

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 1999

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. 99-1855

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JERRY W. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 SNYDER, J. Jerry W. Krueger appeals from a § 343.305, STATS., order revoking his driver's privileges for refusing to submit to a blood alcohol test for intoxication. Krueger contends that he established by a preponderance of the evidence that he was physically unable to submit to a test of his breath due to a physical disability as provided under § 343.305(9)(a)5.c. We conclude that the

trial court did not err in finding that Krueger failed to meet his burden that he was physically unable to take the chemical test and affirm the revocation order.

¶2 Officer Eric Stenson of the City of Oshkosh Police Department observed Krueger operating his vehicle in an erratic manner on March 20, 1999. Stenson stopped the vehicle and asked Krueger if he had any reason for the erratic driving. Krueger complained about a vehicle cutting him off and that he was “pissed off.” Stenson smelled the odor of alcohol coming from the vehicle and noticed that Krueger had slurred speech. Krueger was not able to satisfactorily perform the heel-to-toe test, told Stenson “I can’t do this ‘fucking’ heel to toe test” and became agitated, argumentative and uncooperative.

¶3 After Krueger complained about leg pain and a number of leg operations, Stenson requested that Krueger recite the alphabet from A to Z and perform the finger-to-nose test. Krueger failed these tests. Krueger was asked to provide a preliminary breath test (PBT) sample prior to his arrest. According to Stenson, Krueger did not attempt to generate any breath during the PBT; he “puffed his cheeks out and that was it.”

¶4 After Krueger was placed under arrest, he told Stenson that he “needed some medication because he was going to flip out on us” and that the medication was in his car. Stenson testified that Krueger did not indicate what type of medication. Krueger was transported to the Oshkosh police station where he was read the required Informing the Accused form and was asked to submit to a breath alcohol test. Krueger refused to consent to a test¹ and was presented with a

¹ The record does not include any reason Krueger provided for the refusal:

Q Did you ask [Krueger] at that time if he would submit to a test of his breath?

(continued)

notice of intent to revoke his operator's license pursuant to § 343.305(9)(a), STATS. Krueger timely requested a § 343.305(9) refusal hearing after receiving the notice of intent to revoke.

¶5 At the refusal hearing, Krueger testified that he suffered from panic disorder or panic attacks. He stated that he felt the symptoms of a panic attack coming on at the scene of the OWI arrest and described the feeling as “[s]hortness of breath, just feel hyper, like you want to move and can’t sit still and hard to concentrate; get somewhat disorientated.” Krueger testified that he blew as hard as he could to comply with the PBT request. He stated that at the scene of the stop, “I requested from [Stenson] if I could please take my medication, and I explained to him that I had panic disorder.” Krueger testified that Stenson searched and locked his vehicle and told him, “I have your medication,” but “you’re not getting [the medication] until you’re arrested and let go.” Krueger concedes that he did not provide a breath test sample but stated that he told Stenson that “[i]f he would let me take my medication, in twenty minutes I would be fine, which he indicated that, once again, don’t ask for your medication because you’re not getting it.”

¶6 Dr. E.C. Ping testified that Krueger suffered from panic disorder and had been prescribed medication identified as Alprazolam, also known as Xanax, and Paxil. According to Ping, panic disorder is a “metabolic mental anxiety disorder which is characterized by sudden onset of severe anxiety and panic-like symptoms which include a whole host of physical symptoms including chest

A Yes.
Q What was his response?
A “No.”

pains, shortness of breath, sweating, tremors, nausea, vomiting, dizziness, feeling like you're going to pass out." Ping testified that "[t]he purpose of the Xanax medication is that, when [Krueger] gets into a stressful situation or he begins or he can feel he's going to have panic-like symptoms, he can take [the medication] as needed." Ping further stated that Krueger self-medicates with Xanax when "he's in a crisis situation or stressful situation or he feels an attack coming on." Ping testified that Krueger took Paxil daily.

¶7 A police officer may request that a person submit to a chemical test for blood alcohol content upon the person's arrest for operating a motor vehicle while intoxicated (OWI). *See* § 343.305(3)(a), STATS. When a test subject refuses to take a chemical test and requests a § 343.305(9) refusal hearing, the hearing is controlled by statute. Section 343.305(9)(a)5 limits the issues before the court to: (1) whether the arresting officer had probable cause to believe the accused was driving while intoxicated, (2) whether the officer adequately informed the accused of his or her rights and responsibilities in compliance with § 343.305(4), (3) whether the accused refused to submit to the requested chemical test, and (4) whether the accused should not be deemed to have refused because the evidence shows that the refusal was due to some physical inability to submit to the test which was unrelated to the use of alcohol or drugs.

