

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2006

Cornelia G. Clark
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. 2005AP2354

Cir. Ct. No. 2004TR11703

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF LEWIS J. BURMEISTER:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEWIS J. BURMEISTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
R. ALAN BATES, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ Lewis J. Burmeister appeals a circuit court order revoking his driver's license under the implied consent law. He argues that his asthma rendered him unable to submit to a breathalyzer test and that the circuit court should have sequestered the State's intoximeter expert. We affirm the order.

Background

¶2 Shortly before midnight on June 3, 2004, a police officer observed a vehicle without its headlights on make an illegal U-turn. The officer attempted to stop the vehicle by activating his emergency lights, but the vehicle continued accelerating. It turned into a gas station, which was not open for business, and drove around to the rear of the building.

¶3 The vehicle's driver, later identified as Burmeister, exited the vehicle and started walking away from the officer. The officer ordered Burmeister to stop, but Burmeister said "no" and continued walking until the officer detained him. The officer noticed an odor of intoxicants on Burmeister's breath, that Burmeister's speech was slurred, and that Burmeister was having some difficulty maintaining his balance. Burmeister initially claimed he had not been driving, but also said to the officer something to the effect of, "Is there anything we can do to get out of this?"

¶4 At the officer's request, Burmeister agreed to perform field sobriety tests, including the walk-and-turn test, which yielded seven "clues" of intoxication. The officer asked Burmeister if he had any medically diagnosed

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

condition that would affect his balance, and Burmeister stated yes, but would not elaborate. Burmeister said to the officer something to the effect of: “Come on, man. I couldn’t even do this sober.” Burmeister exhibited all six clues of intoxication when performing the horizontal gaze nystagmus test. The officer placed Burmeister under arrest for operating a motor vehicle while under the influence of an intoxicant.

¶5 At the police station, Burmeister agreed to take a breathalyzer test, but each time he blew into the machine he would blow short breaths in rapid succession with very little breath, rather than a long and steady breath as the officer had instructed. Ultimately, Burmeister failed to blow a sufficient sample, and said that he had asthma. The officer concluded that Burmeister was refusing the test and issued a notice of intent to revoke Burmeister’s driver’s license.²

¶6 Pursuant to WIS. STAT. § 343.305(9), Burmeister requested a refusal hearing.³ After taking evidence, the circuit court found that Burmeister was able

² The officer also issued Burmeister a citation for violating a local ordinance adopting WIS. STAT. § 346.63(1)(a), the statute that prohibits the operation of a motor vehicle while under the influence of an intoxicant.

³ WISCONSIN STAT. § 343.305(9) provides:

REFUSALS; NOTICE AND COURT HEARING. (a) If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person’s license and prepare a notice of intent to revoke, by court order under sub. (10), the person’s operating privilege.... The notice of intent to revoke the person’s operating privilege shall contain substantially all of the following information:

....

4. That the person may request a hearing on the revocation within 10 days

5. That the issues of the hearing are limited to:

(continued)

to but did not give an adequate breath sample on the night of his arrest and, therefore, concluded that Burmeister had refused the test. The court ordered that Burmeister's driver's license be revoked for one year pursuant to § 343.305(10).⁴

Discussion

¶7 Burmeister argues that his asthma rendered him unable to submit to the breathalyzer test. WISCONSIN STAT. § 343.305(9)(a)5.c. provides, in pertinent 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

¶8 In *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985), we explained: “Failure to submit to a breathalyzer test for any reason other than a physical inability to submit to the test is a refusal to take the test.” *Id.* at 191. Thus, the issue here is not simply whether Burmeister

....

c. Whether the person refused to permit the test. 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, controlled substances, controlled substance analogs or other drugs.

