

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1229-CR

Cir. Ct. No. 2004CT1788

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. BROUWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

¶1 BROWN, J.¹ Keith A. Brouwer appeals his judgment of conviction of operating a vehicle while intoxicated, third offense. He claims that all of the information the deputy sheriff gathered to form probable cause occurred after his arrest. But the court found to the contrary, which finding is not clearly erroneous.

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

Brouwer further claims that one of the factors used by the deputy, the Horizontal Gaze Nystagmus (HGN) test, was unworthy of any weight because it was conducted while Brouwer was looking up at bright lights and while the possibility of a concussion lingered, so as to materially detract from the reliability of the test. But the circuit court found that there was no evidence of concussion and no sufficient evidence that bright lights disturb the reliability of an HGN test. These findings are not clearly erroneous either. We affirm.

¶2 On July 24, 2004, at approximately 9:00 p.m., a Waukesha sheriff's deputy arrived at the scene of an accident involving a motorcycle and automobile. The driver of the motorcycle, Brouwer, had severely injured his leg, breaking two bones. Other witnesses at the scene informed the deputy that Brouwer had asked them not to call the police because he had been drinking and believed that he might be intoxicated.

¶3 An ambulance arrived and transported Brouwer to the hospital. A nurse gave him a morphine IV shortly thereafter. The deputy arrived at the emergency room a short time later and continued his investigation of the accident. He asked Brouwer if he had been drinking. Brouwer responded that he had consumed four beers but stated that he did not believe that he was intoxicated. While Brouwer spoke, the deputy detected the odor of intoxicants and noted that Brouwer's eyes appeared glassy.

¶4 The deputy proceeded to administer three verbal field sobriety tests in order to ascertain whether Brouwer was intoxicated. Brouwer passed all three tests; however, his speech was slurred, and he spoke very slowly, pausing several times. The deputy then administered the HGN test while Brouwer lay face up on the hospital bed. The deputy observed all of the clues officers look for on that test.

Following that test, he gave Brouwer two Preliminary Breath Tests (PBTs), both of which Brouwer failed. Brouwer admitted that he actually had six beers rather than the four he mentioned earlier. The deputy determined, based on his observations, that Brouwer was intoxicated, advising him that he was under arrest for operating a motor vehicle while intoxicated. Brouwer submitted to a blood test, which resulted in a reading of .18 grams per 100 milliliters.

¶5 The State brought charges for OWI, and Brouwer moved to suppress the results of the PBTs and the blood draw. At the suppression hearing, the deputy testified consistently with the facts as stated above. Brouwer and his wife, Amy, offered a substantially different version of events. According to Amy, another officer who had accompanied the deputy to the emergency room told Amy before the sobriety tests were administered that her husband was under arrest. Brouwer likewise contended that he was first placed under arrest and then given sobriety tests.

¶6 Following all of the testimony, the parties presented their arguments to the court. In addition to claiming that the deputy arrested Brouwer before he administered any sobriety tests, defense counsel argued that the results of the HGN test were unreliable for two reasons. First, the deputy had not ruled out concussion as a potential cause of nystagmus. Second, he relied on the deputy's testimony that an officer should not administer the HGN test while the person looks at bright or flashing lights. He alluded to testimony that Brouwer was lying on a gurney immobilized and had to look up at the ceiling, which had bright, fluorescent lights overhead.

¶7 The circuit court accepted the deputy's account of the facts and, as a result, found that based on all the circumstances, he had probable cause to arrest

Brouwer for OWI. The court noted that while the morphine Brouwer received may have affected his speech and eyes, several other factors contributed to a finding of probable cause. The court pointed to several factors, including Brouwer's admission that he had been drinking, the odor of intoxicants, and the fact that witnesses had told the deputy at the scene that Brouwer did not want them to contact the police because he had been drinking. According to the court, the deputy's observations reasonably led to the administration of the HGN test and the two PBT's. Moreover, his observations, combined with the results of these tests, supported his decision to arrest. The court further noted that Brouwer's hospital records, which listed "alcohol intoxication" in the diagnosis, substantiated that conclusion.

¶8 The circuit court also rejected defense counsel's argument that the deputy should not have relied on the results of the HGN test in deciding whether to administer a PBT. First, the court found no evidence of a head injury in the medical records. It also found: "there's no testimony to indicate that looking up on a hospital bed is an inappropriate way of administering the horizontal gaze nystagmus, the HGN test."

¶9 Brouwer appeals, arguing that the circuit court improperly denied his motion to suppress evidence. First, he continues to assert that the deputy administered sobriety tests only after arresting Brouwer. WISCONSIN STAT. § 805.17(2) states that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See also *Chapman v. State*, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975). "It is the function of the trier of fact, not the appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."

State v. Poellinger, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Thus, when the record contains conflicting accounts of historical facts, which support more than one inference, we 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.

¶10 The court here noted that “there’s some dispute as to when an arrest occurred,” but did not find any clear evidence that the deputy arrested first and administered sobriety tests later. Essentially, it had to make a credibility determination between the account the Brouwers offered and the deputy’s testimony. We see nothing patently incredible about the deputy’s testimony, and the court was entitled to rely on it.

¶11 We also find support for the court’s conclusion that the deputy properly administered the HGN test. We note that the court relied on Brouwer’s medical records in concluding that head trauma was not an issue in this case. Brouwer does not argue that these documents indicate otherwise. Second, the deputy’s testimony about the protocol for administering the HGN test is equivocal about whether proper procedure precludes giving the test while the subject looks at bright lights in general or at bright flashing lights. The deputy agreed at one point that a subject should not be looking up into lights, but the balance of his testimony emphasizes flashing or strobe lights. The court obviously read these other responses to qualify the answer. This inference was reasonable, and the record contains no other evidence that bright ceiling lights might affect the results of the HGN test. In any event, for the reasons the court articulated, the deputy had sufficient grounds to find probable cause with or without considering Brouwer’s performance on the HGN test. We affirm.

By the Court.—Judgment affirmed.

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