COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1943

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANE A. SLIWINSKI,

DEFENDANT-APPELLANT.

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

¶1 CANE, C.J.[1] Jane Sliwinski appeals from an order concluding that she had improperly refused to submit to a chemical test under Wisconsin's implied consent law, WIS. STAT. § 343.305. She raises two issues on appeal: whether she

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

was required to establish at the refusal hearing that her state of "unconsciousness" was unrelated to the use of alcohol, and, if so, whether she proved that her hypoglycemic stupor on the night of her arrest was unrelated to the use of alcohol. Because the circuit court's finding that Sliwinski failed to meet her burden in establishing her refusal to take the requested chemical test was due to a physical disability or disease unrelated to the use of alcohol is not clearly erroneous, the order is affirmed.

¶2 The parties stipulated that the arresting officer had probable cause to arrest Sliwinski for OWI after she had been involved in a minor one-car accident at approximately 1:10 a.m. on January 10, 1999. In response to the officer's questions at the accident scene, Sliwinski was cooperative. She attempted to find her driver's license, performed or attempted to perform field sobriety tests, indicated that she had been at a party where she had consumed a couple of drinks, and stated that she was only five minutes from getting home when the accident occurred. When arrested, Sliwinski's mood quickly changed and she became unruly, aggressive and made a series of threats to the officer. After the officer read the Informing the Accused form to Sliwinski, she refused to give the requested blood sample because she wanted a lawyer. The officer stated that she repeated this reason before the refusal, during the refusal and then again after the refusal.

¶3 At the refusal hearing, Sliwinski, a physician, explained that she has a medical condition known as hypoglycemia which essentially can render her in a stupor when her blood sugar content becomes too low. Depending on the severity of the low sugar count, she stated that her symptoms range from feeling weak, sweaty, shaky, and irritable to memory loss and decreased concentration to the point where she becomes in "sort of a stupor." She explained that she had eaten

very little that day before attending a winter gathering at her clinic. At the party, she danced and ate only a few vegetables and some cheesecake. She also admitted to having a couple of drinks. She determined that her low food intake, exercise and stress caused her to go into a hypoglycemic episode at the time of her arrest, thereby rendering her incapable of submitting to the requested test.

¶4 Dr. Melody Hoover, who concluded Sliwinski had suffered from a hypoglycemic condition at the time of the arrest, supported Sliwinski's testimony. She stated that Sliwinski's hypoglycemic condition at the time of the arrest rendered her incapable of knowing what was going on in her environment and physically unable to consent to or deny the requested blood sample. She testified that on the night of the arrest, Sliwinski's thinking process was confused by the lack of sugar to her brain making her unable to process what the officer was asking her or respond appropriately. She also testified that she was aware that Sliwinski had consumed alcohol before the arrest and that the symptoms of intoxication and hypoglycemia are difficult to distinguish.

¶5 The trial court first determined that Sliwinski had the burden of establishing that her refusal to submit to the test was due to a physical disability unrelated to the use of alcohol. It concluded that because she offered no evidence that her defense of hypoglycemia was unrelated to the consumption of alcohol, the refusal was improper.

¶6 Sliwinski relies on ***State v. Disch***, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), where the supreme court described when a person is presumed not to have withdrawn consent to chemical testing. In ***Disch***, the court explained that the phrase "otherwise not capable of withdrawing consent" describes a person who has

conscious awareness and can respond to sensory stimuli but lacks present knowledge or perception of his or her acts or surroundings. *See* ***id***. at 235.

¶7 Sliwinski reasons the evidence is undisputed that her hypoglycemic episode altered her mental state to the extent that although she could respond to questions, she, like Disch, lacked the ability to respond appropriately when asked to submit to the chemical test. She contends that she only has to show that she was incapable of consenting and need not show that this condition was unrelated to the use of alcohol. In the alternative, she contends that she nevertheless met this burden because Hoover's testimony took into consideration Sliwinski's consumption of alcohol.

¶8 The trial court rejected the application of ***Disch*** because there the court was faced with the issue of whether the results of a blood test should be suppressed because the defendant was incapable of withdrawing consent. Instead, it considered the issue to be whether Sliwinski's refusal was due to a physical inability to submit to the requested test due to a physical disability or disease unrelated to the use of alcohol. The trial court therefore applied WIS. STAT. § 343.305(9)(a)5c, which provides in relevant part:

> Whether the person refused to permit the test. 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.* (Emphasis added.)

