COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP982 **Cir. Ct. No. 2009TR25632**

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

IN THE MATTER OF THE REFUSAL OF MICHAEL D. URBEN:
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. URBEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 FINE, J. Michael D. Urben appeals the order finding unreasonable his refusal to submit to a chemical test of his blood's alcohol content. *See* WIS. STAT. § 343.305. He claims that the circuit court's determination that he did not prove by a preponderance of the evidence that his "refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the

use of alcohol, controlled substances, controlled substance analogs or other drugs[,]" *see* § 343.305(9)(a)5.c., was error.[1] We affirm.

I.

¶2 This matter arises out of a single-car accident in Shorewood, Wisconsin. Anthony Miller, a Shorewood police officer, testified that when he and an officer trainee arrived at North Lake Drive and East Capitol Drive at approximately 3:30 p.m., he saw Urben standing next to his car, which was "[p]artially off the road. Up on the curb resting against a tree." Urben was talking to another officer who was already there. Although Miller did not try to give Urben field sobriety tests, he saw the other officer do so. Miller told the circuit court that Urben had trouble reciting the alphabet: "I don't remember if he completed or not. I know he stopped in the middle of it and then continued on." Miller also testified that Urben had trouble with the one-leg test, and seemed to be generally uncooperative:

> A Mr. Urben was uncooperative with the test and each time -- each test he stated that he did not want to complete the test.
>
> Q Did he eventually try or never tried the one-legged test?
>
> A He tried it a couple of -- two -- possibly two, three times. Lifted up his leg and put his -- fell to the side.

[1] Under WIS. STAT. § 343.305(9)(a)5.c., a person declining to submit to a chemical test of the alcohol content of his or blood "shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs."

Miller also said that Urben was uncooperative when asked to do a walk-and-turn test, and a horizontal gaze nystagmus test. Miller told the circuit court that Urben "had an odor of intoxicating beverage and his balance was unsteady." Miller then arrested Urben for drunk driving and took him to the Shorewood police station. According to Miller, Urben asked for a blood test before he was arrested.

¶3 Once at the Shorewood police station, Urben refused to take any test that might reveal the alcohol contents of his blood. Miller recounted what happened while Urben was at the Shorewood police station. Some of Urben's interaction with Miller and the officer trainee was recorded, and a DVD disk of that recording is in the Record.[2] We looked at the recording twice and it shows nothing unusual. Urben was left in a holding room, and knew that he was being recorded because he looked up at the camera and said: "This is illegal. You can't hold a person like this." He acknowledged to the camera that Miller was training the other officer and that "I understand that she's young," but said that this was no excuse to "take advantage of people."

¶4 When the officer trainee went into the room where Urben was sitting, Miller stood by the door, watching. The officer trainee sat at the table across from Urben and read Urben his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). He appeared to understand, and said that he was willing to talk to her. She asked if he knew where he was arrested, and he correctly answered "Lake Drive," and told her that he was going "to my home from work." He then invoked his ***Miranda*** rights and asked for a lawyer. As the officer trainee left the room, he

[2] Officer Miller testified that the recording was stopped and restarted and that it does not show Urben for the entire time he was there. Other than pointing this out, Urben does not contend that anything material to the refusal issue was left out of the DVD shown in court.

said to her: "I know you're learning. Good job, honestly." Later, she got identification information from him, and he gave her his birth date and his specific street address in Whitefish Bay. When she read the lengthy implied-consent form to him, Urben listened and nodded, seemingly appropriately. He refused to submit to a test of his blood-alcohol content.

¶5 Thirty-six years old at the time of the refusal hearing, Urben said that he worked as a nuclear medicine specialist at a local hospital, and worked the day of the accident, from 7:45 a.m. to 3:15 p.m. without any breaks, even for food or water. The documents from the hospital that he submitted support that. Urben contends that he is a recovering alcoholic who had suffered two alcohol-withdrawal seizures before the accident, and that another alcohol-withdrawal seizure caused the accident. He told the circuit court that he had no recollection of anything in connection with the accident or his interactions with the Shorewood police officers. He further testified: "I can tell you the seizure was -- happened at approximately -- As my time record would indicate, I left work at 3:15. Takes four minutes to get to my car. I have to sign and sweep out so I am guessing that I left [the hospital] at about 3:20 and turned right out of the parking structure."

