

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-1893

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME M. NELLIGAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Jerome M. Nelligan appeals from an order finding that he improperly refused to submit to a chemical test. Nelligan claims this finding was clearly erroneous. Because the record supports the trial court's finding, the finding is not clearly erroneous and this court affirms.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

At approximately 7 p.m. on March 28, 1996, City of Milwaukee Police Officer Michelle Picard was on routine patrol in a marked squad car, which was being driven by her partner. In the 1500 block of North Farwell Avenue, Picard observed Nelligan's vehicle swerve twice from his traffic lane and nearly strike the squad car. The squad car followed Nelligan's vehicle and observed his car swerve again, nearly striking two parked cars. The police activated the siren on the squad car and pulled Nelligan over. Picard testified that Nelligan stumbled out of the vehicle, had bloodshot eyes and a strong odor of alcoholic beverage on his breath. Nelligan admitted that he had been drinking and failed the field sobriety tests. He was arrested for Operating a Motor Vehicle While Intoxicated and transported to the police station, where Officer James McCarron read him the Informing the Accused form. McCarron then attempted to conduct an intoxilyzer test of the defendant.

During the first attempt, Nelligan placed the entire mouthpiece into his mouth and was unable to produce an accurate breath sample. While waiting to attempt a second sample, Nelligan reached over and struck several keys on the intoxilyzer machine. At the hearing in this matter, Nelligan testified that he was willing to give a second sample. Officer McCarron testified that Nelligan refused to give a breath sample. The trial court found McCarron's testimony more credible and found that Nelligan refused to submit to a chemical test. The trial court entered an order determining that Nelligan's refusal to submit to a chemical test was improper and revoking his driver's license for one year. Nelligan now appeals.

II. DISCUSSION

This court's review of a trial court's findings is limited to determining whether the factual findings are clearly erroneous. *See* § 805.17(2), STATS.; *Noll v. Dimiceli's Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). In rendering its finding that Nelligan refused to take the test, the trial court reasoned:

... I do believe that Mr. Nelligan was twice offered to perform this test. There are these shenanigans going on with the switch, and there is this question of the mouthpiece. Those don't really affect my decision. What happened in those two instances are consistent with somebody who's had something to drink because I think they show a little bit of impaired judgment

... The important facts that need to be considered are these: Officer McCarron offered the mouthpiece to Mr. Nelligan once he said he could blow, he didn't provide enough of a breath sample, the machine was readied the second time, I believe the mouthpiece was offered. I believe Officer McCarron's testimony on this point, and I believe Mr. Nelligan refused it so there are – I believe there was a refusal.

....

... Officer McCarron's testimony was clear and concise. He testified confidentially and I believe him that he offered the test twice and, therefore, I believe ... the refusal was improper

Nelligan argues that the trial court's finding is clearly erroneous. In support of his argument, he claims that Nelligan's testimony is more credible. Nelligan testified that he was ready, willing and able to submit to the breath test another time after the first failed attempt, but that the officer got angry when Nelligan touched the machine. As a result, Nelligan stated the officer declared "this is a refusal" without giving Nelligan another chance to take the test, despite Nelligan's statement of willingness to submit to another sample. Nelligan claims that the

intoxilyzer card supports his version because it shows that at 8:15 p.m., Nelligan blew into the machine and at 8:16 p.m., his attempt yielded a deficient sample. The card then shows the refusal documented at 8:17 p.m. This court is not persuaded.

The trial court's finding is not clearly erroneous because it is supported by Officer McCarron's testimony. The trial court reasoned that McCarron's testimony was more credible on this point. The trial court is in a better position to make credibility determinations because it can observe the tone and demeanor of the witnesses. See *Dejmal v. Merta*, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). Here, the trial court found McCarron's testimony more credible. The record supports this finding. McCarron testified he had conducted these tests hundreds of times, and that he was very experienced in handling chemical tests and subjects who have been drinking. In addition, Nelligan admitted that he was drinking, and Officer Picard testified that he appeared to be intoxicated. Under these circumstances, this court cannot fault the trial court for believing McCarron's testimony over Nelligan's.

In addition, this court is not persuaded by Nelligan's argument regarding the time recordation on the intoxilyzer card. The timing sequence does not render McCarron's testimony false. It is possible in his account of the events that the refusal could have come a minute or so after the initial test.

By the Court.—Order affirmed.

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

