COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1702 **Cir. Ct. No. 02-TR-1483**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGG A. PFAFF,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BROWN, J.[1] This is a review of a refusal hearing arising out of an operating a motor vehicle while intoxicated arrest. The OWI arrest came on the

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

heels of an accident where a driver in another car was killed. The defendant in this case, Gregg A. Pfaff, was also arrested for a felony—homicide by intoxicated use of a motor vehicle. Pfaff had a preliminary hearing on the felony and was bound over by a court commissioner. At the refusal hearing, the trial court sua sponte, and over objection, incorporated the transcript from the preliminary hearing as part of the refusal hearing record and indicated that it would use the transcript in helping the court to decide whether there was probable cause to arrest for OWI, one of the elements in a refusal hearing. But the court also instructed Pfaff that the officers were present in the courtroom and could be cross-examined. On appeal, Pfaff argues that the procedure used by the trial court robbed him of the right to have a tribunal that observes the demeanor of the witnesses in assessing credibility during the State's direct evidence. We agree with the premise. Moreover, the court's decision relieved the State of having to put on witnesses and meet its burden of proof. We reverse and remand with directions to reconduct the probable cause portion of the refusal hearing. However, we further find that the trial court's finding of unreasonable refusal is not clearly erroneous and we affirm on that issue.

¶2 In addition to the refusal hearing, also before the court that day was a motion challenging the bindover in the felony. The court dealt with the bindover first. The assistant district attorney gave a summation of what was contained in the preliminary hearing transcript. We must go by this summation because neither party has seen fit to include the preliminary hearing transcript in the appellate record. In part, the assistant district attorney gave the following account: Deputy Theo Jordan arrived at the vicinity of Hi-Lo Road and I-43 at 1:15 a.m. in regards to an accident. Pfaff identified himself to Jordan. Jordan asked Pfaff if he was the driver. Pfaff admitted that he had been driving the vehicle. Jordan asked if there

were other vehicles involved and Pfaff said there was and pointed out a second vehicle off the shoulder in a ditch. The deputy observed that the car in the ditch had extensive rear-end damage. In that vehicle was Robert Naumann. The deputy checked Naumann and could not find a pulse. Naumann was ultimately pronounced dead. The Pfaff vehicle had extensive front-end damage. The deputy noted that it was Pfaff who had made the cell phone call notifying dispatch of the accident. In that call, Pfaff stated that he was driving on the interstate and another vehicle crossed over and hit him head-on. Jordan then testified that he was an "accident reconstructionist, certified." His opinion was that Pfaff's vehicle had struck the rear of Naumann's vehicle, which was parked to the right of the fog line on the shoulder about four feet off the roadway. Pfaff was transported by ambulance to Waukesha Memorial Hospital.

¶3 Another deputy, Brett Metzen, followed the ambulance to the hospital. He testified that he observed Pfaff to have red and glassy eyes and the odor of intoxicants. Metzen arrested Pfaff for OWI and read the Informing the Accused form to Pfaff. Pfaff refused to consent to the test. Then a blood sample was taken. The blood alcohol content was .147 %.

¶4 After the assistant district attorney finished his summary, the parties debated whether there was probable cause that Pfaff had committed a felony. The trial court reiterated those parts of the preliminary hearing record it believed important and held that the record established probable cause.

¶5 Then the court turned to the refusal hearing and, in particular, whether there was probable cause to arrest and whether the refusal was reasonable considering Pfaff's medical condition at the time. Before proceeding, however, the court made the following comment: "I request that both sides do not repeat

any evidence that was put forth in the preliminary hearing transcript, as I will incorporate that by reference." The court noted that at the preliminary hearing, the defense had not cross-examined on certain issues and stated: "What I will indicate is if you wish further cross-examination, even though I'm incorporating by reference the prior record, I will allow you to have further cross-examination on the probable cause and the refusal issue."

