

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2008

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. 2008AP903-FT

Cir. Ct. No. 2007TR1778

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF JASON G. JOHN:

COUNTY OF ADAMS,

PLAINTIFF-RESPONDENT,

v.

JASON G. JOHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Jason John appeals the judgment revoking his operating privileges after a hearing on his refusal to submit to an intoximeter test. We affirm the judgment.

¶2 John's arguments relate to the intoximeter report generated after his arrest for operating a motor vehicle while under the influence of an intoxicant and to a requirement in the administrative code that law enforcement personnel observe a test subject for a minimum of twenty minutes prior to the collection of a breath specimen. *See* WIS. ADMIN. CODE § Trans 311.06(3).² We address John's arguments after supplying the pertinent background facts.

¶3 The sole witness at John's refusal hearing was the officer who arrested him. The officer testified that he transported John to the county sheriff's department for an "intoximeter" test of John's breath. The officer read the "Informing the Accused" form to John and requested that John submit to an evidentiary chemical test of his breath. John indicated concern about his driving status for his job in Illinois. After the officer advised John that he did not know

¹ This is an expedited appeal under WIS. STAT. RULE 809.17, decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN ADMIN. CODE § Trans 311.06(3) provides, in part:

Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:

(a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.

how John's status might be affected, John told the officer that he would not take the test.

¶4 The County introduced the intoximeter report as an exhibit. The officer identified the report, and the circuit court admitted it into evidence. The report indicated, consistent with the officer's testimony, that John refused the test. The officer testified that he was present when the intoximeter operator prepared the report, which was signed by the operator and by another individual who certified compliance with the twenty-minute observation requirement. The officer was not the individual who did the observation, and he could not identify the signature of the observer because he could not read the handwriting.

¶5 John objected to the report for lack of foundation because he had no opportunity to cross-examine the observer. The circuit court overruled the objection and, after making the requisite findings, ordered John's operating privileges revoked for one year. John appealed the resulting judgment.

¶6 The issues at a refusal hearing are limited to (1) whether the officer had probable cause to believe that the suspect was driving under the influence of alcohol; (2) whether the officer complied with the informational provisions of the statute; (3) whether the suspect refused the test; and (4) whether the refusal was due to a physical inability. *State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986). John's challenge to the circuit court's judgment of revocation goes only to the third issue, namely, whether he refused the test; John does not dispute that the record was otherwise sufficient to support the judgment.

¶7 John first argues that the intoximeter report was not authenticated, and therefore not admissible, because the officer's testimony did not establish who signed the report after observing John. John further argues that the admission of

the report was not harmless error because the circuit court relied on the report in finding that John refused the test. We reject this line of argument for at least two reasons.

¶8 First, we disagree that the report was not authenticated. As already indicated, the officer testified that he was present when the intoximeter operator prepared the report. John presented no evidence undercutting this testimony. The officer's testimony was sufficient for the circuit court to find that the officer had firsthand knowledge of the report and that the report was what it purported to be. *See* WIS. STAT. §§ 909.01 and 909.015(1) (any "matter in question" may be authenticated by "[t]estimony of a witness with knowledge that a matter is what it is claimed to be").

¶9 Second, even if the circuit court had erred by admitting the report, we disagree with John's argument that the error was not harmless. The officer's un rebutted testimony was that John told the officer he would not take the test. The notation in the report that John refused to take the test was essentially cumulative to the officer's testimony. With or without the report, the circuit court would have had to find, based on the evidence before it, that John refused to take the test. Any error in admitting the report was therefore harmless. *See State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (setting forth tests for harmless error).

¶10 John also argues that his refusal was lawful because the County failed to establish compliance with the twenty-minute observation period. We reject this argument in light of the purpose of the observation period. As John recognizes, the obvious purpose of the observation period is to ensure accurate test results. That purpose comes into play when a subject *agrees* to submit to the test.

If, however, a subject refuses to submit to the test, as here, the observation period is irrelevant.

By the Court.—Judgment affirmed.

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

