COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0519

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN J. TANK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

BROWN, J. Kevin J. Tank appeals from the trial court's order revoking his driver's license following a finding that his refusal to submit to a breathalyzer test was unreasonable. He claims that the refusal was due to a physical inability to perform the test and, therefore, was reasonable. But the trial court found that his failure to complete the test was not caused by his physical disability. We conclude that this finding is not clearly erroneous and affirm.

At about 12:40 a.m. on September 12, 1997, Officer Emmett Grissom of the Grafton police department received a call on his cellular phone from an off-duty police officer reporting a possible intoxicated driver heading westbound on Highway 60. The caller provided a description of the car along with the license plate number. Grissom caught up with the vehicle, identified it as the vehicle described by the caller and then pulled the vehicle over after observing it twice strike the curbside and almost drive up onto the sidewalk. Grissom then approached the vehicle and asked the driver for his driver's license. Grissom noticed that the driver's breath smelled of intoxicants, that he fumbled for his license and that he had bloodshot, glassy eyes. The driver's license identified Tank as the driver. Tank admitted that he had been drinking earlier that evening. Grissom asked Tank to step out of the car to perform several field sobriety tests. Tank failed each test and Grissom placed him under arrest.

Grissom transported Tank to the Grafton police department. There, he read Tank Section A of the Informing the Accused form.[1] Tank indicated that he understood the form. Grissom then asked Tank if he would submit to a test of his breath. Tank responded that he would. Although Tank testified that he informed the officer that he had physical disabilities and was taking medication (Vicodin), he never indicated to the officer that his disabilities would impair his ability to perform the test.

Although Grissom did not administer the breathalyzer test, he remained in the room while another officer conducted the test. Tank provided the

[1] Section B of the Informing the Accused form only applies to commercial motor vehicle operator's/driver's and commercial driver's license holders. Tank does not hold a commercial driver's license and he was not operating a commercial motor vehicle when stopped; therefore, Section B was inapplicable to Tank.

first of two required samples. Grissom did not observe Tank having any difficulties providing the first sample. Nothing in the record indicates that Tank was aware of the test results for this first sample. The officer then asked Tank to provide a second sample. Tank, however, never provided the second sample. Grissom testified that instead of blowing into the tube, Tank "would blow into the machine for a few seconds, activate the tone, and then he would stop. He would try blowing around the tube. And at times he would act like he was blowing into it, but wouldn't actually blow into it at all." Grissom further explained that Tank "would puff up his cheeks as if he has got air in them and he is blowing into the machine, but you would hear no air exchanging itself through the tube."

Although the officer administering the test repeatedly informed Tank that he needed to furnish a second sample, Tank never did. At some point during the test, but after Tank provided the first sample, he informed the police that he had allergies and was doing the best he could. Tank explained that he was not refusing the test but, due to allergies, was unable to provide a second sample. He then asked if a blood or urine test could be performed instead. No other tests were performed. Because Tank never provided the second sample, the State filed a notice of intent to revoke Tank's driver's license for unreasonably refusing to submit to the breathalyzer test. A refusal hearing was held and the trial court determined, largely based on Grissom's testimony, that Tank had failed to show by a preponderance of the evidence that his refusal was due to a physical inability to perform the test. Tank appeals.

The appellate issue is whether Tank's refusal was due to a physical inability to submit to the breathalyzer test. Section 343.305(9)(a)5.c, STATS., provides in relevant part:

> The 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, controlled substances, controlled substance analogs or other drugs.

Whether Tank's refusal was reasonable is a question of fact. A trial court's factual finding will not be disturbed unless clearly erroneous. *See* § 805.17(2), STATS.

The record amply supports the trial court's finding that Tank's refusal was not due to a physical disability unrelated to alcohol consumption. Tank informed the officer that he was willing to submit to a breathalyzer test. The officer testified that Tank did not initially indicate that he had a physical problem which would impair his ability to complete the test. Only after Tank provided the first sample did he inform the officers that because of allergies he was unable to continue with the test. Tank testified that he tried to inform the officers that he had a physical disability (allergy problems) and, therefore, he "just couldn't physically do" the test. Grissom's testimony, however, contradicts this claim. Grissom testified that he did not observe Tank experiencing physical problems while trying to provide either the first or the second sample. Instead, he testified that when it came time for Tank to provide a second sample, Tank "would blow into the machine for a few seconds, activate the tone, and then he would stop. He would try blowing around the tube. And at times he would act like he was blowing into it, but wouldn't actually blow into it at all." Grissom stated that Tank "would puff up his cheeks as if he has got air in them and he is blowing into the machine, but you would hear no air exchanging itself through the tube." Grissom's testimony permits the inference that Tank had the purpose of mind to avoid completing the test. While Tank's testimony controverts Grissom's in that he told the court how his physical impairment was the cause of his inability to complete the test rather than any mental purpose to avoid completing it as being

the cause, the choice of inferences was for the trial court to make. Obviously, the trial court chose the inference that Tank was avoiding the test, not that he was physically unable to complete it. We may not disturb the trial court's choice of inference unless it is clearly erroneous. Here, it was not clearly erroneous.

Tank complains that he was not allowed to offer the trial court documentary evidence of his disabilities. The evidence consisted of a generic letter from a health care professional explaining how Tank had been treated for perennial allergies which caused shortness of breath that could be aggravated in times of stress. Tank appears to argue that this evidence would have been an important piece of information for the trial court to consider in choosing between the two inferences before it. But the record does not show that the trial court hindered Tank from seeking admission of the letter. In fact, when Tank referred to the documentary evidence during the hearing and the assistant district attorney objected to admitting the evidence based on hearsay grounds, the trial court remarked that Tank had not as yet offered it into evidence. The trial court's comments obviously alerted Tank that although he was proceeding pro se, he had to offer the document into evidence if he wanted it to be considered by the trial court. Tank never offered it into evidence. If Tank wanted the court to consider his documentary evidence, it was his responsibility to make a record and offer it into evidence.[2] We will not consider assertions of fact not properly before the trial court. *See* ***Jenkins v. Sabourin,*** 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981) (appellate court will not consider assertions of fact outside the record). We

[2] Tank's documentary evidence is part of the record before us because he subsequently mailed the documents to the trial court and those documents were included in the file that was sent to us. But they are not part of the trial court record.

conclude that Tank was not prohibited in any way by the trial court from offering his documentary evidence.

Moreover, even if Tank had offered the document into evidence and even if the document had been admitted, the only value of the document would have been to support his testimony that he had allergies which can cause a shortness of breath. But this evidence was already in the record by way of Tank's testimony. The issue was not whether Tank had allergies that can cause a shortness of breath. Rather, the issue was whether the shortness of breath was the reason why Tank did not complete the test. The health care professional's letter went no further in proving that shortness of breath caused Tank to be unable to take the test than Tank's testimony did. And, as to that testimony, we have already explained how the trial court was free to reject it—and obviously did reject it. Credibility determinations are for the trial court when it acts as the finder of fact. *See* ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). The trial court's finding that Tank's refusal to submit to the breathalyzer test was unreasonable is not clearly erroneous.

By the Court.—Order affirmed.

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