¶6 Pfaff, by his counsel at the time, Allan Eisenberg, objected. He stated, in pertinent part: "I object to incorporating anything by reference. My position is, first of all, [I'm] not on notice as to that, so I haven't examined it from that perspective. I expected that any probable cause hearing on motion and refusal hearing, which also has a probable cause component, would stand by itself and on its own …. We're in a completely different posture now." The trial court responded:

> Okay. For the record, the transcript of the preliminary hearing is only 54 pages. It's been extensively argued by Mr. Eisenberg with reference to certain pages, so there is no surprise as to the information that is in the preliminary hearing transcript. Indeed, Mr. Eisenberg, you have just argued that very well, so there is no surprise there.
>
> As I indicated, I am allowing you further cross-examination if you would desire. To continue just to repeat the same testimony would be a waste of this court's time; therefore, I'm not inclined to sustain your objection, but comments from the state on Mr. Eisenberg's objection?

¶7 The State had no objection to the procedure the court had decided to use. After further colloquy, the State called Metzen to the stand so that more information could be put in the record about the circumstances surrounding the Informing the Accused form.

¶8 In relevant part, Metzen testified that he read the form to Pfaff and then asked Pfaff if he would submit to an evidentiary chemical test of his blood. Initially, Pfaff did not respond. He did not make eye contact with the deputy. He was "just lying there. Looking around the room." His eyes were open and his body was moving on occasion. Metzen repeated the question. This time, Pfaff replied, "No." The deputy marked the form "no," indicating a refusal. Pfaff did not give the deputy any reason for refusing. Thereafter, the deputy arranged for a blood draw to be taken and asked Pfaff if he would submit to the blood draw, to which Pfaff replied that he would.

¶9 Eisenberg then engaged in cross-examination. In pertinent part, Eisenberg asked Metzen if the OWI arrest was based only on the fact that the deputy smelled alcohol on Pfaff's breath. The deputy replied "no sir" and stated that it was also based on Pfaff's inability to maintain control of his motor vehicle. When Eisenberg reminded the deputy that he never saw Pfaff driving the vehicle, the deputy replied that "it was related to me on information and belief by Deputy Jordan, who was on the scene." Jordan had informed Metzen that Pfaff caused the accident. The officer admitted that he had no personal knowledge of Pfaff's driving.

¶10 As to Pfaff's condition after the Informing the Accused form was read to him and his refusal, Metzen testified that Pfaff had a neck brace on and was strapped to a headboard at first, but after returning from a CAT scan, the neck brace was removed and the long board was also removed so that Pfaff was able to sit in a semi-upright position on the bed. At this time, Metzen attempted to question Pfaff regarding the Alcohol Influence Report. He was thereafter medically cleared for discharge.

¶11 After Metzen left the stand, the State informed the court that it had no further evidence to present. The court then asked Eisenberg if he wanted to cross-examine Jordan, who was available. Eisenberg replied: "I'm not going to cross-examine him now, because I object to any consideration of any prior testimony he gave." Eisenberg then called Pfaff to the stand.

¶12 In relevant part, Pfaff testified that oncoming headlights blinded him and a vehicle was coming at him, which he tried to avoid. He related that the other vehicle was coming at him, head-on. He said he was knocked out by the collision. Then he came to and called 911 on his cell phone. He said his neck was sore, he could not move and he was in a lot of pain. He said he had problems breathing as well as back pain. At the scene, the medical personnel put a neck brace on him and strapped him to a backboard. He testified that Metzen never read the Informing the Accused form to him. He said that Metzen was reading something to him but he did not hear it as he was slipping in and out of consciousness. He described his condition as "semi-comatose." Pfaff did remember Metzen asking him if he was going to refuse a blood draw and he said, "No."

