COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1832

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

VILLAGE OF OREGON,

PLAINTIFF-RESPONDENT,

V.

FRANK P. SAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Frank Sauer appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI), in violation of the Village of Oregon traffic ordinance. He claims that the trial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court erred when it derived a "negative inference" from his failure to testify in his own defense, and further, that there was insufficient evidence in the record to establish that he was guilty of OMVWI under the ordinance. We reject both arguments and affirm the appealed judgment.

¶2 The only witness who testified during the bench trial on the OMVWI charge against Sauer was the arresting officer. Thus, the trial court was not required to resolve any conflicts in testimony, and the issue before us is not whether the trial court's factual findings were clearly erroneous. *See* WIS. STAT. § 805.17(2). Rather, the principal issue on appeal is whether the evidence in the record, viewed in the light most favorable to the Village and to the conviction, is so insufficient in probative force that it can be said as a matter of law that no trier of fact, acting reasonably, would have been satisfied to a reasonable certainty by evidence which is clear, satisfactory and convincing, that Sauer operated a motor vehicle at a time when his ability to do so was impaired because of the consumption of alcoholic beverages. *See* WIS JI—CRIMINAL 2663B; *cf.* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶3 Our review convinces us that the record contains sufficient evidence to permit the trial court to conclude that the Village met its burden to show that Sauer was guilty of OMVWI. In its decision at the conclusion of the trial, the court specifically relied upon the following facts testified to by the arresting officer. Prior to the traffic stop, Sauer's vehicle made at least two significant deviations across the centerline of the street, and his vehicle hit the curb when it stopped in response to the officer's signal. The officer detected a strong odor of intoxicants from Sauer, who was the sole occupant of his vehicle. The officer also observed Sauer's face to be flushed and his eyes to be glassy. When the officer asked him if he had consumed any alcoholic beverages, he replied that he had had

"four to five drinks." Sauer grabbed or leaned on the car for balance while getting out of his vehicle, and he performed poorly on the walk-and-turn test. Before being released from custody, Sauer told the officer that "[h]e knew he shouldn't have been out partying tonight and that when he was at the party he was trying to eat some food to help with his driving home…."

¶4 Thus, in light of the foregoing undisputed evidence, we conclude that there was sufficient evidence in the record to find Sauer guilty of OMVWI even without any inferences that the court might have drawn from his failure to testify. The court, in its decision, noted that "[t]he defendant has chosen not to testify, and in this matter the Court may infer from his absence of testimony that his testimony would not be helpful to him…." The court made the "absent witness" inference in response to an argument by Sauer's counsel that a knee problem was responsible for Sauer's poor performance on the walk-and-turn test.[2] We conclude that the trial court's inference in this regard was not unreasonable, and in any event, the evidence at trial was sufficient to convict Sauer even without reliance on this inference. *See* ***Carr v. Amusement, Inc.***, 47 Wis. 2d 368, 375-76, 177 N.W.2d 388 (1970).

¶5 Accordingly, we affirm the judgment convicting Sauer of OMVWI in violation of the village ordinance.

By the Court.—Judgment affirmed.

[2] The officer testified that Sauer declined to perform the one legged stand test, citing a knee problem as preventing him from doing so. Sauer made no similar objection to performing the walk-and-turn test, and the court noted that "if he had a knee condition that interfered with his ability to perform the walk-and-turn test, that he would get on the stand and tell us about it."

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