

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2009

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. 2008AP1922-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2007CT71

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DECEMBER DAWN IRWIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ December Dawn Irwin appeals her judgment of conviction based on a jury verdict for operating while intoxicated and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

operating with a prohibited alcohol concentration, third offense. Irwin argues she is entitled to a new trial because the prosecutor violated WIS. STAT. § 971.23, the discovery statute, by failing to disclose a prosecution witness until two days before trial, and by failing to prove good cause for the failure to disclose. We conclude that the prosecutor's disclosure was not contrary to § 971.23(1). We therefore affirm.

BACKGROUND

¶2 On April 30, 2007, Gary Lindgren, a part-time emergency medical technician (EMT), discovered a car crashed into a tree in the City of Owen. He found Irwin lying on the ground near the car by the front passenger side door. Lindgren called 911 and Officer Michael Sybers, whom he knew to be on duty at the time. Sybers arrived on the scene and observed a hole in the passenger side of the windshield and concluded that Irwin had been ejected through the windshield. Irwin was taken by ambulance to St. Joseph's Hospital in Marshfield where staff drew a blood sample to determine Irwin's blood alcohol level. The test showed Irwin had a blood alcohol level of .22. Irwin was later charged with operating while intoxicated and operating with a prohibited alcohol concentration, third offense.

¶3 In the early morning hours after the accident, Officer Sybers briefly interviewed Samantha Olson, an EMT present at the accident scene. Sybers did not mention his conversation with Olson in his accident report. In August 2007, defense counsel submitted a discovery demand seeking a list of witnesses the State intended to call at trial. The name of Samantha Olson was not disclosed to the defense at this time. In September 2007, the court scheduled a trial date of November 28, 2007.

¶4 On Monday, November 19, 2007, the prosecutor informed Irwin's attorney by email that Officer Sybers would be contacting a new witness who may have seen Irwin driving while intoxicated before the accident. Two days before trial, November 26, the prosecutor provided to defense counsel the name of a new witness, Samantha Olson, and provided a written statement from Olson one day before trial stating that she had seen Irwin driving while intoxicated before the accident. Additional facts relevant to the disclosure of Olson's name are provided in the discussion section.

¶5 Irwin filed a motion *in limine* to exclude Olson's testimony, alleging a discovery violation under WIS. STAT. § 971.23 because the disclosure of Olson's name was untimely, and the State had failed to show good cause for the lateness of its disclosure. The court denied the motion but allowed defense counsel an opportunity to interview Olson before beginning the trial. The jury found Irwin guilty on both counts, and the court entered a judgment of conviction on the operating with a prohibited alcohol concentration charge.

¶6 Irwin moved for a new trial, reasserting the alleged violation of WIS. STAT. § 971.23. The court rejected Irwin's motion, concluding that there was not a discovery violation because the disclosure was made within a reasonable period before trial, and even if the disclosure was untimely, the prosecutor showed good cause and the admission of Olson's testimony was harmless. Irwin appeals.

DISCUSSION

¶7 Irwin contends that the State violated the criminal discovery statute, WIS. STAT. § 971.23, by failing to disclose Olson as a witness until two days before trial. WISCONSIN STAT. § 971.23 requires a prosecutor to disclose to the defendant certain materials and information within its possession, custody or

control “within a reasonable time before trial.” WIS. STAT. § 971.23(1).² Among the information that must be disclosed is a list of all witnesses whom the prosecutor intends to call at trial. Sec. 971.23(1)(d).

¶8 Alleged violations of WIS. STAT. § 971.23(1) are evaluated in three steps. *See State v. Rice*, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517. First, we consider whether the prosecutor violated the requirements of the statute. *See id.* Second, if a violation occurred, we determine whether the prosecutor has shown good cause for the failure to make a required disclosure. *Id.* “[I]f good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance.” *Id.* Finally, if the circuit court admitted evidence that should have been suppressed under § 971.23, we decide whether admission of this evidence was harmless. *Id.* Each of these steps presents a question of law, which we review de novo. *Id.*

¶9 The requirement to disclose under WIS. STAT. § 971.23 includes not only evidence in the prosecutor’s actual possession, but any evidence the

² WISCONSIN STAT. § 971.23(1) provides, in pertinent part:

WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

....

(d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

prosecutor should reasonably possess. *State v. DeLao*, 2002 WI 49, ¶22, 252 Wis. 2d 289, 643 N.W.2d 480. Thus, “[t]he test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence the prosecutor should have discovered it.” *Id.* (citations omitted). Finally, “in order for evidence to be disclosed ‘within a reasonable time before trial’ for purposes of § 971.23, it must be disclosed within a sufficient time for its effective use.” *State v. Harris*, 2004 WI 64, ¶37, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted).

¶10 Irwin contends that the prosecutor failed to meet his obligation to disclose Olson’s name within a reasonable time before trial by making the disclosure two days before trial. Officer Sybers identified Olson as a potential witness and interviewed her within hours of the accident. Irwin contends that, in the months following the accident, the prosecutor failed to exercise due diligence by not obtaining Olson’s name and the substance of her testimony from Sybers. Irwin contends that this untimely disclosure was not harmless error because Olson’s testimony was the only direct evidence the State produced to refute Irwin’s planned defense, which was that she was not operating the vehicle at the time of the accident.

