

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2003

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. 03-0266
STATE OF WISCONSIN**

Cir. Ct. No. 02TR1685

**IN COURT OF APPEALS
DISTRICT III**

CITY OF STURGEON BAY,

PLAINTIFF-RESPONDENT,

v.

MARY P. FINNEGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Mary Finnegan appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. During her jury

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

trial, Finnegan moved for a mistrial on the grounds that the City of Sturgeon Bay improperly introduced testimony that (1) she was given her *Miranda*² rights and then exercised her right to remain silent, and (2) the preliminary breath test did not obtain a result. The trial court denied the motion. Finnegan argues the trial court erred. We disagree and affirm the judgment.

BACKGROUND

¶2 Finnegan was driving in Sturgeon Bay on May 25, 2002, when at approximately 2:35 a.m. officer Gregory Zager observed her stop where there was no stop sign. She then turned right and later failed to stop at a stop sign. Zager activated his emergency lights, which automatically turned on the video camera in his squad. Zager pulled Finnegan over. At trial, Zager testified that it took twenty seconds for Finnegan to roll down the window. When she did get the window down, Zager detected a strong odor of intoxicants. Finnegan admitted to drinking a couple of wines. Zager asked her to exit the vehicle to perform field sobriety tests. When exiting, Finnegan stumbled. Her speech was slurred and she leaned against the vehicle to keep her balance.

¶3 The first test Zager administered was the horizontal gaze nystagmus test, which indicated intoxication. Next, Finnegan attempted the walk and turn test. Finnegan stated before the test that her balance was “whacked” because she had undergone chemotherapy. Zager testified he took that into account but continued with the test. Finnegan appeared confused and was unable to keep her balance during the instruction portion of the test. Zager did not ask Finnegan to

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

complete the test, nor did he administer any other balance tests because he was concerned she would fall down and injure herself.

¶4 Zager asked Finnegan to recite the alphabet, but she was unable to do so. Zager then attempted to administer a preliminary breath test. However, Finnegan appeared confused as to how to blow into the machine, and ultimately the machine did not register any result.

¶5 Zager arrested Finnegan for operating while under the influence of an intoxicant and transported her to Door County Memorial Hospital for a blood draw. The result showed a blood alcohol level of .261%. Finnegan was charged with operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration.

¶6 At the jury trial, the City requested that the jury view the videotape of Finnegan attempting the preliminary breath test. Finnegan objected, arguing that allowing the jury to view the video would violate WIS. STAT. § 343.303, which prohibits admission of the results of a preliminary breath test. She also argued it was irrelevant and would be unfairly prejudicial. The court, however, allowed the jury to view the video. Additionally, Zager testified that he was unable to obtain any result from the test.

¶7 Zager also testified that he used an alcohol influence report. The report included *Miranda* warnings, which Zager read to Finnegan, and a series of questions to be asked only if she waived her rights. Zager testified that Finnegan “had some difficulty understanding” her rights. As a result, Zager did not ask Finnegan any further questions. Finnegan objected to this line of questioning. She requested a mistrial based on evidence regarding the results of the preliminary

breath test and the testimony about Finnegan's right to remain silent. The court denied the request. The jury convicted Finnegan on both charges and she appeals.

DISCUSSION

¶8 Finnegan argues the trial court erred by not granting a mistrial. The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. *Haskins v. State*, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *State v. Grady*, 93 Wis. 2d 1, 13, 286 N.W.2d 607 (Ct. App. 1979). We will reverse the denial of a motion for mistrial only on a clear showing of an erroneous use of discretion by the trial court. *Johnson v. State*, 75 Wis. 2d 344, 365, 249 N.W.2d 593 (1977).

¶9 Finnegan first argues she is entitled to a mistrial because the City improperly informed the jury that Finnegan exercised her right to remain silent. She maintains this violated her due process rights. Whether Finnegan's constitutional rights have been violated presents a question of law that we review independently. See *Door County DHFS v. Scott S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999).

¶10 The Fifth Amendment requires that no person may be compelled in any *criminal* case to be a witness against himself or herself. *Village of Menomonee Falls v. Kunz*, 126 Wis. 2d 143, 147-48, 376 N.W.2d 359 (Ct. App. 1985). However, the Fifth Amendment was not designed to protect a defendant from the jury's consideration of his or her silence in a non-criminal proceeding. Nevertheless, Finnegan argues it is irrelevant that this is a civil rather than a criminal case. She admits that *Miranda* warnings were not required because this is a civil offense, but once the warnings were in fact given, she had the right to

assert those rights and not have her silence used against her at trial. She cites no authority for this proposition.

¶11 To begin with, the record does not support Finnegan's premise that she invoked her *Miranda* rights. In fact, she neither invoked nor waived those rights. Rather, Zager testified Finnegan had difficulty understanding her rights. Zager stopped questioning because of Finnegan's confusion, not because she invoked her rights. This is hardly a violation of *Miranda* or a prohibited comment on Finnegan's silence. Therefore, even if *Miranda* applied to this civil case, Finnegan's rights were not violated and the court did not err by denying her request for a mistrial on this issue.

¶12 Finnegan next argues she is entitled to a mistrial because the City violated WIS. STAT. § 343.303 when it introduced evidence that the preliminary breath test did not obtain a result. This issue involves statutory interpretation, which is a question of law we decided independently. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). However, the trial court's factual findings must be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶13 WISCONSIN STAT. § 343.303 states: "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, the record shows the preliminary breath test did not obtain a result. However, Finnegan argues that "the lack of a result is a result" and therefore the City violated § 343.303 by introducing evidence that there was no result.

¶14 We do not agree that the lack of a result is a result. Rather, lack of a result is in fact not a result at all. If it was, Finnegan could have argued that there was no alcohol in her system because the machine did not detect any. She made no such argument.

¶15 Furthermore, even if “the lack of a result is a result” Finnegan was not prejudiced. Finnegan was convicted of both operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration. Finnegan’s argument about the preliminary breath test applies only to the operating while under the influence charge. The argument has no bearing on the conviction for operating with a prohibited alcohol concentration.

¶16 WISCONSIN STAT. § 346.63(1)(c) states that a person may be charged with both operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration. However, there is a single conviction for purposes of sentencing. *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). Finnegan does not dispute that she was driving and that the blood test revealed a blood alcohol content of .261%. The record therefore supports the jury’s finding of guilt for operating with a prohibited alcohol concentration, and Finnegan’s argument about the preliminary breath test does not affect her conviction on this charge.

By the Court.—Judgment affirmed.

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