¶6 Urben's treating physician, a neurologist at the hospital where Urben works, testified that Urben had three seizures, including the one on the day of the accident, and that a post-seizure, postictal condition, "consists of lethargy, confusion, slurred speech, lack of coordination." He admitted, however, that he did not see the video played at the hearing, which based on our review does not show that Urben was confused, lethargic, uncoordinated or that he was slurring his speech. The physician also said that although Urben "could have verbally [*sic* — orally] answered the question [of whether he would consent to a test of his blood-alcohol level no], but he would not have a full understanding of the question," if

he were in a "postictal state."[3] The physician agreed with Urben's lawyer that, "if Mr. Urben was in the postictal state, he would not have been able to consciously refuse a breath test at that time."

¶7 Also testifying for Urben was Dr. Fran Gengo, an associate professor of pharmacology and neurology at the State University of New York, in Buffalo.[4] He testified by telephone, and told the circuit court that withdrawal of alcohol from a recovering alcoholic trying to quit can significantly adversely affect the brain. He said that a person in a post-seizure postictal state would suffer from "disorientation, confusion, slow or slurred speech, incoordination [*sic*], things like -- because remember, the brain is now working on a lot less [*sic* — fewer] nutrients and a lot less oxygen than it normally needs. It spent all of that during the seizure." As a result, he said, "You're able to respond, but you're not able to respond appropriately. You're not able to respond to your full capacity."

¶8 Dr. Gengo, who said that he saw the video recording, opined that he did not believe that Urben "was capable of making an informed, truly informed decision" because persons in a postictal state "are disoriented, confused, not capable of making informed decisions." He said that in his view, the video recording showed that Urben's "answers were responsive when" he was asked "very simple questions." But, "[w]hen he was asked questions that were more

[3] We *sic* the physician's use of the word "verbally" when he meant spoken communication (as opposed to the all-encompassing "use of words") because conflating "verbal" with "oral" is improper, albeit common. *See* ***State v. Ebersold***, 2007 WI App 232, ¶¶12, n.3, 14, 306 Wis. 2d 371, 379–380, n.3, 381, 742 N.W.2d 876, 879–880, n.3, 880.

[4] The transcript quotes Dr. Gengo as saying that he is an "associate professor of pharmacy." Urben tells us in his appellate brief, that Dr. Gengo's professorship is in "pharmacology." The State does not dispute this.

complex, or more importantly, when he was kind of left to his own devices, he rambled, in my opinion, somewhat nonsensical [*sic*]." Dr. Gengo also said that it would have been impossible for Urben to have drunk enough alcohol in fifteen or so minutes to have passed out.

¶9 As we have seen, the circuit court held that Urben had not proven that his refusal to submit to a test of his blood-alcohol content was excused by WIS. STAT. § 343.305(9)(a)5.c. The circuit court noted correctly that the statute required that there be a "physical inability" to submit, and that Urben did not prove that. The circuit court opined that, contrary to Dr. Gengo's testimony, the video recording did not show someone who was unaware of what was happening, and opined that when Urben realized that test results "could be used against him, and then he refuses the test." The circuit court concluded that the "tape showed very appropriate conduct" by Urben, and that "it showed that he was very much aware of his surroundings." Our review of the DVD confirms the circuit court's analysis.

II.

¶10 As we have seen, WIS. STAT. § 343.305(9)(a)5.c. provides that a person declining to submit to a chemical test of the alcohol content of his or blood "shall not be considered to have refused the test if it is shown by a preponderance of evidence that *the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol*, controlled substances, controlled substance analogs or other drugs." (Emphasis added.) Urben argues that the circuit court should have accepted what he calls the "uncontradicted testimony of the only two experts to testify" and that their testimony and the other evidence proved "by a preponderance of the evidence that

his refusal was due to a physical inability to submit to the test." (Bolding omitted.) We disagree.

