**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 21, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1002-CR** **Cir. Ct. No. 2015CT10**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH K. LARSON,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Iron County: PATRICK MADDEN, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Joseph Larson appeals a judgment of conviction for third-offense operating a motor vehicle while intoxicated (OWI). He argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

circuit court erred by denying his motion to suppress evidence. That motion was based on postarrest issues regarding use of the Informing the Accused form and administration of a breath test. We affirm.

## BACKGROUND

¶2 At the suppression hearing, deputy Eric Snow of the Iron County Sherriff's Department testified he stopped Larson's vehicle at 8:36 p.m. after observing it travel over the speed limit and twice cross the center line. After approaching Larson's vehicle and making observations suggesting Larson was intoxicated, Snow administered field sobriety tests and arrested Larson. Snow testified they waited about thirty-five minutes for Larson's vehicle to be towed, after which he transported Larson to the Iron County Jail. Snow testified they arrived at the jail at 9:35 p.m.

¶3 Deputy Luke Wozniak testified he read the Informing the Accused form to Larson two times before administering a breath test at the jail. *See* WIS. STAT. § 343.305(4). He testified Larson agreed to take a breath test after the second reading. Wozniak further testified he performed a twenty-minute observation of Larson before conducting the test. Snow also testified that he observed Wozniak conduct the twenty-minute observation period, Larson agree to a breath test, and Larson take a breath test.

¶4 Two exhibits were introduced at the hearing: the Informing the Accused form and the printout of the breath test results. The test results printout indicated the machine was activated at 10:13 p.m., Larson was tested over a period from 10:13 to 10:23 p.m., and Wozniak had conducted a twenty-minute, pretest observation period. The Informing the Accused form was signed by Wozniak and had 10:17 p.m. written as the time of signature. Wozniak acknowledged that he

marked "urine" on the form as the requested test, but he testified he did so inadvertently and that he had actually requested a breath test from Larson when reading the form. Larson testified he originally understood he would be taking a urine test but also noted the officers asked him to take a breath test. Larson testified he was "[n]ot a hundred percent sure" if the officers observed him for twenty minutes before collecting a specimen of his breath. Snow, Wozniak and Larson all testified that Larson did not request an alternative test.

¶5 The circuit court denied the suppression motion, finding that the result of the breath test was reliable, the officers' testimony that the twenty-minute waiting period occurred was credible, and Wozniak requested and Larson agreed to a breath test, despite the form's reference to a urine test. Larson pled guilty to third-offense OWI and now appeals pursuant to WIS. STAT. § 971.31(10).

## DISCUSSION

¶6 Appellate review of a decision on a motion to suppress presents a question of constitutional fact, which consists of two steps. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. We uphold the circuit court's findings of fact unless they are clearly erroneous, while we apply constitutional principles to those findings independent of the circuit court's conclusions. ***Id.***

¶7 Larson challenges only matters related to the administration of the breath test. He first claims the officers failed to comply with WIS. STAT. § 343.305(4) and (6), which govern the reading of the Informing the Accused form and the requirements for chemical analyses, including of a suspect's breath. His argument involves two factual contentions regarding the Informing the Accused form here—namely, that he only consented to a test at 10:17 p.m.—the time

Wozniak signed the form—after it had already been initiated, and that he only consented at that point to a urine test, not a breath test. Larson's arguments on both points are thus premised on whether he consented to the test, which he argues never occurred. *See* ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430 ("search conducted pursuant to consent" is exception from Fourth Amendment warrant requirement). Larson does not argue that any consent he may have provided to Wozniak was involuntary. We only review whether consent was given "in fact by words, gestures, or conduct," which is a question of historical fact for the circuit court. *See* ***id.***, ¶30.

¶8 Larson argues the circuit court's findings were clearly erroneous on both the time and nature of the test of which he was informed. His argument is essentially that the information on the Informing the Accused form, the test results printout, and his own testimony are credible. According to Larson, this evidence defeats the "inconsistent" testimony of the officers, and renders the circuit court's contrary factual findings clearly erroneous. In effect, Larson requests that we retry his evidentiary hearing and make independent factual findings, which this court cannot do. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Instead, the circuit court, as the fact finder, was entitled to determine the witnesses' credibility and weigh the testimony and evidence presented, even if they are, at some level, "inconsistent." *See* ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979).

¶9 We conclude the circuit court's findings are not clearly erroneous. The court declared Wozniak was credible and relied on his testimony regarding the time and nature of the test of which Larson was advised, agreed to and received, rather than the writings on the form and Larson's testimony that he expected to receive a urine test rather than a breath test. Furthermore, the court

found that the selection of "urine" on the form was a "scrivener's error" in light of testimony that Larson explicitly consented to a breath test. Larson may himself believe the exhibits carry greater weight than the officers' testimony, but that alone certainly does not render the court's findings erroneous. *See* ***State v. Wenk***, 2001 WI App 268, ¶8, 248 Wis. 2d 714, 637 N.W.2d 417 ("[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record.").

¶10 Larson also argues the breath test was invalid because Wozniak did not conduct a twenty-minute observation period of Larson as set forth in WIS. ADMIN. CODE § TRANS 311.06(3)(a) (Mar. 2012), as promulgated under WIS. STAT. § 343.305(6)(b). Larson argues it was impossible for him to have arrived at the jail at 10:13 p.m. because, adding up the stated times in Snow's testimony, Larson must have arrived at the jail by 10:00 p.m. at the earliest. We disagree. This assertion ignores the court's explicit credibility finding regarding Wozniak's statement that he observed Larson for twenty minutes before conducting the test, and that Snow testified he arrived at the jail at 9:35 p.m. Once again, Larson's disagreement with these findings does not mean they are erroneous, much less clearly erroneous.[2] *See* ***Wenk***, 248 Wis. 2d 714, ¶8. We thus conclude the circuit court properly denied Larson's motion to suppress.

[2] Contrary to Larson's argument, there is nothing on the printout of the breath test results showing when the observation period was actually commenced relative to when the first breath specimen was collected. The printout certainly does not state the observation period began at 10:13 p.m., as Larson contends.

*By the Court*.—Judgment affirmed.

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