COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP207 **Cir. Ct. No. 2016TR1587**

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

IN THE MATTER OF THE REFUSAL OF DANIEL JOHN MCKEE:

CITY OF CHETEK,

PLAINTIFF-RESPONDENT,

V.

DANIEL JOHN MCKEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Daniel McKee appeals a judgment revoking his privilege to operate a motor vehicle after he refused to submit to a breath test.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

McKee contends his refusal was justified under WIS. STAT. § 343.305(9)(a)5.c. because a physical disability or disease prevented him from submitting to the test. We reject McKee's arguments and affirm.

BACKGROUND

¶2 At the refusal hearing, the arresting officer testified that he stopped McKee's vehicle at 11:55 p.m. after he saw it run a stop sign at a high rate of speed. When he made contact with McKee, the officer noted McKee had bloodshot and glassy eyes and spoke with slurred speech. The officer also smelled intoxicants in the vehicle, and McKee admitted he had consumed four or five beers. After McKee performed field sobriety tests, the officer determined McKee was intoxicated.

¶3 The officer requested that McKee to submit to a preliminary breath test. McKee responded he would not "under the advisement of his union rep from the Chicago Fire Department." The officer then placed McKee under arrest and read to him the Informing the Accused form. *See* WIS. STAT. § 343.305(4). When the officer requested if McKee would submit to a chemical test of his breath, McKee again declined. The officer also testified that McKee at some point told the officer that McKee had gastroesophageal reflux disorder, also known as GERD, but the officer indicated he did not know about the effects of the disorder.

¶4 During his testimony, McKee, a firefighter, claimed to have told the officer that he was "physically unable" to take a breath test. McKee explained that his Barrett's esophagitis, which he described as a "progression from the normal GERD," caused asthma-like symptoms and tightness of the chest that prevented him from blowing into any machine. He further claimed his union representative advised him to submit to testing other than the standard breathalyzer. McKee did

not recall being read the Informing the Accused form, and he denied telling the officer he drank four to five beers. McKee admitted, however, that he had consumed some beer that night, even though he had been advised to abstain from alcohol due to his GERD.

¶5 McKee moved to admit medical records purportedly showing that he had GERD and Barrett's esophagitis. The City objected on the ground that McKee failed to call a witness to authenticate and explain the records. The circuit court excluded the reports as inadmissible hearsay and rejected McKee's argument that the records "should be admitted because he's the patient."

¶6 The officer was recalled to testify after McKee. When asked what McKee said in refusing the breath test, the officer testified:

> In my conversation with [McKee], he indicated that he is not to submit to a breath test for any field sobriety due to facing termination from his job. He indicated that if he has a test with an intoxication level number, he will be terminated from his job due to violating the department policy. Where if he contested it and did not, they'll take the revocation, and I specifically recall him stating that if you throw a bunch of money at a lawyer to make it go away, that's how they do things in Chicago.

¶7 The circuit court concluded that the officer had probable cause to believe McKee committed operating a motor vehicle while intoxicated (OWI), that McKee was properly read the Informing the Accused form, and that McKee improperly refused the breath test. In addition, the court determined McKee had failed to show by a preponderance of the evidence that his refusal was due to a disease or physical inability to submit to the breath test. The court found that McKee "was told not to take [a breath test] because it affected his job in Chicago" and that the evidence showed McKee "refused to do it because of information from a union rep" rather than a disability stemming from his GERD. The court

also denied defense counsel's motion "to take judicial notice of the research [counsel] did on GERD."

¶8 The circuit court entered a judgment revoking McKee's operating privilege for one year. This appeal follows.

DISCUSSION

¶9 The issues that a defendant may raise at a refusal hearing are limited to: (1) whether the police officer had probable cause to believe the accused drove a vehicle under the influence of an intoxicant and was lawfully arrested for an OWI offense; (2) whether the officer properly informed the defendant under the implied consent statute consistent with WIS. STAT. § 343.305(4); and (3) whether the defendant improperly refused a chemical test. WIS. STAT. § 343.305(9)(a)5.a.-c. A defendant is deemed not to have refused a chemical test if he or she "show[s] 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 …." Sec. 343.305(9)(a)5.c. Under this standard, a refusal for any other reason is improper. ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 191, 366 N.W.2d 506 (Ct. App. 1985).

