

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 3, 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. 95-0990-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL W. CORRIGAN,

Defendant-Appellant.

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

MYSE, J. Daniel W. Corrigan appeals a judgment of conviction for operating a motor vehicle while intoxicated in violation of § 346.63(1)(a), STATS. Corrigan contends that he was denied his constitutional right to confront a witness when the trial court admitted the then-deceased arresting officer's investigation report under the hearsay exception for records of regularly conducted activity. Corrigan further contends that the report was inadmissible because the State failed to lay a proper foundation for its admissibility. Because this court concludes that the admission of the investigation report offends Corrigan's constitutional right of confrontation, the judgment of conviction is reversed and the cause is remanded.

Officer McCready filed an investigation report that described the following chain of events. McCready discovered Corrigan asleep behind the wheel of his illegally parked vehicle with the motor still running. After knocking on the window several times, McCready opened the door, turned off the vehicle and removed the keys. He observed beer cans on the floor and smelled a strong odor of alcohol. Corrigan initially refused to get out of the car. When Corrigan got out, he fell against the car. After Corrigan refused to take a field sobriety test, McCready placed Corrigan under arrest for operating a motor vehicle while under the influence of an intoxicant. On the way to the jail, Corrigan said that he would take the test. McCready conducted several field sobriety tests and concluded that Corrigan failed to perform the tests properly. Corrigan was again placed under arrest. Corrigan then complained of an asthma attack and was transported to the hospital by ambulance. At the hospital, the staff took a blood sample that showed a blood alcohol content of .24%.

Following this incident and in a matter unrelated to this case, McCready, the investigating officer, was killed. Consequently, McCready was unavailable during Corrigan's trial. Corrigan moved to exclude the investigation report because it was inadmissible hearsay and violated his right of confrontation. The trial court denied the motion. At trial before the court, Corrigan stipulated to admission of the blood test results from the hospital without requiring the analyst to testify. As a result, no witnesses testified and the court found Corrigan guilty based on the investigation report and the blood test.

The dispositive issue is whether the admission of the arresting officer's investigation report violates Corrigan's constitutional right of confrontation.¹ Appellate review of constitutional principles is de novo. *State v. Woods*, 117 Wis.2d 701, 712, 345 N.W.2d 457, 463 (1984).

The initial question in confrontation clause analysis is whether the evidence fits within a recognized hearsay exception. *State v. Bauer*, 109 Wis.2d 204, 215, 325 N.W.2d 857, 863 (1982). If the evidence fits within a hearsay

¹ Corrigan's right of confrontation comes from art. I, § 7, of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution.

exception, the right of confrontation requires that (1) the witness is unavailable, and (2) the evidence bears some indicia of reliability. *Id.* Reliability of the evidence can be inferred if the evidence fits within a firmly rooted hearsay exception. *Id.* However, this inference does not make the evidence admissible per se. *Id.* The evidence may nonetheless be excluded if there are unusual circumstances warranting its exclusion. *Id.*

The trial court determined that the investigation report fits within § 908.03(6), STATS., the hearsay exception for records of regularly conducted activity. The trial court further determined that McCready was unavailable and that § 908.03(6) is a firmly rooted hearsay exception. This court is not required to decide whether the investigation report fits within § 908.03(6) or whether § 908.03(6) is a firmly rooted hearsay exception because it concludes that unusual circumstances render the report unreliable and warrant its exclusion.

When unusual circumstances exist, the reliability of the evidence turns on "whether the purposes behind the confrontation clause have been satisfied." *Bauer*, 109 Wis.2d at 219, 325 N.W.2d at 865. The primary purpose of the confrontation clause is "to ensure that the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence admitted in a criminal case." *Id.* at 208, 325 N.W.2d at 859-60.

Two unusual circumstances render the report unreliable and warrant its exclusion. First, McCready at the time he wrote his investigative report anticipated testifying in Corrigan's trial. Therefore, the purpose of the report was to justify McCready's conclusion that Corrigan was guilty of operating a motor vehicle while intoxicated. Normally one would not expect exculpatory information to be included in such a report or expect McCready to specify the degree of certainty with which his observations and conclusions were made. Second, many of McCready's personal observations are subjective. Much of the investigation report deals with subjective conclusions such as the presence of the odor of alcohol, the way Corrigan fell against the car when he got out, the way Corrigan almost fell twice when he walked heel to toe, and similar evidence. Corrigan can no longer question McCready regarding these subjective conclusions. Accordingly, this court concludes that under these circumstances the admission of the report would frustrate the purposes of the confrontation clause.

Because § 908.03(6), STATS., does not require the witness to be unavailable, a conclusion to the contrary would allow driving while under the influence trials to be conducted without the presence of the arresting officer. This court does not believe that would comport with the constitutional rights of confrontation or sound public policy. While this decision may make prosecution of Corrigan impossible, it is better to lose a few prosecutions under these unique circumstances than to allow driving while under the influence trials to be conducted solely on an officer's investigation report.

Because this report was prepared for the purpose of trial and reflects a great deal of subjective opinion evidence from the witness, this court concludes that the admission of the investigation report is in violation of the constitutional right of confrontation as guaranteed by both the United States and Wisconsin Constitutions. Accordingly, this court need not decide whether the state failed to lay a proper foundation for the admissibility of the report. The judgment of conviction must be reversed and the case remanded for a new trial.

By the Court. – Judgment reversed and cause remanded.

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