¶9 This court agrees with the trial court. In ***Disch***, the supreme court was faced with the situation where the defendant was immediately taken to a hospital after an accident where she signed a written consent form for the taking of

a blood sample. However, the officers had not issued a citation and did not give her the information set forth in WIS. STAT. § 343.305(4), which is contained in the Informing the Accused form. The issue became whether the officers may administer a test to a person who is "unconscious or otherwise not capable of withdrawing consent" when there is probable cause to believe the person had operated a motor vehicle while under the influence of an intoxicant. *See* ***Disch***, 129 Wis. 2d at 234. If the answer were yes, then it would be unnecessary for the officer to request a chemical test or give the defendant the information set forth in § 343.305(4). *See* ***Disch***, 129 Wis. 2d at 235. In making its determination, the supreme court warned that the phrase "not capable of withdrawing consent" must be construed narrowly and applied infrequently. It reasoned that if law enforcement officers or the courts construe the phrase "not capable of withdrawing consent" broadly to apply to all persons who are confused or disoriented, the legislative purpose of § 343.305 would be defeated. *See* ***Disch***, 129 Wis. 2d at 235. Thus, it cautioned that law enforcement officers and the courts should be very reluctant to declare a person "not capable of withdrawing consent." The better practice suggested was that the officer when faced with a defendant who is conscious is to follow the recommended practice of issuing the citation, requesting the person to provide a sample and to give the information under § 343.305(4). *See* ***Disch***, 129 Wis. 2d at 235.

¶10 Here, the officer followed the recommended practice. Unlike the situation in ***Disch***, the officer placed Sliwinski under arrest, issued a citation, asked her to provide a blood sample and gave her the information required under WIS. STAT. § 343.305(4). She refused. Thus, the trial court correctly framed the issue as to whether under the terms of § 343.305(9)(a)5c, Sliwinski is not considered to have refused the test. Under the language of this statute, the burden

is on Sliwinski to prove that her refusal was due to a physical disability or disease unrelated to the use of alcohol.

¶11 On appellate review, a trial court's factual findings will not be set aside unless they are clearly erroneous, and this court must give due regard to the court's determination of a witness's credibility. *See* WIS. STAT. § 805.17(2). Also, reversal is not required simply because some evidence might support a contrary finding. *See* ***In re Estate of Becker***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

¶12 Here, the court observed that while both Sliwinski and her expert testified that Sliwinski was suffering from a hypoglycemic episode at the time of her arrest, there was no evidence that the condition was unrelated to the use of alcohol, especially in light of the evidence that she had consumed alcohol earlier at the party. Therefore, it concluded that because she failed in her burden to prove that the hypoglycemic condition was unrelated to the use of alcohol, her refusal was improper.

¶13 This finding is not clearly erroneous. As the trial court stressed, there was no evidence concerning the relationship of alcohol consumption and hypoglycemia. Also, the evidence revealed that because it is difficult to distinguish between a person suffering from a hypoglycemic episode and alcohol impairment, the best way to diagnose this person is from a glucose tolerance test. This test was not done.

¶14 The trial court should not be required to speculate whether Sliwinski's hypoglycemic condition was unrelated to her earlier use of alcohol. Here, the trial court was faced with evidence inconsistent with that of a person suffering from a hypoglycemic episode. Sliwinski did not appear to be confused

at the accident scene. Rather, she appeared to be aware of her actions and surroundings. She knew that she had been at an office party earlier and was five minutes from home. She was cooperative with the officer and responded appropriately to his questions until placed under arrest for OWI. Then she became angry, unruly and made a series of threats against the officer. While at the jail, she was able to call her husband to come to the jail and take her home. Her repeated refusal to provide a blood sample was because she wanted to talk to her lawyer, not because she appeared confused. Faced with this evidence, the trial court could reasonably conclude that Sliwinski had failed in her burden to prove that her refusal was because of a physical disability unrelated to the use of alcohol.

By the Court.—Order affirmed.

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