affecting the defendant's substantial rights. *Id.* at 587, 370 N.W.2d at 263.

Although Bents has a right to explain his refusal, this right does not come without limitations. Bents attempted to offer evidence specifically prohibited under § 343.303, STATS. This statute states in relevant part: "The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)."

Here, Bents not only attempted to show that he had taken the preliminary breath test, but also that he had passed the test with a result lower than .10% and therefore believed he had complied with the required alcohol test. This result of the preliminary breath screening test is exactly what is prohibited under § 343.303, STATS. Accordingly, this court is satisfied that the trial court reasonably exercised its discretion by limiting Bents's explanation for refusing the alcohol test to the officer's refusal to show him the breath alcohol regulations.

By the Court. – Judgment affirmed.

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