¶11 This appeal concerns the interplay between the applicable statute and the evidence presented to the circuit court. Our analysis of what a statute requires is *de novo*. ***State v. Devries***, 2011 WI App 78, ¶2, 334 Wis. 2d 430, 433, 801 N.W.2d 336, 337. We apply statutes "as they are written unless they are ambiguous or unconstitutional." ***Ibid.*** "Further, we will not overturn a circuit court's findings of fact unless they are 'clearly erroneous.' WIS. STAT. RULE 805.17(2) (trial court's findings of fact accepted on appeal unless they are 'clearly erroneous.')." ***Ibid.*** Our review of "purely documentary" evidence is, however, *de novo*. ***Ibid.*** "[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording." ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 414, 799 N.W.2d 898, 904.

¶12 Under WIS. STAT. § 343.305(9)(a)5.c., "a mental condition cannot serve as a basis for properly refusing a chemical test. The mental disorder is relevant to the refusal issue, however, because if severe enough, that person is deemed not to have refused at all under [the predecessor to § 343.305(9)(a)5.c.]. In that situation, an officer may proceed to administer the test or tests because consent is presumed not to be withdrawn." ***State v. Hagaman***, 133 Wis. 2d 381, 383, 395 N.W.2d 617, 617–618 (Ct. App. 1986). Thus, *if* Urben could not have refused to submit to the test because of what he contends was his serious mental disconnect caused by what he argues was his postictal state, the officers here could have tested his blood-alcohol level whether he "consented" or "refused." ***Id.***, 133 Wis. 2d at 383, 395 N.W.2d at 618. Stated another way, ***Hagaman*** does not

excuse a refusal to submit to a test, it recognizes that the statute permits the test *if* the alleged drunk driver's "severe" "mental disorder" makes the driver incapable of revoking his or her implied consent to the test.

¶13 The statute, however, is more forgiving than a reading of ***Hagaman*** might suppose because it provides that a person "*shall not be considered to have refused the test* if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol." (Emphasis added.) Thus, whether the officers could have given Urben a test, he could not be found to have "refused" the test (and thus endure the attendant legal consequences to a refusal) if "the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs." So, as phrased by his reply brief on this appeal, Urben contends that "his seizure due to alcohol withdrawal and subsequent postictal state created a *physical disability* that rendered him *physically unable* to submit to the chemical test." (Emphasis added.) Leaving for another day whether an alcohol-caused postictal state is the type of disability encompassed by the statute, the problem with Urben's argument is, as the circuit court recognized, wholly unsupported by the evidence. Indeed, neither of Urben's expert witnesses testified that he was "physically unable" to either blow into a breath-test machine or give a sample of his blood. At most, they testified that Urben's mental condition made him unaware of whether he should or should not submit to a test. Although it may very well be that in an unusual circumstance an alleged drunk driver is so mentally impaired by a physical condition unrelated to his or her drinking that consent or non-consent is impossible, this is not the case. Indeed, the video recording is clarion evidence that Urben was fully aware of his surroundings, and that he could

not only understand and invoke his rights under ***Miranda***, and tell the officer trainee his birth date, his specific street address, and the street where he was arrested, but also that he recognized that the officer trainee, to whom he referred by name, was "young" and "learning." The circuit court's finding that Urben's refusal was not excused by the statute is affirmed.[5]

By the Court.—Order affirmed.

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

[5] As noted, Urben argues that the circuit court ignored the "uncontradicted" testimony of his experts and that this was improper. We disagree. The circuit court properly assessed their testimony in light of all the evidence, especially the video recording. Moreover, although it is true that, as Urben contends, "[p]ositive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court ... in the absence of something in the case which discredits ... it ...," ***Duffy v. Duffy***, 132 Wis. 2d 340, 346, 392 N.W.2d 115, 118 (Ct. App. 1986) (quotation marks, quoted source and emphasis omitted, ellipses by ***Duffy***), a factfinder is not bound by the opinions of any expert even if those opinions are not contradicted, ***Pautz v. State***, 64 Wis. 2d 469, 476, 219 N.W.2d 327, 330–331 (1974). The circuit court did not ignore or disregard any "uncontradicted testimony as to the existence of some *fact*." (Emphasis added.)