COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1040

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

IN THE MATTER OF THE REFUSAL OF DWAN L. SCHUCK:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DWAN L. SCHUCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

EICH, J.[1] Dwan L. Schuck appeals from an order revoking her driving privileges for refusing to submit to a breath test after being arrested for driving while intoxicated. She argues that her refusal was not unlawful. She

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

claims that because the arresting officer filled out the notice of intent to revoke her license before asking her to submit to a breath test, he must have deemed her to have refused the test at that point and that, as a result, her subsequent refusal must be disregarded and any refusal sanctions voided. We reject the argument and affirm the order.

After Sergeant Brian Ackeret of the Madison Police Department arrested Schuck for driving while intoxicated, he took her to police headquarters, where he issued the citation and read the "informing-the-accused" form to her *verbatim*. She asked some questions and Ackeret re-read relevant portions of the form. According to Ackeret, he asked Schuck if she would submit to a chemical test of her breath, and that she eventually refused. Ackeret then checked the "no" box on the form and prepared Intoxilyzer machine. He asked Schuck again if she was willing to submit to a chemical test, and again, she refused.

Rejecting Schuck's argument that Ackeret had failed to follow appropriate statutory procedures by completing the notice of intent to revoke *before* asking her to submit to the test, instead of after, the trial court ruled that she had improperly refused the test and revoked her driving privileges.

Schuck renews her argument on appeal, claiming that her actual refusal should be considered moot because Ackeret, by filling out the notice, must be considered to have deemed her to have refused at that point, and she asserts that "a driver cannot be deemed to have refused twice under the implied consent law." According to Schuck, once an officer fills out the notice of intent to revoke—which she says is the only mechanism to indicate that a refusal has occurred—the refusal is effectuated and the individual is no longer required to submit to a chemical test. Any refusals after that time, she claims, are "irrelevant."

We are not persuaded. Schuck's argument rests entirely on her assertion that the Intoxilyzer test record indicates that she refused the breath test at 1:47 a.m., while the notice of intent to revoke was filled out two minutes earlier, at 1:45 a.m. But, as the State points out, the Intoxilyzer test record was not admitted into evidence, and we therefore may not consider it on appeal.[2] *See* ***Dane County v. McManus***, 55 Wis.2d 413, 425-26, 198 N.W.2d 667, 674 (1972) (appellate court cannot consider factual assertions not reflected in the record). In the absence of any evidence of record as to when Schuck first refused the test, we have no way to establish the chronology of events, and thus no way to evaluate Schuck's argument.

Beyond that, it appears that trial court made its own assessment of Ackeret's and Schuck's credibility with respect to their conflicting testimony on the point.

> I guess we come down to a question of weight and credibility ... and in that regard the officer [was] performing his duties at the time.... On the other hand, the testimony from Miss Schuck is that just prior to this time, she was upset, and ... did have three drinks of wine, and so I just feel like if I'm weighing these two on a balancing act, I'm going to come down on the side of the officer in terms of whether or not 343.305 was complied with.

The trial court thus found Ackeret to be more credible, and went on to conclude that that he had properly complied with the procedures set forth in § 343.305(9)(a), STATS., with respect to preparation of the notice of intent to revoke. We will not upset the trial court's credibility determinations, or its assessment of the weight of the evidence, unless they are clearly erroneous. ***Leciejewski v. Sedlak***, 116

[2] We also note Ackeret's testimony that Schuck refused the test before he prepared the Intoxilyzer machine. That chronology would explain why the time on the notice of intent to revoke predates the time indicated on the Intoxilyzer test record, if it indeed does.

Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984); and Schuck has not persuaded us that they are.

By the Court.—Order affirmed.

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