

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3239

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF RHINELANDER,

PLAINTIFF-RESPONDENT,

V.

THOMAS R. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
ROBERT E. KINNEY, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Thomas Johnson appeals his conviction, after a trial to the court, for operating a motor vehicle while under the influence of an intoxicant, first offense. The arresting officer found Johnson, who was undisputably

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

intoxicated with a blood alcohol content of .357%, unconscious in a grocery store. After sitting for some time in the back room of the store, Johnson was interviewed. He stated that he had driven from the last place where he had been drinking to the grocery store. Johnson's vehicle was found parked in the store's parking lot. Johnson also incorrectly recited the alphabet as part of a sobriety test. At trial, however, Johnson testified that he parked his car at the grocery store earlier in the day and then walked to two different bars to drink before returning to the store.

¶2 Johnson contends that his statement to the arresting officer without some corroboration was insufficient evidence to show that he had operated a vehicle after he had been drinking. He also reasons that his statement about his drinking and driving was no more reliable than his incorrect recitation of the alphabet. This court disagrees and affirms the conviction.

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Where there are inconsistencies in the testimony of the witnesses, it is the trier of fact's duty to determine the weight and credibility of the testimony. See *Thomas v. State*, 92 Wis. 2d 372, 381-82, 284 N.W.2d 917 (1979). An appellate court will substitute its judgment for that of the trier of fact only when the fact-finder relied on evidence that was "inherently or patently incredible—that

kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Finally, a trial court's factual findings shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. *See* WIS. STAT. § 805.17(2).

¶3 Here, Johnson's admissions about his drinking and driving are corroborated by the fact that he was found intoxicated at the grocery store and his car was found in the nearby parking lot. Although Johnson's testimony at trial contradicted his statements to the arresting officer, this was a matter for the trial court's determination of credibility. The trial court believed his statements to the police officer were more credible than his contrary trial testimony. Because the evidence supports the trial court's findings that Johnson operated his car while under the influence of an intoxicant and these findings are not clearly erroneous, the conviction is affirmed.

By the Court.—Judgment affirmed.

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

