**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 12, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-1258**

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

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**IN THE MATTER OF THE REFUSAL OF GUENTHER KIRCHHUEBEL:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GUENTHER KIRCHHUEBEL,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

DEININGER, J.[1] Guenther Kirchhuebel appeals an order which declared unlawful his refusal to submit to a test for intoxication under § 343.305,

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

STATS. Kirchhuebel claims that he established by a preponderance of the evidence that he was physically unable to submit to a test of his breath due to a physical disability. *See* § 343.305(9)(a)5.c, STATS.[2] We conclude the trial court did not err in finding that Kirchhuebel had not established he was physically unable to take the test. Kirchhuebel also argues that the trial court should have granted his motion for relief from the order under § 806.07, STATS. Again, we disagree, and thus we affirm the order.

## BACKGROUND

A law enforcement officer may request that a person submit to chemical testing for blood-alcohol content upon the person's arrest for OMVWI. *See* § 343.305(3), STATS. Kirchhuebel refused to consent to chemical testing after his arrest for OMVWI. Upon receiving notice of the State's intent to revoke his driver's license, he requested a refusal hearing under § 343.305(9). The only issues before the court at a refusal hearing are: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol [and lawfully placed the suspect under arrest]; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." ***State v. Willie***, 185 Wis.2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994). In this appeal, as in the trial court, Kirchhuebel challenges only the trial court's finding on the last issue—whether he had established that his refusal was due to his physical inability to provide a breath sample.

[2] The relevant provisions of the statute are quoted in the text, below.

A Watertown police officer testified at the refusal hearing that, after observing a traffic violation, he stopped a motor vehicle driven by Kirchhuebel. The officer asked Kirchhuebel to perform field sobriety tests, following which the officer asked him to submit to a preliminary breath test (PBT). On each of three attempts, Kirchhuebel blew an insufficient amount of air for a proper PBT sample. Although Kirchhuebel "did seal his lips around the tube like requested," the officer believed that Kirchhuebel was attempting to suck air in, rather than blowing a breath sample into the PBT, and that he was "playing a game."

After the final PBT attempt, the officer arrested Kirchhuebel for operating a motor vehicle while under the influence of an intoxicant (OMVWI) and took him to the Watertown Police Station. When the officer attempted to examine his mouth, Kirchhuebel stuck his tongue out at the officer, in a manner that the officer later characterized as "childish" in response to a question from the court. When the officer asked Kirchhuebel to submit to an Intoxilyzer test, the officer initially believed Kirchhuebel had agreed to do so, but when the machine was prepared to receive Kirchhuebel's sample, Kirchhuebel stated that he would not give another breath sample because he had already given one. The officer then recorded Kirchhuebel's response as a refusal. At no point did Kirchhuebel offer any explanation to the officer for not taking the Intoxilyzer test, other than his apparent belief that his attempt to give the earlier PBT should suffice.

Kirchhuebel established at the refusal hearing that he was missing a number of lower teeth. He also presented the expert testimony of a former Department of Transportation employee whose duties had included testing, evaluation and calibration of breath test equipment, officer training and related work. Specifically, she testified that she had done a study and published a report regarding the effects of dentures and dental adhesives on breath alcohol testing.

Based on her experience and training, she opined that Kirchhuebel's difficulty in providing a proper PBT sample stemmed from the gaps in his lower teeth. She also related that she had worn upper and lower braces and knew from this experience that "there are things regarding the person's mouth that will affect the ability to provide a sample." Finally, she stated that, in her opinion, when an officer encounters someone having difficulty providing a breath sample, the officer should proceed to administer an alternative test of blood or urine, and that based on the times recorded on the Intoxilyzer test report, the officer who arrested Kirchhuebel had waited an insufficient time before declaring a refusal.

Kirchhuebel also testified at the hearing. He explained his refusal to provide an Intoxilyzer breath sample at the police station as follows: "I had told [the officer] that I had already done this on the street and it was going to be useless to try it again."

After reviewing the testimony, the trial court noted that Kirchhuebel had never told the officer, either during the attempted PBT or thereafter, that he was physically unable to provide a sample, nor did he testify to that effect at the hearing. Further, the court discounted the defense expert's testimony regarding missing teeth leading to difficulties in providing breath samples because she had not witnessed Kirchhuebel's attempts to give a PBT, and because her opinion regarding the reason for Kirchhuebel's refusal was based on "facts not in evidence." Finally, the court found the arresting officer "more credible" regarding Kirchhuebel's efforts to perform the PBT and his unwillingness to submit to an Intoxilyzer test. Accordingly, the court found that Kirchhuebel had not met his burden to show by a preponderance of the evidence that he was physically unable to submit to the Intoxilyzer test.

Following the court's ruling, Kirchhuebel moved for relief under § 806.07, STATS., from the ensuing order on the grounds that it is "inequitable to penalize someone for refusing to take a test when the officer has the authority and has made no attempt to seize blood anyway." Noting that there was no evidence that the Watertown Police Department had a policy of seizing blood samples following refusals to submit to breath tests, the court concluded that it was not inequitable to punish persons who unlawfully conceal evidence. Kirchhuebel appeals the order declaring his refusal unlawful and denying relief under § 806.07.

## ANALYSIS

Section 343.305(2), STATS., deems the driver of a motor vehicle to have consented to a blood alcohol content test. *See* ***Village of Elkhart Lake v. Borzyskowski,*** 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985). A physical inability to take the test is the only proper basis on which a driver may refuse the test. *See* ***id.*** and § 343.305(9)(a)5.c, STATS., which provides, in relevant part, as follows:

> 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.

