COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1719

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. MORAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

NETTESHEIM, J. Michael J. Moran appeals from a trial court order revoking his operating privileges after the court determined that Moran improperly refused to submit to a test for intoxication pursuant to the implied consent law, § 343.305, STATS. On appeal, Moran argues that he did not refuse the test because his diabetic condition rendered him incapable of withdrawing consent pursuant to § 343.305(3)(b). We hold that the evidence does not establish

that Moran was incapable of withdrawing his consent. Because Moran otherwise failed to prove that he was physically unable to submit to the test, we affirm the order.

On July 5, 1996, Laura Harding, a police officer with the Town of Linn Police Department, was advised that a motorcycle accident had occurred on Black Point Road in the town of Linn, Walworth county. Shortly thereafter, Harding was told to disregard the information because the person involved in the accident was being transported to the hospital by private car. Harding was then directed to Lakeland Medical Center because the hospital security officer had reported a suspicion that intoxicants were involved in the accident. When Harding arrived at the hospital she met with Moran.

Harding testified that Moran identified himself verbally. Harding noted that Moran smelled of intoxicants, had extremely blood shot eyes and slurred speech. When Harding asked Moran what happened, he responded that he had decided to drive his twenty-year-old nephew's motorcycle. Harding testified that Moran stated that he had forgotten how to ride a motorcycle and did not know how to stop. When Harding asked Moran if he had been drinking, Moran stated that he had consumed "two beers and two martinis."

During the course of her conversation with Moran, Harding formed the opinion that Moran was under the influence of intoxicants and was too intoxicated to drive. Based on this observation, Harding issued Moran a citation for operating under the influence and a citation for operating a motorcycle without a motorcycle endorsement on his license. Harding then read the Informing the Accused form to Moran. After reading each paragraph, Harding asked Moran if he understood. Moran answered each inquiry by stating, "I respectfully decline,

I'm in pain." After reading all the warnings to Moran, Harding asked Moran to submit to an evidentiary chemical test of his blood. Moran responded, "I respectfully decline, I'm in too much pain." Although Harding's incident report stated that Moran had a "blank stare" during her questioning, Harding testified that Moran appeared to understand the information. Harding issued Moran a Notice of Intent to Revoke Operating Privilege based on his refusal to submit to chemical testing pursuant to § 343.305(9)(a), STATS.

At the refusal hearing, Moran defended on the grounds that he was incapable of withdrawing consent because he was in a state of diabetic shock due to elevated blood sugar levels. His testimony in support of this claim was as follows. He is a forty-six-year-old man with diabetes and aortic stenosis. He performs a blood test every morning to determine his blood sugar levels. Based on his own experience with diabetes and his experience as a hospital lab technician, he is familiar with the effect of an abnormally high or low blood sugar level. High blood sugar levels can result in diabetic shock. Alcohol consumption or severe trauma can dramatically increase blood sugar levels. His blood sugar level, which is usually 135, was abnormally high at 365 on the morning following the accident. This blood sugar level placed him at risk of diabetic shock. He estimated that his blood sugar level on the night of the accident would have been even higher.

With respect to his conversation with Harding, Moran testified that he did not have any recollection of speaking with her and he did not recall anyone requesting him to submit to a blood test.

Moran's wife, Carolyn, testified that Moran was confused and crying on the way to the hospital. She described Moran as being in a state of shock and

that his answers to questions posed to him were confused and not always appropriate. She testified that Moran's eyes were opening and closing during the questioning. She confirmed Harding's testimony that when asked to submit to a blood test, Moran stated, "I respectfully decline."

Finally, Moran presented the testimony of his physician, Sheshan Natarajan, M.D. Natarajan testified that the alcohol consumed by Moran would have lowered Moran's blood sugar levels while the trauma induced by the accident would increase his blood sugar level. Natarajan expected that Moran's blood sugar levels would have been abnormally high, between 400 and 550, following the accident. A blood sugar level in this range "could make a person somnolent or sleepy and would interfere with their ability to understand questions and affect their comprehension in that regard." Natarajan additionally testified that a person with a high blood sugar level may emit a fruity odor which is often confused with alcohol.

