

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 2010

A. John Voelker
Acting 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. 2010AP497

Cir. Ct. No. 2009CV2607

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MENASHA,

PLAINTIFF-RESPONDENT,

V.

GLEN A. NIEMUTH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
THOMAS J. GRITTON, Judge. *Affirmed.*

¶1 REILLY, J.¹ Glen A. Niemuth appeals from an order of the circuit court affirming a judgment of the municipal court of the City of Menasha. The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

issue on appeal is whether the evidence supports the municipal court decision. Because the record reveals that the circuit court properly sustained the decision of the municipal court, we affirm.

¶2 On May 7, 2009, Niemuth was arrested for operating a motor vehicle while intoxicated. On August 12, 2009, a trial was held before the City of Menasha municipal court wherein Niemuth was convicted of operating a motor vehicle while under the influence of an intoxicant, contrary to a city ordinance adopting by reference WIS. STAT. § 346.63(1)(a). Niemuth was advised of his right to appeal and requested a transcript review pursuant to WIS. STAT. § 800.14(5).

¶3 On October 12, 2009, the circuit court, having reviewed the transcript, rendered a written decision holding that the municipal court's findings were not clearly erroneous and affirmed Niemuth's guilt. On October 21, 2009, Niemuth requested the circuit court to reconsider its decision, arguing that hearsay testimony was allowed and that the evidence did not support a finding of guilt by clear and convincing evidence. The circuit court denied the motion to reconsider on October 22, 2009. This appeal followed.

¶4 This case is governed by WIS. STAT. § 800.14(5), which provides for a transcript review. In an appeal based upon a transcript review, this court applies the same deference to the municipal court decision as the circuit court does. *Village of Williams Bay v. Metzl*, 124 Wis. 2d 356, 362, 369 N.W.2d 186 (Ct. App. 1985). We are thus not permitted to substitute our judgment for that of the

municipal court, and we are limited to an examination of the transcript to determine whether the evidence supports the municipal court decision. *Id.* at 361. As a result, findings of fact of the municipal court should not be set aside unless clearly erroneous and due regard should be given to the opportunity of the municipal court to judge the credibility of the witnesses. *Id.*; *see also* WIS. STAT. § 805.17(2).

¶5 Niemuth was charged with operating a motor vehicle while under the influence of an intoxicant pursuant to a traffic citation. The citation charged that on May 7, 2009, at 1:37 a.m., Niemuth was operating a motor vehicle while intoxicated. Based upon the testimony of the arresting officer and Niemuth, the municipal court found that the City had met its burden of proof on the charge set forth in the citation. We now examine the record to determine whether the municipal court reached a result which the evidence supports. *Metzl*, 124 Wis. 2d at 362.

¶6 The record reveals: the arresting officer testified that at approximately 1:20 a.m. on May 7, 2009, he observed a vehicle with a missing or defective right mirror and expired plates. He stopped the vehicle and ascertained that Niemuth had been driving. He smelled alcohol coming from Niemuth's vehicle and observed Niemuth to have bloodshot eyes. Officer Sawyer requested that Niemuth perform sobriety tests; Niemuth failed all three sobriety tests. Niemuth indicated to the officer that he drank four to five beers that night, and that

he was on his way home from the bar. The result of .11 on the intoximeter was placed into evidence without objection.

¶7 Our review of the trial record persuades us that sufficient facts exist to support the municipal court's ultimate determination. The decision of the municipal court, therefore, will not be disturbed on appeal.

By the Court.—Order affirmed.

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