¶13 The assistant district attorney cross-examined Pfaff. Pfaff admitted being the driver of his vehicle and having come from a tavern. He admitted to drinking that night before driving. He did not recall how much he had to drink or over what period of time, but denied being intoxicated. Pfaff admitted calling 911 on the cell phone and estimates that it was fifteen or twenty minutes before anyone arrived. Pfaff recalled being told he was under arrest for OWI. He admitted being able to get up and walk at some point so as to be transported to jail after being medically cleared.

¶14 In closing arguments, the assistant district attorney informed the court that Metzen based his belief that there was probable cause to arrest Pfaff for OWI in part on Pfaff's culpability for the accident. The prosecutor acknowledged that Metzen had no personal knowledge of Pfaff's guilty conduct, but cited Wisconsin case law for the proposition that an officer may use the entire spectrum of evidence available to police authorities in determining probable cause. The assistant district attorney then reiterated Jordan's testimony at the preliminary hearing and coupled that with Metzen's observations in arguing that probable cause was found. As to whether there was a medical condition excusing Pfaff's refusal, the assistant district attorney asked the court to find Metzen's testimony more credible than Pfaff's and that Pfaff was physically able to respond.

¶15 The trial court began its remarks by reiterating its earlier ruling that it had incorporated by reference the transcript of the preliminary hearing. Based on this record, the court found Jordan's account to be credible. It also found Metzen's account credible. Regarding whether there was a medical explanation for Pfaff's refusal, the court reasoned that since Pfaff had the wherewithal and good judgment to call 911 at the scene, he was in control of his faculties. Coupled with his later being medically cleared, the court found that Pfaff did not have a physical inability to submit to the test. The court ordered that Pfaff's license be revoked for one year for unreasonable refusal to consent to the chemical blood test. From this order, Pfaff, by new counsel, appealed.

¶16 We agree with Pfaff that the procedure employed by the trial court—incorporating by reference the preliminary hearing testimony, using evidence gleaned from that hearing and making credibility calls based on the transcript—was error. As pointed out by Pfaff, a refusal hearing requires that a tribunal hear testimony and find facts. In particular, regarding WIS. STAT. § 343.305(9)(a)5.a,

the tribunal is charged with determining as a matter of fact whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, whether the officer properly complied with his or her duty to read the Informing the Accused form, and whether the defendant unreasonably refused to consent to the test. When the person charged with observing the demeanor and assessing the credibility of witnesses relies instead upon a cold black-and-white record, we agree with Pfaff that the procedure violates his due process right to a hearing before a tribunal.

¶17 We reject the trial court's apparent view that because the officers were available for cross-examination, Pfaff would have the opportunity to test the officers' credibility in front of the court and the court would then be able to assess the witnesses' demeanor and credibility based on that cross-examination. The court has an obligation to make its credibility assessment based not only on what it sees and hears during cross-examination, but also on what occurs during direct examination. Moreover, the court has the obligation to make the State put on its case. The court's decision effectively relieved the State of that obligation.

¶18 We also reject the trial court's view that making the officers take the stand and making the State ask virtually the same questions it asked at the preliminary hearing is a "waste" of the court's time. The prior hearing occurred before a court commissioner, not the court of record in the refusal hearing. There is no way the trial court could make a credibility assessment based on a cold record. That is why judges on the court of appeals do not engage in fact-finding based on a transcript. In ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980), the supreme court commented that our state constitution precludes appellate courts from making factual determinations where the evidence is in dispute. The court wrote, in pertinent part, that the making of factual

determinations "is a power reserved to trial courts" where the evidence is in dispute. ***Id.*** It is not a waste of time for a trial court to exercise its constitutional responsibility to observe witness demeanor even if it means an officer has to reiterate what he or she said at another hearing before a different tribunal.

