COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2487

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

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

v.

JOHN J. QUINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] John J. Quinn appeals from his conviction for first-offense drunk driving. The issue in this appeal is limited to Quinn's complaint that the trial court erred in failing to suppress the results of a chemical

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

test of his breath. Because the trial court is the ultimate arbiter of the credibility of witnesses, we accept its finding that Quinn was incredible when he testified at the suppression hearing. Therefore, we affirm.

¶2 Quinn seeks to suppress the results of the chemical test of his breath on the grounds that the arresting officer failed to honor his request for the alternative chemical test. The suppression hearing was limited to the events occurring after Quinn was arrested by Deputy Robert Hall and transported to the Walworth County Sheriff's Department. The testimony established that with some reluctance, Quinn agreed to submit to a breath test after being read the Informing the Accused form. When Quinn's test results came back with a 0.10% blood alcohol concentration, Hall walked him to the booking area of the county jail. After they entered the booking area, Corrections Officer Jerold Quaerna entered to begin the booking process. Hall moved twelve to fourteen feet away and turned his back on Quinn and Quaerna. Shortly after Quaerna entered the room, Quinn looked up from the Informing the Accused form and said, "This says I can have a second test. I want a second test." Hall testified that he never heard Quinn's request for an alternative test and, according to Quaerna, Hall never gave any indication that he heard Quinn ask for a second test. Quaerna never brought Quinn's request to the attention of Hall. Quinn continued to make a request for a second test after he was moved to another room and Hall was out of earshot.

¶3 In denying Quinn's motion to suppress, the trial court made detailed findings on credibility and concluded that Hall was a credible witness and Quinn was not. The trial court held that Quinn never made a request for an alternative test that was heard by Hall. The trial court commented that "[i]t's one thing to be yammering away … but somebody's got to be on the receiving end of this and

you've got to make it clear and based on the testimony that I've heard here today there wasn't any clear communication of your desire to have an alternative test."

¶4 On appeal, Quinn challenges Hall's testimony that he never heard a request for an alternative test. He asserts that the trial court erred in ruling that Hall did not hear Quinn's request for an alternative test. "Judge Gibbs and the State, with a straight face, but with no humor, would have this court of appeals believe that because Deputy Hall testified he did not hear the Defendant's request, then no request was made." Quinn also argues that Quaerna heard his request for an alternative test, that Quaerna is an employee of the Walworth County Sheriff's Department, as is Hall, that WIS. STAT. § 343.305(5)(a) is silent as to whom the request for an alternative test must be made, and therefore, his statutory right to an alternative test was activated.[2]

¶5 Whether a law enforcement officer has made a reasonably diligent effort to comply with the statutory obligations of the implied consent law is an inquiry that must consider the totality of circumstances as they exist in each case. ***State v. Stary***, 187 Wis. 2d 266, 271, 522 N.W.2d 32 (Ct. App. 1994). If the suspect is denied the statutory right to an alternative test, the primary test must be suppressed. ***State v. McCrossen***, 129 Wis. 2d 277, 287, 385 N.W.2d 161 (1986). Whether Hall heard Quinn's request for an alternative test is a question of fact. We will not reverse a circuit court's findings of fact unless they are clearly

[2] This court rejects Quinn's argument that his request to Quaerna activated his right to an alternative test without further discussion because it does not appear that he raised this issue in the trial court. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (an appellate court will generally not review an issue raised for the first time on appeal). Quinn's brief to the trial court does not even hint at this issue, and in oral argument to the trial court, he specifically mentioned that "I don't think that [this issue] is really important for today's decision. This is an issue of credibility."

erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); WIS. STAT. § 805.17(2).

¶6 The issue is not whether Quinn made a request for an alternative test; the issue is whether Hall heard Quinn's request and denied him the alternative test in violation of the implied consent law.[3] The answer to this issue requires the determination of Hall's and Quinn's credibility because their testimony was diametrically opposed—Quinn testified that he made a request for an alternative test, but Hall testified that he never heard Quinn's request.[4]

¶7 Contesting a trial court's credibility determinations is a desperate appellate argument, the success of which is so rare as to be almost nonexistent. This is because it is hornbook law that when there is conflicting testimony, the trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). It is for

[3] A driver's right to demand an alternative test is found in WIS. STAT. § 343.305(5)(a):

> If the person submits to a test under this section, the officer shall direct the administering of the test…. The person who submits to the test is permitted, upon his or her request, the alternative test provided by the agency under sub. (2) or, at his or her own expense, reasonable opportunity to have any qualified person of his or her own choosing administer a chemical test for the purpose specified under sub. (2).... If a person requests the agency to administer a breath test and if the agency is unable to perform that test, the person may request the agency to perform a test under sub. (3)(a) or (am) that it is able to perform. The agency shall comply with a request made in accordance with this paragraph.

[4] Quaerna's credibility is not at issue. Although Quaerna supports Quinn's assertion that he made a request for an alternative test, he also supports Hall's assertion that he did not hear the request for an alternative test.

the trial court, not the appellate court, to resolve conflicts in the testimony. ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Pindel v. Czerniejewski***, 185 Wis. 2d 892, 898-99, 519 N.W.2d 702 (Ct. App. 1994).

¶8 The trial court began its decision by agreeing with Quinn that the motion turned on credibility. The trial court observed that Quinn had been drinking and Hall had not. "We've got a sober deputy and somebody who's intoxicated … who are calling upon their memories at this particular point." And, the court concludes its decision with the comment that "[w]hat I have to go on here is the testimony of the people who were there who were sober."

¶9 The court also makes the statement that there was agreement that Hall read the Informing the Accused form to Quinn and that Quinn understood the form. The trial court continues:

> He was more concerned with something else though, and this is where we come into a question of credibility.
>
> Mr. Quinn, ah, seems to have his own agenda regardless of what's being asked of him or what someone else is talking about. He wants to talk about what he wants to talk about and that was evident to me when he was on the stand here today. When he'd be asked a question, he would veer off that question and go back to discussing what was of interest to him.
>
> The same thing happened at this arrest point.… And I have a very strong suspicion based on having observed Mr. Quinn here today and having listened to the testimony about this, that Mr. Quinn is listening with half an ear to everything else that's being said and appears to be focusing on what is of interest to him.

¶10 Another example of the trial court's detailed findings of credibility or incredibility relates to Quinn's claim that after completing the breath test he

asked about the alternative test and Hall told him that the second time he blew into the Intoxilyzer was the alternative test. The court noted, "[W]ell, Deputy Hall has four years of experience and that just does not ring true. Deputy Hall knows that's not the second test. And to say that's what the deputy told you, I just don't believe you."

¶11 We have no quarrel with the trial court's credibility determination. The witnesses appeared before the trial court and it was in a superior position to assess their demeanor, to observe how they answered questions and to gauge the persuasiveness of their testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980).

¶12 The trial court found that the credible testimony at the suppression hearing established that Hall never heard Quinn's request for the alternative test. This finding dictated the conclusion that Hall made a reasonably diligent effort to comply with the implied consent law. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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