COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0221-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Everett Daniel Neal,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

SCHUDSON, J.[1] Everett Daniel Neal appeals from a judgment of conviction, following his no-contest plea, for operating an automobile after revocation, contrary to § 343.44(1), STATS. Neal also appeals from a judgment of conviction, following a jury trial, for operating a motor vehicle while under the influence of an intoxicant, contrary to §§ 346.63(1)(a) and 346.65(2), STATS. Neal claims that the evidence was insufficient to support the jury verdict. Because Neal has failed to brief any arguments pertaining to the operating-after-

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

revocation conviction[2] and because the OWI conviction is sufficiently supported by evidence from the trial, this court affirms both judgments.

The State called Milwaukee Police Officers Michael Grogan and Dean Schubert to testify during Neal's OWI trial. Officer Grogan testified that on August 25, 1993, he observed Neal driving his vehicle and deviating from his driving lane. Officer Grogan testified that he pulled Neal over and that Neal had bloodshot and glassy eyes, slurred speech and coordination problems. Officer Grogan testified that he detected a "strong odor" of alcohol on Neal's breath. Officer Grogan further testified that Neal failed four different field sobriety tests. Officer Schubert testified that he administered the breathalyzer test but that Neal did not breathe into the tube and merely "puffed his cheeks." Officer Schubert further testified that despite either a second or third attempt during which Neal again "puffed his checks," Neal threw the tube at him and "said words to the effect that he's f----- anyway if he takes the test."

Contrary to the testimony of the police officers, Neal testified that the officers did not ask him to perform any field sobriety tests. Neal also testified that he did breathe into the breathalyzer but was told that he had not blown hard enough to register a reading.

Neal challenges the jury verdict. He argues that the evidence of OWI was insufficient.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence

[2] *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues raised but not briefed deemed abandoned).

> adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citations omitted). Where there are inconsistencies in the testimony of the witnesses, it is the trier of fact's duty to determine the weight and credibility of the testimony. *See* ***Thomas v. State***, 92 Wis.2d 372, 381-382, 284 N.W.2d 917, 923 (1979). An appellate court will substitute its judgment for that of the trier of fact when the fact-finder relied on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

Here, the testimony of Officers Grogan and Schubert was sufficient for a reasonable jury to find Neal guilty of OWI. The jury obviously found the officers' testimony regarding their observations of Neal's physical condition, his inability to perform various field sobriety tests, and his refusal to provide an adequate breathalyzer sample more credible than Neal's version of events. Nothing in the officers' testimony was "inherently or patently incredible." Therefore, this court affirms.

By the Court.—Judgments affirmed.

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