

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2003

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. 03-0682

Cir. Ct. No. 02TR009646

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. KUCHINSKAS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Edward J. Kuchinkas appeals from an order revoking his driver's license for his refusal to take a breathalyzer test. He argues that the circuit court's finding that he was on a public highway, and therefore

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

subject to the implied consent law, was erroneous. We disagree and affirm the circuit court's order for revocation.

FACTS

¶2 On August 22, 2002, firefighters noticed Kuchinskas's van in a ditch at the end of a driveway and they stopped to investigate. One of the firefighters, Michael Ratajczyk, talked with Kuchinskas to find out if he was injured. In the course of that conversation, Ratajczyk smelled alcohol on Kuchinskas's breath. He also noticed Kuchinskas was stumbling quite a bit. Ratajczyk asked the fire department dispatcher to call the police and Officers Mark Herbst and Frederick Michell arrived at the scene shortly thereafter. During Michell's investigation, Kuchinskas refused to take a breathalyzer test. Michell issued a notice of intent to revoke Kuchinskas's driving privileges.

¶3 Kuchinskas requested a refusal hearing to contest the impending revocation. At the hearing, the parties stipulated that the court's decision would rest on the deposition testimony of Ratajczyk, Herbst, and Michell. The parties narrowed the issue to whether Kuchinskas's van was on a "highway."

¶4 Ratajczyk described Kuchinskas's van as having its right front tire in the ditch and its right rear tire on the adjacent road, Crestview Drive. Michell claimed no knowledge of whether any portion of the van was on Crestview Drive; however, he testified that the ditch was approximately fifteen feet from Crestview Drive, the van was approximately twenty-five feet long, and the van's front passenger tire was in the ditch. Herbst testified that the back passenger tire of Kuchinskas's van was hanging off the driveway over the culvert.

¶5 Referencing Ratajczyk’s deposition testimony and a diagram that Ratajczyk created during his deposition, the circuit court found that Kuchinskas’s van was beyond the boundary of the private driveway and had entered onto the public highway of Crestview Drive. Because the van was on a public highway, the circuit court found that Kuchinskas was subject to the implied consent law and ordered a one-year revocation of his license.

¶6 Kuchinskas contends that the circuit court used an “erroneous standard of proof.” He argues that the circuit court allowed the testimony of the police officers to be “overcome” by the testimony of the firefighter, and in doing so failed to weigh all of the evidence. We disagree.

DISCUSSION

¶7 Kuchinskas challenges the application of the implied consent law, WIS. STAT. § 343.305(2), which states that a motorist on a public highway is deemed to have given consent to one or more breath, blood or urine tests for purposes of determining the presence or quantity of alcohol or other drugs in his or her system.

¶8 Kuchinskas claimed that his van was on a private driveway rather than a highway; therefore, his refusal to take the breathalyzer test was not covered by the implied consent law and revocation of his license would be improper. *See City of Kenosha v. Phillips*, 142 Wis. 2d 549, 558, 419 N.W.2d 236 (1988). The circuit court disagreed and found that the van was on the public highway and ordered revocation.

¶9 Findings of fact by a trial court shall not be set aside on appeal “unless clearly erroneous.” WIS. STAT. § 805.17(2). At the hearing, the parties

stipulated to the facts contained in the depositions of the three witnesses. The depositions demonstrated a range of observations related to the contested location of the van. Herbst stated that the van was “at the end of the driveway ... [and] the back passenger tire was hanging off the driveway over the culvert.” Less conclusively, Michell stated that he did not know if any part of the van was on Crestview Drive. Finally, Ratajczyk stated that the van was about “a foot or two into the street.” Exhibit 1, marked during the Ratajczyk deposition and referred to in the court’s decision, also places the van partially on Crestview Drive.

¶10 Because the witnesses provided inconsistent evidence, the circuit court was obligated to determine the van’s location. Kuchinskas challenges the circuit court’s reliance upon Ratajczyk’s testimony rather than that of Herbst or Michell. As we have stated before, when the evidence presented to the circuit court supports conflicting conclusions, “the trial court and not this court must decide which inference to draw.” *J.F. v. R.B.*, 160 Wis. 2d 840, 842-43, 467 N.W.2d 553 (Ct. App. 1991). The circuit court’s determination of the credibility and weight of the evidence will not be disturbed on appeal. *Id.* at 843.

¶11 The circuit court reviewed the testimony of the three witnesses along with a diagram of the van’s location. The court chose to rely on Ratajczyk’s description of the van’s location along with the diagram showing the vehicle on Crestview Drive. We will accept factual determinations by a lower court “unless no reasonable finder of fact could have reached the conclusions reached by the trial court.” *State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997). Although each witness gave a slightly different description of the van’s location, the circuit court’s factual determination was not beyond the scope of reason.

CONCLUSION

¶12 We conclude that the circuit court relied on facts stipulated into evidence by the parties to determine that Kuchinskas's van was on a public highway and the finding was not clearly erroneous. We therefore affirm the order of the circuit court.

By the Court.—Order affirmed.

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

