

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2373-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES J. REED,

DEFENDANT-APPELLANT.

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

ANDERSON, J. The trial court found that Charles J. Reed was read the Informing the Accused form before he was asked to submit to a chemical test of his breath and his refusal to submit to the breath test was not due to any physical inability; accordingly, the trial court revoked Reed's operating privileges. Reed appeals the order arguing that time notations on the Intoxilyzer report and the Informing the Accused form establish that the arresting officer did

not follow the statutory sequence and that he had established, by a preponderance of the evidence, that a recent hernia surgery prevented him from submitting to a breath test. Because we agree with the trial court, we affirm.

Reed's first contention is that § 343.305(4), STATS., requires that the information contained in the Informing the Accused form be given to a driver before the time a chemical test specimen is requested by the arresting officer. He alleges that the evidence at the refusal hearing conclusively establishes that the officer did not read him the Informing the Accused form until after he was requested to submit to a breath test. Reed relies upon the time stamp of 3:11 a.m. printed on the Intoxilyzer 5000 test card and the handwritten time of 3:47 a.m. placed by the officer on the Informing the Accused form. He argues that the trial court's conclusion that the officer followed the correct sequence of events and informed Reed of his rights under the implied consent law before asking him to submit to a breath test is against the great weight and clear preponderance of the evidence.

We will not reverse the findings of the trial court, sitting as the trier of fact on this issue, unless the findings of fact are clearly erroneous. *See State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). 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. *See In re Estate of Dejmaj*, 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 that can arise in an evidentiary hearing between documentary evidence and the testimony of a witness. *See id.*

The trial court explained that at the beginning of the Informing the Accused form there is a time notation of 2:40 a.m. and it concluded that this was the time at which the arresting officer began to inform Reed of the mandated information. The court found that the time of 3:47 a.m. noted on the foot of the form was the time that the officer completed all of the paperwork. The trial court's conclusion that Reed was informed of his rights in the proper sequence is supported by the evidence.

Officer Long testified that after he arrested Reed he took him to the City of Delavan Police Department for the purpose of taking a breath sample. The officer's testimony is that he read verbatim to Reed the Informing the Accused form. After reading the form to Reed, he asked him if he would consent to a breath test and Reed asked for some time to consider the request. Long acceded to the request and completed filling out the citation for operating while intoxicated. Long completed the citation and gave it to Reed and asked if he was then willing to submit to a breath test. Reed refused. Long noted the refusal on the Informing the Accused form and Reed signed the document to acknowledge his refusal. After Reed refused to take the breath test, Long entered the information into the Intoxilyzer and a report was automatically printed.

Reed confirmed the sequence of events when he testified that he was taken to "the Delavan Police Department, at which time I was presented with the Informing the Accused." Reed never testified that Long did not read the Informing the Accused form until after Reed had refused to submit to a breath test.

Reed's second contention is that he had established that his refusal to submit to a breath test was due to a physical inability. In addition to evidence that almost immediately after he was stopped Reed informed the officer that he had recently had hernia surgery, Reed submitted, by stipulation, the letter of his treating physician. Reed's physician wrote that although Reed tolerated the surgery, he developed a seroma in the groin which caused local pain and discomfort and prevented Reed from engaging in strenuous physical activity for several weeks. The physician also noted Reed's self-report that for several months he would "notice that even taking a deep breath would cause severe pain in his groin and would trigger a cough reflex"

While acknowledging that Reed may have had continuing discomfort and pain from the hernia surgery, the trial court concluded that he had failed to establish by a preponderance of the evidence that the pain and discomfort prevented him from blowing into the Intoxilyzer. Reed appeals this conclusion arguing that his unrefuted evidence was more than enough to establish his physical disability.

A person is not deemed to refuse the test if the preponderance of the evidence shows that "the 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." Section 343.305(9)(a)5.c, STATS. We will not set aside the trial court's findings that Reed failed to meet his burden unless those findings are clearly erroneous. *See* § 805.17(2), STATS.

Reed's principal complaint is that it was improper for the court to base its conclusion on the fact that Reed did not even attempt to blow into the machine. The court concluded that without an attempt by Reed to provide a breath

sample it would never be known if his hernia surgery prevented him from complying with the officer's request.

The trial court considered all of the evidence presented before finding Reed's refusal unreasonable. After carefully weighing the evidence, the trial court found that Reed had failed to establish his affirmative defense by a preponderance of the evidence. We agree. It is only after the fact that Reed argues he hurt so much that he could not blow into the Intoxilyzer even though he never attempted to do so. We also note that there is no evidence that Reed appeared to be in pain or suffering from any coughing reflex, or evidence of any other physical manifestation from which the officer could determine that Reed was physically unable to submit to a breath test.

We conclude that the trial court correctly applied the provisions of § 343.305(9)(a)5.c, STATS., and that the courts' findings were not clearly erroneous. We agree that the refusal was unreasonable.

By the Court.—Order affirmed.

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