Kirchhuebel first argues that the trial court erred in concluding he had not met his burden to prove a physical incapacity to provide a breath sample, due to disease or disability, by a preponderance of the evidence.

The trial court's determination that Kirchhuebel had not met his burden of establishing that he was physically unable, due to a disease or disability, of providing a sample of his breath is a factual finding that we will not disturb

unless it is clearly erroneous, that is, unless the finding is contrary to the great weight and clear preponderance of the evidence. *See* § 805.17(2), STATS.; ***Noll v. Dimicelli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). When a trial court sits as trier of fact, it determines issues of credibility. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). It is for the trier of fact, and not this court to assess witness credibility. ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974). This is true for experts as well as lay witnesses. *See* WIS J I—CIVIL 260 (Trier of fact "should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case;" it is "not bound by any expert's opinion.").

Kirchhuebel contends that the testimony of his expert witness establishes that he had a physical disability rendering him incapable of taking a breath test. As we have noted, a trier of fact is free to discount or disbelieve expert testimony, just as it is free to do so for the testimony of any witness. But even if the trial court had found the expert credible, her testimony fell well short of proof that Kirchhuebel was physically unable due to a disability to provide a breath sample. Rather, the expert noted only that (1) Kirchhuebel was missing a number of lower teeth; (2) persons with missing teeth find it "difficult" to direct all of their air into a mouth piece; and (3) an "alternate explanation" for his failure to provide an adequate PBT sample was that air escaped via the gaps in his teeth. The expert, of course, had not witnessed Kirchhuebel's effort to provide a PBT sample, as had the officer, and there is no indication in the record that she had performed any tests herself to evaluate Kirchhuebel's ability to form a seal around an Intoxilyzer mouthpiece, or whether he was, in fact, physically incapable of performing the test.

In short, the expert looked into Kirchhuebel's mouth at the beginning of her testimony and then made general statements that people with missing teeth sometimes have difficulty in providing breath samples. The arresting officer testified that when administering the PBT to Kirchhuebel, it appeared he was sucking in air and "playing games" to frustrate a successful test, and that Kirchhuebel never even attempted to provide an Intoxilyzer sample. We cannot conclude on this record that the trial court's finding that Kirchhuebel had not met his burden under § 343.305(9)(a)5.c, STATS., was clearly erroneous.

Kirchhuebel argues, however, that the trial court placed too great an emphasis on the fact that Kirchhuebel had not told the officer at the time of his arrest that he was unable to provide breath samples because of a physical disability. According to Kirchhuebel, this emphasis is tantamount to adding an element to the statutory requirements—not only must a person prove physical inability due to a disability or disease, but he or she must also show that the disability was brought to the arresting officer's attention. We do not accept this assertion. The court noted the statutory requirements when making its findings. It deemed that Kirchhuebel's failure to tell the arresting officer of any physical inability, disease or disability at the time the PBT and Intoxilyzer tests were requested, and his failure to testify in court that he was physically unable to comply, were gaps in proof that simply had not been overcome by the expert's testimony. When Kirchhuebel's trial counsel questioned whether the court was ruling that "the defendant's burden is not to show merely that a disability existed, but that he has to have told the officer about it that night," the court responded: "No, but that certainly would help in his proof that he had a disability at that time, if he mentioned that he had a disability at that time."

Finally, Kirchhuebel contends that, if we sustain the trial court's findings, we must then conclude that he should nonetheless be relieved from the trial court's order by virtue of § 806.07(1)(d), (g) or (h), STATS., which provide as follows:

> On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ….
>
> (d) The judgment is void;
>
> ….
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

The trial court denied Kirchhuebel's motion for relief, and we review an order denying a motion for relief under § 806.07, STATS., for an erroneous exercise of discretion. *See* ***Nelson v. Taff***, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993) (citation omitted).

We agree with Kirchhuebel that rules of civil procedure, such as § 806.07, STATS., generally apply to refusal proceedings, which are "special proceedings." *See* § 801.01(2), STATS.; ***State v. Schoepp***, 204 Wis.2d 266, 270, 554 N.W.2d 236, 238 (Ct. App. 1996) (refusal hearing is a special proceeding for purposes of § 801.01(2)). Beyond that proposition, we find little in Kirchhuebel's argument on this point which we can accept. To the extent we understand it, the argument seems to be that because the Wisconsin Supreme Court has held that an arresting officer may constitutionally obtain a blood sample from someone who has been arrested for a drunk-driving related violation after the driver has refused a breath test, *see* ***State v. Bohling***, 173 Wis.2d 529, 533-34, 494 N.W.2d 399, 400

(1993), the failure to do so in this case renders the imposition of a driver's license revocation for Kirchhuebel's refusal void, inequitable, unconstitutional, or all three. In essence, Kirchhuebel claims that because an arresting officer may proceed to obtain a blood sample, the officer must do so instead of reporting the driver's refusal to comply with § 343.305, STATS.

We find nothing in the language of the supreme court's opinion in ***Bohling*** suggesting such a result. Simply because the arresting officer had available a possible alternative option for obtaining evidence of Kirchhuebel's blood alcohol content despite his refusal of the breath test, the fact remains that Kirchhuebel unlawfully refused to consent to a test of his breath. The relief Kirchhuebel requests would contravene the purpose of the implied consent law, which "is to facilitate the gathering of evidence against drunk drivers." ***State v. Neitzel***, 95 Wis.2d 191, 203-04, 289 N.W.2d 828, 835 (1980). The trial court did not erroneously exercise its discretion in denying Kirchhuebel's motion for relief from the order.

Accordingly, we affirm the appealed order and the trial court's denial of relief from that order.

*By the Court.*—Order affirmed.

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