⁴ WISCONSIN STAT. § 343.305(10) provides:

(b)

2. Except as provided in subd. 3., 4. or 4m., for the first improper refusal, the court shall revoke the person's operating privilege for one year.

has asthma, but instead whether the record supports the court's finding that Burmeister was physically able to give a breath sample on the night of his arrest. The narrow question we must answer is whether that finding was clearly erroneous. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) ("On review of a factual determination made by a trial court ..., an appellate court will not reverse unless the finding is clearly erroneous."). It was not.

¶9 According to the arresting officer's testimony, Burmeister "did say ... at one point that he had asthma," but this "seemed like an ... after thought." Consistent with the details of Burmeister's arrest as described above, the officer further testified that "[t]hroughout the whole arrest, [Burmeister] was very evasive, through every stage." The officer also specifically testified that he believed Burmeister was trying to subvert or evade the test.

¶10 The officer's testimony describing his observations of Burmeister's physical state also support the circuit court's finding that Burmeister was able to give a breath sample on the night of his arrest:

Q During the entire time you were with [Burmeister], did he—other than this soft, short blowing into the machine, did he appear to have any trouble getting his breath?

A No, not at all.

Q Did he appear to be wheezing?

A No.

Q Did he appear at any time, other than during the Intoximeter test, appear to have any shortness of breath?

A No, he did not.

Q Did he at any time other than what you've testified about, "I have asthma," when he was blowing in, complain of any symptoms of asthma?

A No.

Q Did he at any time take out any inhalers or use any form of medication, including but not limited to inhalers?

A No, he did not.

....

Q During the time that you were in contact with him, from the time—time you first noticed him and stopped him and did the various things that you testified to before, um, was there anything about the manner and method in which he conducted himself that it would have led you to believe he had asthma?

A No.

¶11 We readily acknowledge that the officer was not qualified to give a *medical opinion* as to whether Burmeister has asthma or displayed asthma symptoms. Nonetheless, the officer's testimony showed that Burmeister was not exhibiting any observable shortness of breath, apart from the time he actually blew short breaths into the machine, that would have prevented him from providing a breath sample.

¶12 We find nothing in the testimony of Burmeister's physician, who diagnosed Burmeister with asthma after the arrest, that is inconsistent with the circuit court's finding. The physician testified that asthma can come and go. In addition, the physician conceded that he could not say what Burmeister's capabilities were on the date of the arrest. The physician's testimony also included an opinion suggesting that the results of Burmeister's asthma test showed that at the time of that test Burmeister *would have been* able to give a sufficient breath sample for purposes of a breathalyzer test.

¶13 Burmeister also asserts that the circuit court erred by exempting the State's intoximeter expert from the court's sequestration order without first determining that the expert's presence was "essential to the presentation" of the State's case under WIS. STAT. § 906.15(2)(c).⁵ The State concedes error, but argues that the error was harmless. A circuit court's failure to comply with § 906.15(2)(c) is subject to harmless error analysis. *See Bagnowski v. Preway, Inc.*, 138 Wis. 2d 241, 250-51, 405 N.W.2d 746 (Ct. App. 1987). We agree that the error was harmless.

¶14 The most significant testimony given by the intoximeter expert was her opinion that the test administered by Burmeister's physician, even if it reflected Burmeister's abilities at the time of the arrest, showed that Burmeister would have been able to give a sufficient breath sample on the night of his arrest. Our review of the record does not disclose any reason to think that the intoximeter expert's presence during the physician's testimony affected the intoximeter expert's ability to provide this testimony. Regardless whether the State's expert was present during the physician's testimony, the expert could have been informed

⁵ WISCONSIN STAT. § 906.15 provides:

Exclusion of witnesses. (1) At the request of a party, the judge or a circuit court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

....

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

of the physician's test and could have given the same opinion. Consequently, we conclude that the error was harmless.

¶15 In sum, the circuit court's finding that Burmeister was able to give a breath sample on the night of his arrest was not clearly erroneous, and any circuit court error under WIS. STAT. § 906.15 was harmless. We therefore affirm the circuit court's order.

By the Court.—Order affirmed.

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

