

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP574

Cir. Ct. No. 2014TR2100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF DAVID FRANCIS WALLOCH:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID FRANCIS WALLOCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County:
TODD K. MARTENS, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ David Francis Walloch appeals from the circuit court’s order finding he unlawfully refused to submit to a chemical test for intoxication, pursuant to WIS. STAT. § 343.305, after being arrested for operating a motor vehicle while under the influence of an intoxicant. Walloch’s only contention on appeal is that the circuit court erred in concluding at the refusal hearing “that the State had sufficiently identified [Walloch] as the person who refused chemical testing.” We conclude that the court did not err and affirm.

¶2 Both parties assert that the State was required to prove by a preponderance of the evidence the identity of the person who was arrested and refused chemical testing. Ultimately, Walloch is arguing that the State failed to produce sufficient evidence to satisfy this burden. In considering the sufficiency of the evidence, if the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met, we will sustain the decision. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980).

¶3 Walloch complains that the witnesses at the refusal hearing provided only conclusory testimony that the person they arrested and who subsequently refused chemical testing was David Walloch. Walloch states:

While the [S]tate introduced conclusory testimony that the suspect in question was Defendant David Walloch, it provided no rationale for how its witnesses identified this suspect. No evidence was introduced which would allow a trier of fact to assess the manner in which an identification was made, or why it should be considered reliable.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

We conclude the State provided sufficient evidence from which the circuit court could reasonably conclude the State had proven that Walloch was the individual the officers arrested and who refused chemical testing.

¶4 At the hearing, the State called Slinger Police Officer Andrew Mammen as a witness and asked him: “On July 29th, 2014, do you recall conducting an investigation of and subsequently arresting an individual that you *then identified* as David Walloch?” (Emphasis added.) Mammen responded: “Yes.” The State also admitted into evidence the Informing the Accused form Mammen used with Walloch at the time of the arrest. The State asked Mammen: “Is this a fair and accurate copy of the document that you used with regards to Mr. Walloch on this date?” Mammen responded: “Yes.” The Informing the Accused form—on which the date and time correspond to Walloch’s arrest, and which includes the same citation number as the Notice of Intent to Revoke Operating Privilege issued on the same date to David Francis Walloch, and on which is included a driver license number—states in relevant part: “I certify that I have read the above information to DAVID FRANCIS WALLOCH, who has been arrested for a violation of OWI 2nd, and have provided him/her a copy of this form. *He/She was identified by WI DL.*” (Emphasis added.) “DAVID FRANCIS WALLOCH,” “OWI 2nd,” and “WI DL” are handwritten on the blank lines provided on the form.

¶5 Mammen went on to testify:

[State]: Can you explain to the Court how you went over [the Informing the Accused] form with the Defendant?

[Mammen]: While he was in the backseat of the vehicle, I read the form verbatim to him and asked him to submit to the evidentiary chemical test of his blood.

[State]: What answer did he provide to you at that time?

[Mammen]: “Yes.”

[State]: And I am assuming then you and Lieutenant Cashin attempted to transport him for purposes of a blood or breath draw?

[Mammen]: Yes.

[State]: In this case, it was blood, correct?

[Mammen]: That’s correct.

....

[State]: And during the ... trip [to the hospital for the blood draw], did the Defendant make any statements indicating to you that his position regarding consenting to the draw had changed?

[Mammen]: He had made a few statements to the effect that he did not want to submit to this, and that the testing was ridiculous.

....

[State]: And when you were at the hospital, did you then attempt to read the form to the Defendant again, the form being, the Informing the Accused document?

[Mammen]: It was read a second time after being in the— what they call the blood draw room, when he made statements that he didn’t want to submit to the test anymore.

....

[State]: Did you read [the Informing the Accused form] verbatim on both occasions?

[Mammen]: Yes.

¶6 Slinger Police Lieutenant Joseph Cashin was also present and interacted with Walloch at the time of the subject arrest. Cashin testified at the refusal hearing as follows. When asked if he “effected the arrest of an individual *you identified as David Walloch,*” Cashin responded, “Yes.” (Emphasis added.) Cashin was present both times Mammen read the Informing the Accused form to

Walloch and heard Walloch agree to a blood draw when the form was first read to him in the back of the squad car and later refuse to submit to a blood draw when the form was read to him at the hospital.

¶7 Both officers confirmed that they identified the person they had arrested as David Walloch. The precise manner in which the officers learned of Walloch's identity is not essential to a finding that Walloch was the individual who refused the blood draw.² From the testimony alone a reasonable fact finder could reasonably infer that the officers learned by some means at the time of the arrest and blood draw that the suspect in their custody was David Francis Walloch. In this case, however, the fact finder, here the circuit court, would not need to rely only on inferences as to how the officers learned of Walloch's identity because the evidence at the hearing provided this explanation. The Informing the Accused form was admitted into evidence without objection. Accordingly, the circuit court had before it evidence that Walloch was identified, by at least Mammen, at the time of Walloch's arrest and blood draw as "DAVID FRANCIS WALLOCH" from Walloch's "WI DL." In the context in which "WI DL" is used, it could mean only that Walloch was identified by his Wisconsin driver's license.

¶8 The evidence presented could have convinced a trier of fact, acting reasonably, that the State had proven that Walloch was the individual the officers arrested and who refused to submit to chemical testing as required.

² We note that during the refusal hearing, Walloch at no point objected on the basis of lack of foundation or any other ground to the identification of "David Walloch" as the person the officers arrested and who refused the chemical testing. In addition, Walloch had the opportunity to cross-examine the officers on the specific method they utilized to determine the individual they arrested and who had refused the chemical testing was David Walloch. Walloch chose not to conduct such cross-examination.

By the Court.—Order affirmed.

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