At the close of the testimony, the trial court rejected Moran's defense. The court stated, in part:

> I find the officer had probable cause at least to ask the defendant to give a test, the defendant was read the Informing the Accused, he failed to give the requested test, which in this case was a blood test. Now he was in a lot of pain, but he was conscious and he could use the term, respectfully decline ….
>
> [T]he defendant is deemed not to have refused if by the preponderance of the evidence he shows physical inability to submit, and [Moran] didn't show physical inability to submit.

Based on these findings, the court revoked Moran's driving privileges for a period of one year.

On appeal, Moran raises the same argument made before the trial court: that he was incapable of withdrawing consent because he was in a state of diabetic shock. Moran contends that despite his verbal refusal, Harding should have drawn his blood pursuant to § 343.305(3)(b), STATS., which allows an officer to order a blood draw for "[a] person who is unconscious or otherwise not capable of withdrawing consent." In so arguing, Moran attempts to portray the issue as one of law, contending that the question is whether the facts fulfill the legal standard set out in § 343.305(3)(b). *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983) (the issue of whether the facts fulfill the statutory standard is a legal conclusion which is reviewed de novo).

However, at other points in his brief, Moran also seems to take issue with certain of the trial court's factual findings. Therefore, before deciding whether the facts of this case establish that Moran could not withdraw his consent under § 343.305(3)(b), STATS., we first turn to the trial court's findings at the refusal hearing that Moran was conscious and aware of the implied consent warnings when he refused to submit to a chemical test. In so doing, we bear in mind that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Section 805.17(2), STATS. Reversal is not required simply because some evidence might support a contrary finding. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979)**.** Rather, we examine the record, not for evidence to support a finding which the trial court did not make, but for facts to support the finding the trial court did make. *See* ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis.2d 524, 543, 309 N.W.2d 356, 365 (Ct. App. 1981).

A defendant accused of improperly refusing a chemical test may request a hearing pursuant to § 343.305(9)(a)4, STATS. One defense available to a defendant in a refusal hearing is a physical inability to submit to the test. *See* § 343.305(9)(a)5.c. If it is shown by a preponderance of evidence that an individual's refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, the individual shall not be considered to have refused the test. *See* ***id***.

However, § 343.305(3)(b), STATS., provides another possible defense to a refusal allegation. If the evidence establishes that the defendant was unconscious or otherwise not capable of withdrawing consent, the officer is nonetheless authorized to administer a chemical test.[1] *See* ***id***. Moran rests his case on this statutory provision.

The trial court rejected this defense. At the refusal hearing, the court found that Moran's repeated responses to the reading of the Informing the Accused form and his ultimate response to Harding's request for a blood test—"I decline respectfully, I am in a lot of pain"—was "hardly a statement of a person that's incompetent or so seriously injured that he cannot respond." We agree. Harding testified that Moran seemed to be listening to and understanding the information in the Informing the Accused form. Moran was able to give the hospital and Harding a full account of the accident and events leading up to it. In addition, the trial court found that Moran's ability to respond to questioning was

[1] We recognize that § 343.305(3)(b), STATS., does not expressly designate this scenario as a "defense." Regardless, if such a situation exists, the defendant's refusal is excused and the defendant will have successfully defended the allegation.

inconsistent with the sleepiness which Moran's physician, Natarajan, testified that a person in diabetic shock would experience.

Moran contends, however, that his repeated response, "I respectfully decline, I'm in pain," to each paragraph of the implied consent warnings demonstrates his inability to understand the testing procedure. He contends that his responses were inappropriate because Harding did not ask him to take the test until she had delivered all of the warnings. However, the very first paragraph of the warnings advised Moran that he was presumed to have given consent to the test. Under those circumstances, we do not deem Moran's responses as unduly inappropriate. One fair reading of these responses is that Moran decided early on to refuse the test and persisted in that stance. This was the interpretation adopted by the trial court when it described Moran's conduct as "defiant."

Moran also argues that the trial court did not grasp that his defense was based on a claim that he was incapable of withdrawing his consent under § 343.305(3)(b), STATS. Instead, Moran contends that the trial court simply saw the case as a routine refusal proceeding. We disagree. Although not by name, the trial court distinguished the case of ***State v. Disch***, 129 Wis.2d 225, 385 N.W.2d 140 (1986), which squarely addresses the withdrawal of consent under § 343.305(3)(b). In addition, the court expressly rejected Moran's claim that his diabetic condition rendered him unable or incompetent to comprehend the implied consent warnings or to make an informed decision regarding the test.

