COURT OF APPEALS
DECISION
DATED AND RELEASED

October 4, 1995

No. 95-1182-FT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THERESA MC DONALD,

Defendant-Appellant.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

SNYDER, J. Theresa McDonald appeals from an order revoking her driving privileges for one year. McDonald argues that the trial court's finding of refusal under § 343.305(6)(c)3, STATS., was clearly erroneous. Because we conclude that under the facts presented, McDonald's failure to produce an adequate breath sample was a refusal, we affirm.

McDonald was stopped by Officer Mark Ockwood when he observed her vehicle driving erratically. When Ockwood approached

McDonald, he noted an odor of alcohol. He then asked McDonald to perform several field sobriety tests. When McDonald was unable to perform the tests to Ockwood's satisfaction, he placed her under arrest for operating a motor vehicle while under the influence of an intoxicant.

McDonald was taken to the Menomonee Falls police department, read the Informing the Accused form and asked to submit to a chemical test of her breath using an Intoxilyzer. McDonald agreed. Another officer, James Kirchberger, instructed McDonald on how to perform the test and administered it.

McDonald provided four breath samples, but the machine rejected each of them as inadequate. After the first sample was rejected, Kirchberger asked McDonald whether she had any respiratory difficulty or breathing problems, and McDonald replied that she did not. Kirchberger testified that McDonald blew very lightly on her first two attempts, and he encouraged her to blow harder. He told McDonald that she needed to blow until the machine emitted a tone. On the third try, McDonald increased her effort to blow, and the tone was activated. Kirchberger said that this was followed almost immediately by a reduction in effort on McDonald's part and that she "resumed the very light blowing of breath that she had done the first two samples."

After McDonald provided a fourth inadequate sample, Kirchberger concluded that she was refusing to cooperate with the Intoxilyzer test and deemed it to be a refusal.

A refusal hearing was held. The court found that (1) the officer had probable cause to arrest McDonald, (2) the officer properly read her the Informing the Accused form, (3) McDonald refused to permit the test, and (4) McDonald failed to establish a physical inability to submit to the test. This appeal followed.

In an appellate review of the trial court's factual findings, the court applies the clearly erroneous standard. ***Novelly Oil Co. v. Mathy Constr. Co.,*** 147 Wis.2d 613, 617-18, 433 N.W.2d 628, 630 (Ct. App. 1988). The trial court's findings of fact will not be set aside unless clearly erroneous. Section 805.17(2), STATS.

Under the implied consent statute, § 343.305, STATS., an individual who is deemed to have refused to take a chemical test may request a hearing on the refusal. Section 343.305(9)(a)4. The issues at the hearing are limited to the following: (1) whether there was probable cause to arrest the defendant, (2) whether the defendant refused to permit the test, (3) whether the officer complied with § 343.305(4) in reading the Informing the Accused form, and (4) whether there was a medical reason for the defendant's refusal. *See* § 343.305(9)(a)5.a-c. Under § 343.305(6)(c)3, the failure of an individual to provide two separate, adequate breath samples constitutes a refusal. When a person's conduct effectively prevents the operator of a breath-testing device from obtaining an accurate sample, the individual will be deemed to have refused the test. ***Village of Elkhart Lake v. Borzyskowski,*** 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985).

Based on the testimony at the refusal hearing, the court found that McDonald's failure to provide an adequate test sample was a refusal. Kirchberger testified that McDonald was blowing very lightly, and when her increased efforts on her third try caused the Intoxilyzer to signal the start of an adequate sample, he observed that McDonald immediately resumed a lighter exhalation. The trial court also heard the testimony of McDonald, who said, "I blew in the breathilyzer [sic] as hard as I could."[1] Having heard the contradictory testimony of the officer and McDonald, and without any evidence offered by McDonald of a physical problem that prevented her from providing an adequate sample, the trial court concluded that Kirchberger's testimony was more credible.

McDonald argues that because the State failed to establish that the Intoxilyzer machine was operated properly and was in proper working order, the finding of the trial court that the lack of an adequate sample was due to McDonald's refusal was clearly erroneous. She bases this on § 343.305(6), STATS., which delineates the requirements for obtaining blood, urine and breath samples. These requirements relate to the admissibility of valid tests from adequate samples. McDonald failed to give an adequate sample; therefore, there was no test. *See* ***State v. Grade,*** 165 Wis.2d 143, 149, 477 N.W.2d 315, 317

[1] McDonald also argues that she should have been allowed a "citizen witness" in the room to observe her efforts. The police refused to bring in such a witness. Under ***State v. Neitzel,*** 95 Wis.2d 191, 289 N.W.2d 828 (1980), the supreme court held that an individual has no right to counsel when deciding to take or refuse a chemical test for intoxication. This holding was based, in part, on the fact that the implied consent statute does not confer such a right. *See* ***id.*** at 200, 289 N.W.2d at 833. Likewise, there is no requirement in the statute which allows for the presence of a citizen witness.

(Ct. App. 1991). The only part of this subsection which is applicable to McDonald is § 343.305(6)(c)3, which states that the "[f]ailure of a person to provide 2 separate, adequate breath samples in the proper sequence constitutes a refusal."

The trial court's finding that McDonald failed to provide adequate breath samples for the Intoxilyzer was not clearly erroneous. Testimony as to the reason for the failure was heard from Kirchberger and McDonald, and the court found the officers' testimony more credible. When fact-finding is premised on the trial court's assessment of credibility, an appellate court must give due regard to the trial court's opportunity to make this assessment. ***Jacquart v. Jacquart,*** 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994). Accordingly, we affirm.

By the Court.—Order affirmed.

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