COURT OF APPEALS
DECISION
DATED AND RELEASED

August 21, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0473-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS LEE WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

DYKMAN, P.J.[1] Dennis Lee Wilson appeals from an order suspending his driver's license for two years for refusing to submit to a chemical breath test, contrary to § 343.305, STATS., the implied consent statute. Wilson contends that the trial court improperly revoked his driver's license because:

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

(1) the State failed to show by clear and convincing evidence that he refused the chemical breath test before the arresting officer read him the ***Miranda*** warnings; and (2) the arresting officer failed to observe him for twenty minutes before initiating breath test procedures as required by § 343.305, STATS., and WIS. ADM. CODE § TRANS 311.06(3)(a). We conclude that: (1) the trial court's finding that Wilson refused to submit to chemical breath testing before the officer advised him of his ***Miranda*** rights is supported by credible evidence; and (2) the officer did not need to observe Wilson for twenty minutes because Wilson refused to submit to a breath test. We therefore affirm.

On September 15, 1996, Deputy Sheriff Julie Mikulski arrested Wilson for operating a motor vehicle while intoxicated. Wilson refused to take a chemical breath test as required by § 343.305, STATS., and Mikulski issued a Notice of Intent to Revoke Operating Privileges. Wilson requested a refusal hearing.

At the January 1997 refusal hearing, Wilson argued that Mikulski had read him the ***Miranda*** warnings before asking him if he would submit to a chemical breath test. To support his allegation, Wilson referred to two reports completed by Mikulski. According to the times posted on the reports, Mikulski read Wilson the Alcoholic Influence Report, which contained the ***Miranda*** warnings, at 2:55 a.m., and read him the Informing the Accused form, which explains the obligation to submit to chemical breath testing and the penalty for refusing to do so, at 3:45 a.m. Wilson argued that the trial court should dismiss the charge and suppress the refusal response because the deputy deviated from the procedural requirements of § 343.305, STATS., in a manner that prejudiced him.

Mikulski testified that the posted times were incorrect. She stated that she always fills out the citation, the Informing the Accused form, the Intent to Revoke or Suspend form, and then the Alcoholic Influence Report, in that order. Therefore, she believed, she most likely filled out and read the Informing the Accused form to Wilson at 2:45 a.m., before she filled out and read the Alcoholic Influence Report to him at 2:55 a.m.

The court found Mikulski's testimony credible and determined that the officer asked Wilson to submit to a breath test prior to informing him of his ***Miranda*** rights. Therefore, the court determined that Wilson unlawfully refused to submit to a chemical breath test in violation of § 343.305, STATS.

On appeal, Wilson argues that the State did not show by clear and convincing evidence that Mikulski asked him to submit to a breath test before reading him the ***Miranda*** warnings.[2] Wilson argues that the trial court erred in believing Deputy Mikulski's testimony over the times posted on the two reports. Because he was prejudiced by being informed of his ***Miranda*** rights before being requested to submit to a breath test, Wilson argues that his license cannot be revoked under ***State v. Wilke***, 152 Wis.2d 243, 249-50, 448 N.W.2d 13, 15 (Ct. App. 1989).

Without deciding whether an officer would fail to comply with the implied consent law by reading a driver the ***Miranda*** warnings before requesting a chemical breath test, we conclude that the trial court's finding that Wilson was informed of his ***Miranda*** rights after being requested to submit to chemical breath

[2] Section 345.45, STATS., sets the standard of proof for conviction of any person charged with violation of any traffic regulation as evidence that is clear, satisfactory and convincing.

testing is not clearly erroneous. The trier of fact determines the credibility of witnesses, and we will not disturb the court's determination where more than one reasonable inference can be drawn from credible evidence. ***In re Estate of Dejmal***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980). "Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief as a matter of law." ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43, 46 (1972). It is the function of the fact-finder to determine where the truth lies in a normal case of confusion, discrepancies and contradictions in the testimony of a witness. ***Id.***

The court explained that, despite some irregularities in the time sequences, it seemed reasonable that Mikulski asked Wilson to submit to chemical breath analysis before reading him the ***Miranda*** warnings. The court reasoned that Wilson would not have voiced his refusal to submit to testing if he had wished to exercise his right to remain silent. Because the court drew a reasonable inference from the testimony presented, we will not disturb its finding that the Wilson was read the ***Miranda*** warnings after refusing to submit to a breath test.

Wilson next argues that Mikulski did not administer a proper chemical breath test under § 343.305, STATS., because Mikulski did not observe him for twenty minutes as required by WIS. ADM. CODE § TRANS 311.06(3)(a). Citing ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), Wilson contends that when law enforcement officers fail to comply with the implied consent statute, a driver's license cannot be revoked for refusing to submit to a chemical test and the fact of refusal cannot be used in a subsequent criminal prosecution for drunk driving as evidence of the driver's consciousness of guilt.

The interpretation of administrative rules is a question of law that we review *de novo*. ***Brown v. Brown***, 177 Wis.2d 512, 516, 503 N.W.2d 280, 281 (Ct. App. 1993). Section 343.305(6)(b), STATS., requires the Department of Transportation to establish methods for the chemical analysis of breath. As part of its control procedures for breath analysis, the Department of Transportation requires a law enforcement officer to observe a person for a minimum of twenty minutes prior to the collection of a breath specimen. WIS. ADM. CODE § TRANS 311.06(3)(a). The trial court reasoned that, because Wilson refused to submit to breath analysis, Mikulski had no reason to observe him. The twenty-minute observation period, the court stated, only comes into play if in fact there is a test result from an Intoxilyzer. We agree. Because the deputy did not collect a specimen, Mikulski did not violate § TRANS 311.06(3)(a) by failing to observe Wilson for twenty minutes.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.