Next, we turn to the legal issue in this case: whether the facts as determined by the trial court constituted an inability on Moran's part to withdraw his consent. Here, Moran relies on ***Disch***. There, Disch claimed that the officer should have administered a chemical test because she was not capable of

withdrawing her consent. The court agreed. *See* ***Disch***, 129 Wis.2d at 236, 385 N.W.2d at 144. The court stated that the phrase "not capable of withdrawing consent" described "a person who has conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings." *See* ***id***. at 235, 385 N.W.2d at 144. The court's determination was based on the following facts: Disch had been injured in an accident and had been given an unidentified drug before the officer saw her; she was able to state her name and address but did not seem able to concentrate; she was in a stupor and appeared to be dozing off; and she testified that she was not sure what people were saying to her and that she was not sure what it was all about. *See* ***id***. at 236, 385 N.W.2d at 144.

Moran argues that he, like Disch, was not capable of withdrawing consent. Although Moran points to his wife's testimony that he was confused and Harding's testimony that he had a "blank stare" when she spoke with him, we have already detailed the evidence which supports the trial court's findings that Moran was conscious and competent regarding the testing process. And, as we have already held, these findings are not clearly erroneous. Moreover, we bear in mind the caution sounded by the ***Disch*** court that the phrase "not capable of withdrawing consent" must be construed narrowly and applied infrequently. *See* ***id.*** at 235, 385 N.W.2d at 144. The court said that "[i]f law enforcement officers or the courts construe the phrase … broadly to apply to all persons who are confused or disoriented, the legislative purposes of sec. 343.305 will be defeated." ***Disch***, 129 Wis.2d at 235, 385 N.W.2d at 144. Moran's interpretation of the evidence in this case takes us over the line set down by ***Disch***.

Finally, we address Moran's argument that his inability at the refusal hearing to recall substantial portions of the evening following his accident

indicates that he was incapable of withdrawing consent. In support, Moran relies upon ***State v. Hagaman***, 133 Wis.2d 381, 385, 395 N.W.2d 617, 618 (Ct. App, 1986), in which this court concluded that the defendant, who was able to testify in detail at the hearing regarding the chain of events from arrest through jailing, was not so severely affected by her mental disorder that she was incapable of withdrawing consent.

Moran's reliance on ***Hagaman*** is misplaced. The focus of the inquiry in ***Hagaman,*** as in any refusal hearing where the issue is the ability to withdraw consent, was the defendant's condition at the time of the testing procedure, not at the time of the hearing. This is in accord with ***Disch*** where the supreme court stated that a person who is not capable of withdrawing consent "lacks *present* knowledge or perception of his or her acts or surroundings." ***Disch***, 129 Wis.2d at 235, 385 N.W.2d at 144 (emphasis added). Thus, when a defendant can testify about the events surrounding the testing procedure, the trial court will factor that testimony, together with the other evidence, into the decision. That is what the ***Hagaman*** court did. However, when the defendant cannot provide such testimony, the court will decide the issue based on the evidence which otherwise exists. That is what the trial court did here. ***Hagaman*** does not stand for the proposition that a defendant who cannot recall the events of the testing procedure at the refusal hearing is incapable of withdrawing consent as a matter of law.

Moran's inability at the refusal hearing to recall portions of the testing procedures on the date of his arrest does not alter the fact that Harding testified that Moran was able to provide her with intelligible information regarding the accident and that Moran appeared to be listening and responding when she read him the Informing the Accused form. We reject Moran's argument that his

inability at the refusal hearing to recall the events concerning his arrest demonstrates that he was incapable of withdrawing his consent.

We uphold the trial court's findings that Moran was alert and able to consent to the blood test and that he consciously declined to submit to the test. As such, these findings do not support Moran's claim that he was incapable of withdrawing his consent under the legal standard set out in § 343.305(3)(b), STATS. Since the evidence does not otherwise show that Moran's refusal was due to a physical inability to submit to the blood test, the trial court correctly ruled that Moran had improperly refused to submit to the blood test.

By the Court.—Order affirmed.

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