

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 2, 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. 96-1156-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS J. LAUGHRIN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

SNYDER, J. Thomas J. Laughrin appeals from an order finding that he refused to submit to a chemical test of his breath in violation of § 343.305(9), STATS. Laughrin contends that his refusal was reasonable because of an injury. See § 343.305(9)(a)5.c. After hearing the evidence, the trial court determined that the refusal was unreasonable.

On appeal, Laughrin argues that the trial court impermissibly required that he show that he either attempted to provide a breath sample or complained of physical injury as a prerequisite to his assertion of the affirmative defense and that this requirement violated the “plain and unambiguous” language of § 343.305(9)(a)5.c, STATS. We disagree with Laughrin and affirm.

Deputy Bruce Brandenburg of the Calumet County Sheriff's Department was dispatched to the scene of a single-car accident at approximately 7:00 p.m. on January 20, 1996. After arriving at the scene and identifying Laughrin as the driver of the vehicle, Brandenburg asked him whether he had any injuries; Laughrin responded that he had none.¹ Brandenburg then conducted field sobriety tests and as a result placed Laughrin under arrest. While filling out an accident report, Brandenburg again asked Laughrin if he was injured, and again Laughrin said no. Laughrin was transported to the sheriff's department, where Brandenburg requested that he submit to a breath test. Laughrin refused.

Laughrin requested a refusal hearing. At the hearing, Laughrin contended that he refused the test on the grounds of physical inability to submit to a breath test for reasons unrelated to the use of alcohol or drugs. *See* § 343.305(9)(a)5, STATS. Laughrin maintained that he was in so much pain from a broken rib that he was physically unable to perform the test.² The State

¹ Laughrin testified that Brandenburg never asked him if he was injured.

² Laughrin also testified that after he was released by the sheriff's department, he went to the hospital and was examined by a physician. Although no certified medical records were presented, Laughrin testified that the emergency room doctor visualized a fracture. Because there was no objection to the hearsay statement, that evidence was also

presented the testimony of Brandenburg, who testified that Laughrin never complained of any pain and when questioned told the deputy that he was not injured.

After hearing the testimony, the trial court stated that if Laughrin had complained of injuries or had attempted to provide a breath sample and been unable to do so, the court would have found that the refusal was due to a physical inability to submit. However, based on the evidence before it, the trial court found that Laughrin had not established the affirmative defense by a preponderance of the evidence and found the refusal unreasonable.

The central dispute in this appeal concerns the trial court's suggestion that had Laughrin complained of injury or attempted to perform the breath test, the court would have found that the refusal was due to his physical inability to submit to the test. Therefore, Laughrin argues that the trial court wrongly based its decision on a requirement that he present evidence that he had done one or the other in support of his affirmative defense. Laughrin then reasons that this "expand[ed] examination beyond the plain language of the statute [and] violate[d] the fundamental principle ... that the issues at a refusal hearing are narrowly tailored." See *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (1986). We are unpersuaded by Laughrin's characterization of the trial court's decision.

(...continued)
considered by the court.

When a refusal is contested on the grounds that the individual was physically unable to perform the test, a preponderance of the evidence is required. *See* § 343.305(9)(a)5.c, STATS. An appellate court will not set aside a trial court's findings of fact unless those findings are clearly erroneous. Section 805.17(2), STATS.

Brandenburg testified that before he asked Laughrin to perform any field sobriety tests, he asked whether Laughrin had suffered any injuries and Laughrin said no. In addition, Brandenburg testified that while filling out the accident report, he again asked Laughrin if he was injured and was told no. Brandenburg also reported his observations of Laughrin: "He never indicated he had any pain. He never walked in a guarded manner. He never touched or held his ribs."

In response, Laughrin testified that he was in such great pain that he could not submit to the breath test. Laughrin stated that Brandenburg never asked him whether he was injured. He testified that he was having trouble taking a deep breath and that he did not believe he could properly perform the breath test. He stated that he did not relate any of this to Brandenburg because "I just wanted to get out of there. I didn't want to be there anymore." He also said that he visited a hospital emergency room after he left the sheriff's department, and a physician took an x-ray and told him he had a fractured rib.

Laughrin solicited the opinion of a lung function expert to bolster his testimony. The expert, who never examined Laughrin, stated that Laughrin would have been physically unable to submit to the breath test. On cross-

examination, however, the expert admitted that pain is subjective and that some individuals with this type of fracture would be able to submit to the Intoxilyzer test.

The trial court considered all of the evidence presented before finding Laughrin's refusal unreasonable. After detailing the conflicting evidence, the trial court concluded:

[T]here has been no testimony or showing that Mr. Laughrin even knew what amount of lung pressure or breath pressure was required to blow into the Intoxilyzer machine.

... Had Mr. Laughrin complained of injuries or pain that evening, had he attempted to provide a sample and had not been able to provide a sufficient sample, I'm certain that the Court would find that the preponderance of the evidence indicated that the refusal was due to a physical inability to submit to the test.

But, given the testimony of [Laughrin's expert] and the fact there was never an attempt to blow into the machine, and given the fact there was no complaint of injury at the time, I'm satisfied that the affirmative defense is not established by the preponderance of the evidence.

The court found Brandenburg's testimony to be more credible than the testimony offered by Laughrin. After carefully weighing the evidence, the trial court found that Laughrin had failed to establish his affirmative defense by a preponderance of the evidence. As the court noted, "Now, after the fact, [Laughrin] comes in and states that it hurt so much that he couldn't blow into the Intoxilyzer, but he says that without even having attempted to do so."

We conclude that the trial court correctly applied the provisions of § 343.305(9)(a)5, STATS., and that the court's findings were not clearly erroneous. We agree that the refusal was unreasonable.

By the Court. – Order affirmed.

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