¶11 As a general rule, information within the possession of investigators, but not personally known to the prosecutor, is imputed to the prosecutor. *DeLao*, 252 Wis. 2d 289, ¶21. Citing *DeLao*, Irwin argues that the prosecutor’s failure to obtain from Officer Sybers Olson’s name does not excuse the prosecutor of the duty to disclose under WIS. STAT. § 971.23. Irwin fails to recognize, however, that the relevant testimony provided by Olson in this case—that she had seen an intoxicated Irwin get behind the wheel of a vehicle and drive off—was not in Officer Sybers’ possession, much less the prosecutor’s, until later. On the

morning after the accident, Olson said only that she had seen Irwin minutes before the accident drinking at the tavern where Olson worked as a part-time bartender. Olson's testimony about this observation would have been cumulative; the fact that Irwin was intoxicated was established conclusively by the blood alcohol test. Thus, having only this information, the prosecutor would not have had good reason to call Olson as a witness. The prosecutor therefore had no duty under WIS. STAT. § 971.23(1) to disclose Olson as a potential witness based on Sybers' initial interview with Olson.

¶12 By November 19, 2007, Officer Sybers came to suspect that a witness, presumably Olson, had seen Irwin operating her vehicle before the accident. On that date, the prosecutor emailed the following disclosure to defense counsel: "The arresting officer (Sybers) tells me he might have a witness who saw [Irwin] drive away from the tavern alone shortly before the accident. He's trying to find that witness today. I'll keep you posted." November 19, 2007, was the Monday before Thanksgiving, and Officer Sybers testified that he was off work that week. Sybers did not obtain a written statement from Samantha Olson until November 26 declaring that she saw Irwin get behind the wheel and drive away from the tavern alone. This statement was faxed to defense counsel on November 27, the day before trial.

¶13 The State asks us to engage in a straightforward prejudice analysis in determining whether it violated the witness disclosure requirements of WIS. STAT. § 971.23(1), citing *Fredrickson v. Louisville Ladder Co.*, 52 Wis. 2d 776, 784, 191 N.W.2d 193 (1971). But, as the State acknowledges, *Fredrickson* is a civil case, and the test for addressing the untimely naming of a witness in the civil context differs from the test for handling potential criminal discovery violations set forth in the cases interpreting § 971.23. See generally *State v. Schaefer*, 2008

WI 25, ¶30, 308 Wis.2d 279, 746 N.W.2d 457 (discussing § 971.23, and explaining that criminal discovery operates on different principles from civil discovery).

¶14 Nonetheless, we conclude for different reasons that the trial court did not err in determining that the disclosure of Olson's name was within a reasonable period of time before trial under WIS. STAT. § 971.23. Critical to our analysis is the fact that the prosecutor disclosed to defense counsel nine days before trial the basic substance of Olson's testimony, if not Olson's name. We acknowledge that because the prosecutor did not provide Olson's name at that time the email itself did not fulfill the requirements of § 971.23(1)(d). However, because the prosecutor's email apprised Irwin nine days before trial of the likely existence of a witness who would challenge Irwin's planned defense that she was not the driver of the vehicle, the defense had sufficient time within the meaning of *Harris* to effectively use Olson's name once it was disclosed two days before trial. The email gave defense counsel a fair opportunity to review counsel's strategy and, if necessary, to gather additional information relevant to Irwin's defense. Further, the email gave counsel information that allowed him to be prepared for the pre-trial interview of Olson when she was made available two days before trial. Irwin does not explain how the disclosure one day before trial deprived defense counsel of the opportunity to make effective use of the witness and her testimony. Accordingly, we conclude that, under the circumstances, the prosecutor's disclosure of Olson's name two days before trial was disclosure within a reasonable time before trial within the meaning of § 971.23(1).

¶15 This case is distinguishable from *DeLao*, wherein the supreme court excluded a statement of the defendant that was disclosed during the first day of trial. *DeLao*, 252 Wis.2d 289, ¶46. The *DeLao* court distinguished *State v.*

Maass, 178 Wis. 2d 63, 502 N.W.2d 913 (Ct. App. 1993), a court of appeals decision which concluded that disclosure two days before trial was reasonable where the prosecutor did not discover the information until that time, and the information was held by an officer who was not working with the prosecutor on the case. Here, the prosecutor disclosed the basic substance of Olson's testimony nine days before trial, if not Olson's name. Unlike *DeLao*, the disclosure in this case was made before trial, and the email disclosure of the essence of Olson's testimony nine days before trial gave counsel sufficient time under the circumstances to prepare effectively for the new witness.

¶16 Because we conclude that the disclosure of Olson's name two days before trial did not violate WIS. STAT. § 971.23(1), Irwin's arguments that the State failed to show good cause and that the disclosure was not harmless error, which are both predicated on the existence of a violation of § 971.23(1), do not pertain.

By the Court.—Judgment affirmed.

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

