COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP150 **Cir. Ct. No. 2004TR7491**

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

IN THE MATTER OF THE REFUSAL OF JON R. TENNYSON:

CITY OF RIPON,

PLAINTIFF-RESPONDENT,

V.

JON R. TENNYSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

¶1 BROWN, J.[1] Jon R. Tennyson appeals from a circuit court order finding that he refused to submit to a chemical test and revoking his operating privileges for one year. Tennyson argues that the circuit court's conclusions regarding the credibility of the witnesses at the refusal hearing were clearly erroneous. Since the court had a rational basis for rejecting Tennyson's testimony and instead accepting the testimony of the arresting officer, we affirm.

¶2 Sergeant William Wallner was on duty in the City of Ripon the night of June 4, 2004. He arrested Tennyson for operating under the influence of an intoxicant, pursuant to WIS. STAT. §346.63(1)(a). Following the arrest, Wallner transported Tennyson to the Ripon Medical Center. In the exam room, the officer issued Tennyson an OWI citation and read him the Informing the Accused form verbatim. When asked by Wallner whether he would submit to a chemical test, Tennyson responded that he would not. Upon further questioning by the officer, Tennyson indicated he understood the document and did not have any questions.

¶3 At this point, Tennyson began asking Wallner and Officer Kaepernick, who was also present, for advice on whether or not he should submit to the chemical test. Both officers stated that they could not give Tennyson advice and that it was his decision to make. Wallner offered to reread the Informing the Accused form, but Tennyson indicated he did not need to hear it again. Wallner offered Tennyson another opportunity to take the chemical test when the lab technician entered the room, but Tennyson again refused.

[1] This case is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Tennyson was accused of refusing to submit to a chemical test, pursuant to WIS. STAT. §343.305. At the October 20 refusal hearing, Wallner testified to the facts above. Tennyson, however, presented a different version of the events that transpired on the night of June 4. He testified that Wallner advised him not to submit to the chemical test when Kaepernick had exited the room. Tennyson indicated that the officer's alleged advice was the reason why he refused to take the test. Tennyson said that he was asking the officers for advice because he had never been in this kind of situation before. When the prosecutor asked Tennyson about an implied consent violation in Illinois in 1991, Tennyson testified that he could not remember the circumstances behind what happened and only recalled that a traffic incident was involved.

¶5 The circuit court accepted Wallner's account of the facts and entered an order revoking Tennyson's driver's license for one year for refusing to submit to the chemical test. The court emphasized two factors in making its credibility determination. First, it noted the implied consent violation in Illinois:

> Mr. Tennyson in his testimony … seemed to indicate that the reason that [he] was requesting or asking these questions is he had never been in that position before and just didn't know what to do. And I guess what struck me is there was a question about the 1991 implied consent conviction. Mr. Tennyson didn't shed much light on that. Said he just didn't remember what that was all about. And no, I'm not licensed to practice in Illinois, but I can take the conviction on its face. And the reason I found that to be significant is the gist I got from Mr. Tennyson's testimony was that he just didn't have a clue as to what was going on and therefore he was seeking guidance. And I think that doesn't necessarily follow with the prior conviction.

The court also considered how Tennyson's version of the story is inherently less believable because of his self-interest in escaping a conviction.

¶6 Tennyson appeals, arguing that the circuit court improperly resolved the credibility contest in favor of the City. WISCONSIN STAT. §805.17(2) dictates that "[f]indings of fact shall not be set aside unless clearly erroneous." The statute also states that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Section 805.17(2). *See also* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975). It is not the function of an appellate court to resolve conflicts in testimony, to weigh the evidence, and to reason toward ultimate findings of fact. *See* ***State v. Poellinger,*** 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07.

¶7 We hold that the circuit court properly exercised its discretion. First, the court considered Tennyson's testimony that he asked the police officers for advice because he had no idea what was going on in light of Tennyson's 1991 conviction for a similar offense. The court obviously took that conviction as evidence that Tennyson *had* been in a similar situation before. In the court's words, "I can take the conviction on its face." We reject Tennyson's suggestion that the potential differences between state laws made such an inference improper. One could assume that most people would not easily forget a prior conviction, so the court's implicit assumption that Tennyson's prior experience should have alerted Tennyson to at least the possibility of similar consequences was not irrational.

¶8 Second, the circuit court properly examined the relative interests of each witness in giving self-serving testimony. Tennyson contends that Wallner "has an obvious self-interest in seeing his arrest result in convictions … because,

after all, officers are only human and as such have egos." The court did consider this interest, however:

> Now, one could argue that law enforcement has an interest in wanting to obtain convictions and therefore may chose to color their testimony so as to enhance that prospect. One could make that argument. I don't know that that rises to the level of the interest of a defendant in avoiding a refusal.

We cannot say the court acted unreasonably in concluding that Tennyson's interest in protecting his privilege to drive outweighed Wallner's interest in stoking his ego with one more conviction.

¶9 The circuit court had a rational basis for accepting the testimony of the police officer. For this reason, we reject Tennyson's claim that the court erred in resolving the credibility contest against him. We affirm.

By the Court.—Order affirmed.

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