COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1166 **Cir. Ct. No. 00-TR-10206, 00-TR-10208**

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

COUNTY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

YDBI ISLAMI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Ydbi Islami appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), first offense, pursuant to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(a). Islami was found guilty

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of the charge following a jury trial. He is contesting the trial court's denial of his motion to suppress evidence of a breath test obtained pursuant to the implied consent law. On appeal, Islami contends that the arresting officer disregarded his request for a blood test under the implied consent law as required by ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985). We disagree and therefore affirm.

¶2 The State charged Islami with OWI. Islami responded with a motion to suppress, contending that the arresting officer did not accommodate his request for an alternate test. The trial court denied Islami's motion. On appeal, Islami challenges the trial court's findings of fact that he did not request an alternate chemical test after providing two sufficient breath samples during the second round of breath tests.

¶3 We will not set aside the trial court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2). We will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not make. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). It is for 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). 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). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand.

¶4 With the above standard of review well in mind, we will examine the record of the hearing on Islami's motion. We begin that examination by acknowledging that the trial court found the police officer to be a more credible historian than Islami.

> The test results, whether they were valid or not, show a result of .12 which is evidence of legal intoxication, so from the perspective of this motion only, that would at least indicate that Mr. Islami was legally intoxicated at that point in time. Therefore, his own credibility and his perspective of remembering with specific detail the events that occurred [at the time of his arrest], I think, are suspect at best.

¶5 The arresting officer was Daniel Billington of the Waukesha County Sheriff's Department. Billington testified that after arresting Islami for operating while intoxicated, he transported Islami to the sheriff's department to have a breath test administered to Islami. At the department, Billington read the required Informing the Accused form to Islami and then asked if Islami would submit to a chemical test of his breath. Islami agreed. Although Islami provided an adequate sample the first time he blew into the Intoximeter, his second sample was deficient.

¶6 A brief discussion then ensued between the Intoximeter operator and Islami. During the discussion, Billington interrupted and warned Islami that if he failed to do the test he would be taken to the hospital for a forced blood draw. Islami replied, "Okay, but if this doesn't work, then I'm going to want blood." Islami then provided two adequate breath samples during a second round on the Intoximeter. Billington testified that after completing the second round on the Intoximeter, Islami never renewed his request for a chemical test of his blood.

¶7 As can be expected, Islami's recollection is different from Billington's testimony. Islami's testimony was consistent with Billington's that the first round of breath testing was a failure and he was told that if he did not provide an adequate sample of his breath, he would be taken to the hospital. But Islami's testimony is inconsistent with Billington on the number of times he requested a blood test—Islami testified that he made a request for a blood test at least three or four times.

¶8 On appeal, Islami insists that this case is closely on point with the facts of ***Renard***. He argues that the trial court erred in not holding, as we did in ***Renard***, that the requested additional test was mandatory after he submitted to the breath test and in not strictly enforcing his right to the test he requested. ***Renard***, 123 Wis. 2d at 460. Islami argues that his one request for a blood test was enough to trigger a duty in Billington to diligently inquire, after completion of the second round of breath tests, if Islami still asserted his right to an alternate test.

¶9 Islami's attempt to fit the facts of this case to the decision in ***Renard*** overlooks the standard of review that is employed, especially when it comes to the credibility of witnesses. "On questions of credibility, this court is bound by the trier of fact's determinations." ***Assoc. Fin. Servs. Co. v. Hornik***, 114 Wis. 2d 163, 169, 336 N.W.2d 395 (Ct. App. 1983).

¶10 In ***Renard***, the trial court found that "Renard requested a breathalyzer test in addition to the blood test," and we held that the finding was "not contrary to the great weight and clear preponderance of the evidence." ***Renard***, 123 Wis. 2d at 460. However, in this case, the trial court found that "Mr. Islami never made that request for an alternate test," and we must affirm this finding if it is not clearly erroneous.

¶11 Our own independent review of the record confirms the correctness of the trial court's findings. The trial court determined that Islami qualified his agreement to participate in a second round of breath tests when he stated, "Okay, but if this [the second round on the Intoximeter] doesn't work, then I'm going to want blood." The trial court also dismissed testimony from Islami that he repeatedly requested an alternate test because the court found Islami less credible than Billington.

¶12 We reach the same conclusion the trial court reached. Islami clearly qualified his request for a blood test to a situation where the second round on the Intoximeter failed to provide adequate breath samples for analysis. Because the second round on the Intoximeter was successful, there was no request for an alternate test that Billington was compelled to grant. Therefore, the trial court's finding that Islami did not request a blood test as an alternate test is not clearly erroneous and we affirm.

By the Court.—Judgment affirmed.

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