¶8 Krueger limits his appellate challenge to the fourth § 343.305(9)(a)5, STATS., factor. A driver of a motor vehicle is deemed to have consented to a blood alcohol test. *See Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985). A physical inability to take a chemical test is the only proper basis on which a driver may refuse the test. *See id.* Section 343.305(9)(a)5.c provides in relevant part:

The person shall not be considered to have refused the test if it is shown by a preponderance of evidence 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

Krueger contends that the trial court erred in concluding that he had not met his burden of proving a physical incapacity to provide a breath sample, due to disease or disability, by a preponderance of the evidence.

¶9 The trial court's determination that Krueger was not physically unable, due to disease or disability, to provide a sample of his breath is a factual finding that we will not disturb unless it is clearly erroneous, that is, unless the finding is contrary to the great weight and clear preponderance of the evidence. *See* § 805.17(2), STATS.; *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). When a trial court sits as a trier of fact, it determines issues of credibility. *See Fidelity & Deposit Co. v. First Nat'l Bank*, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). It is for the trier of fact, not this court, to assess witness credibility. *See Rohl v. State*, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974). This is true for experts as well as for lay witnesses. *See* WIS JI—CIVIL 260 (trier of fact “should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case;” it is “not bound by any expert's opinion”).

¶10 Whether Krueger was suffering from a panic disorder episode at the time he refused to take the chemical test is a question of fact. Krueger argued to the court that if someone is suffering from a panic attack causing shortness of breath so that the person cannot produce a breath sample, that would be a physical disability. Further, he contended that a preponderance of the evidence supported that he was suffering from a panic attack and that he asked several times for his medication. According to Krueger, “he wanted his medication so he would be

able to blow because of his panic disorder; and, because of his panic disorder, he couldn't blow" and that "he didn't have the lung capacity to blow." After hearing Krueger's arguments, the trial court noted Krueger's overall lack of cooperation with the police officer. The court determined that based upon the record evidence and the totality of the circumstances, Krueger had failed to meet his burden.

¶11 We agree with the trial court that Krueger's contentions that he was suffering a panic attack at the time he was requested to submit to the chemical breath test, that he was unable to provide a sufficient breath sample at that time or that he lacked lung capacity to provide a breath sample are not supported by the record evidence. The trial court found that Krueger was under treatment for panic disorder, as testified to by Ping, and that he had requested his medication from the officers. However, the trial court also noted the lack of evidence as to the manifestation of the disorder and attending symptoms as described by Ping "when [Krueger] got down to the station."

¶12 Even if the trial court found Ping's testimony credible, it fell short of proof that Krueger was physically unable to provide a breath sample at the time the sample was requested. At best, Ping testified to a periodic mental condition that is subject to self-medication, with the purpose of the medication being that "when [Krueger] gets into a stressful situation or he begins or he can feel he's going to have panic-like symptoms, he can take [the medication] as needed."

¶13 Krueger testified that he felt the symptoms of a panic attack coming on at the scene of the arrest, described the feeling and said that he told Stenson that he wanted his medication because "I had a panic disorder." He testified that he told Stenson at the police station that if he could take his medication "in twenty minutes I would be fine." Krueger never specifically testified that he was

suffering an episode of panic disorder, as described by Ping, at the arrest scene or at the time the chemical breath test was requested.

¶14 Stenson testified that Krueger told him he needed his medication “because he was going to flip out on us.” In spite of Krueger’s warning to Stenson, the record is void of any evidence that Krueger suffered any consequences of a lack of medication other than his own statement that he had a shortness of breath at the arrest scene. Krueger’s contention that he blew as hard as he could during the PBT procedure is contrary to Stenson’s observations of Krueger’s efforts to comply. Neither Krueger nor Stenson testified to the existence at any time of any of the litany of symptoms testified to by Ping that would accompany the onset and existence of a panic disorder. According to Ping, the panic disorder medication is used when a person “can feel he’s going to have panic-like symptoms” or when a person “feels that an attack is coming on.” We read the trial court’s analysis as finding that the need for medication to avoid a panic disorder is separate from the existence of the disorder.²

¶15 We conclude that the question of whether Krueger was able to comply with the request to provide a chemical test sample is a credibility determination. Accordingly, we are satisfied that the trial court’s findings that Krueger did not meet his burden of showing by a preponderance of the evidence

² The trial court concluded:

I have to find, based on the record here and the totality of the circumstances that [Krueger’s] refusal here was unreasonable, to refuse to at least attempt to take this test. It just flat out was a refusal ... *and the medication isn’t going to change that; and he’s functioned over the years with this medication* [Emphasis added.]

that he was physically unable to submit to a chemical test of his breath are not erroneous.

By the Court.—Order affirmed.

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