¶19 We further reject the State's attempt to protect the court's procedural ruling. The State cites our decision in ***State v. Carlson***, 2002 WI App 44, 250 Wis. 2d 562, 641 N.W.2d 451, *review denied*, 2002 WI 48, 252 Wis. 2d 151, 644 N.W.2d 687 (Wis. Apr. 22, 2002) (No. 01-1088), for the proposition that incorporating a bindover transcript and using that to help determine probable cause in a refusal hearing comports with due process. In ***Carlson***, the defendant temporarily had his driving privileges revoked without a hearing. The temporary loss totaled nineteen days. ***Id.*** at ¶3. Using ***Mathews v. Eldridge***, 424 U.S. 319 (1976), as its guide, the court held that since the mistake was recognized almost immediately and since Carlson did eventually receive an opportunity to be heard in a meaningful time and in a meaningful manner, he received all process due for a refusal hearing. ***Carlson***, 2002 WI App 44 at ¶27. This was especially so because the private interest affected—nineteen days without a driver's license—was not substantial. ***Id.*** at ¶21. The State posits that using a transcript in lieu of actual testimony on direct examination is adequate because a driver's license is not a substantial interest, the possibility of deprivation in license revocation cases is not significant, and the government's interest in getting drunk drivers off the road is high.

¶20 The State misreads our decision in ***Carlson***. We did not say that the refusal hearing is of such little moment that the process due at those hearings is insignificant. Rather, we said that the nineteen days of license deprivation was so minimal that a lack of a hearing for those nineteen days was not a fundamental due

process deprivation. ***Id.*** The ***Carlson*** decision was directly tied to the facts in that case—the nineteen days, in particular. ***Id.*** at ¶¶21, 27. In this case, however, the tribunal has a job—to find facts after observing the demeanor of witnesses. It is a significant due process violation when the tribunal, despite objection, finds facts based on a cold black-and-white record—whether the violation occurs in a high profile felony murder or a low profile refusal hearing. If the statute affords a right to an evidentiary hearing before a neutral fact finder, then that is what must be accorded.

¶21 We cannot conclude that the error was harmless. Without the information from the transcript, there is not enough independent information from which we can be confident that probable cause to arrest was established. For example, the trial court made, as part of its probable cause findings, a determination that Jordan's preliminary hearing testimony was credible. Based on our conclusion that the trial court was in no position to make such a finding, we must ignore it. We must do the same with Metzen's testimony at the preliminary hearing and the trial court's findings that he was credible at that hearing.

¶22 This does not leave us with much. While Pfaff admitted during the hearing that he was driving, that he had been drinking, and that he had come from a tavern, this information was not available to Metzen when he made the decision to arrest Pfaff for OWI. And while Metzen was subject to cross-examination on the issue of whether he observed Pfaff to have glassy eyes and an odor of intoxicants on his breath, we cannot give it any credence because to do so would give license to the very procedure we have just decided is contrary to due process. So, the only information that we can credibly rely upon is the undisputed facts: that Pfaff was driving and that he was in an accident. We cannot use the harmless error doctrine to affirm. We must reverse and remand the probable cause portion

of the refusal hearing with directions that the State present its witnesses in direct examination and put on its case before a tribunal. These witnesses may then be cross-examined and, based on the record made before the tribunal, the tribunal shall make the required findings of facts and conclusions of law.

¶23 Regarding the reasonable refusal issue, Metzen was subject to direct examination and cross-examination on that issue. So, there is no due process question. Metzen testified that Pfaff answered "no" to the question about whether he would consent to the chemical blood test, the second time he was asked. The trial court believed Metzen's account, which is a credibility call that is not clearly erroneous. And while Pfaff argues that the trial court erred by inferring consciousness at the time of the refusal because he made a call to 911 before the refusal and was medically released after the refusal, we hold that the court's inference was valid. The elemental inferences made by the trial court as a result of the State's proof of basic facts are these: Pfaff made the 911 call, so he was lucid then. And Pfaff was medically cleared to leave the hospital, so he was lucid at that time as well. A reasonable inference can then be made from these two elemental inferences: that Pfaff was also lucid and capable of giving or denying consent at the time he was asked to consent to the test. On remand, the parties and the trial court shall treat our decision on the reasonable refusal issue as the law of the case and shall not retry it.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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