¶10 On appeal, McKee does not challenge the circuit court's conclusion on probable cause. Instead, he argues that he did not improperly refuse a chemical test under WIS. STAT. § 343.305(9)(a)5.c., challenging both the circuit court's ruling on the admissibility of his medical records and its findings of fact. We also understand McKee to argue the officer did not properly inform him about

alternative testing available due to his GERD diagnosis when the officer requested a breath test.[2]

¶11 We uphold a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). The application of the implied consent statute to findings of fact is a legal question that we review de novo. ***State v. Reitter***, 227 Wis. 2d 213, 223, 595 N.W.2d 646 (1999). We review a court's evidentiary ruling for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶12 McKee first argues that the circuit court erred when it excluded the medical records showing that he had GERD or Barrett's esophagitis and that he was prescribed medication for that condition. McKee admits that the records were hearsay, but he maintains they were admissible under WIS. STAT. § 908.03(6m) as patient health care records. Patient health care records do not require a custodial witness if, at least forty days before trial, the moving party provides to all appearing parties an "accurate, legible and complete duplicate of the patient health care records for a stated period *certified by the record custodian*." Sec. 908.03(6m)(b)1. (emphasis added). McKee's record submissions did not contain any such certification, and they were not provided to the City at least forty days before trial. McKee otherwise failed to present any qualified witness to lay a

[2] McKee's briefing is poorly organized and contains a considerable number of appellate rule violations. For example, McKee's factual references, which are infrequent, cite only to his appendix. A party must include appropriate references to the record in its briefing. WIS. STAT. RULE 809.19(1)(d)-(e). The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Furthermore, McKee refers to himself as "Defendant-Appellant" or "Appellant." A party must reference itself by name, rather than its party designation, throughout its argument section. RULE 809.19(1)(i). We admonish McKee's counsel that future rule violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

proper foundation for the court to admit the records into evidence or to testify that his condition prevented him from providing a breath test on the date of his arrest.

¶13 In an apparent effort to remedy his failure at the hearing to comply with WIS. STAT. § 908.03(6m)(b)1., McKee attaches a doctor's letter and medical records to the appendix filed with his reply brief. The record does not reflect that the doctor's letter and medical records proffered in the appendix were ever provided to the circuit court. We will not consider documents not contained within the record. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256.

¶14 In conclusory fashion, McKee also contends the medical records he submitted at the refusal hearing contained an "obvious circumstantial guarantee of trustworthiness." However, he does not develop an argument or cite any legal authority in support of this statement, so we do not address the issue further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988). Accordingly, we conclude the circuit court properly exercised its discretion when it excluded the medical records.

¶15 McKee next challenges the credibility of the officer's testimony. His argument in this regard ignores our standard of review. The circuit court determines the credibility of the witnesses and the weight of the evidence, due to its superior opportunity to observe the demeanor of witnesses and consider the persuasiveness of their testimony. ***Patrickus v. Patrickus***, 2000 WI App 255, ¶26, 239 Wis. 2d 340, 620 N.W.2d 205. We may only overturn a court's credibility findings if they are "in conflict with the uniform course of nature or with fully established or conceded facts." ***Yates v. Holt-Smith***, 2009 WI App 79, ¶25, 319 Wis. 2d 756, 768 N.W.2d 213.

¶16 The officer testified that McKee refused to take a breath test specifically because he was concerned about his employment status, not because of reasons related to his GERD. McKee disputed this version of events and claimed to have explained to the officer that GERD or Barrett's esophagitis prevented him from taking the breath test. The court, however, found the officer more credible than McKee, and it was free to reject McKee's unsubstantiated testimony that his purported diagnoses prevented him from blowing into a machine. *See* WIS. STAT. § 805.17(2). Because the circuit court's findings of fact are not clearly erroneous, we conclude the court properly determined that McKee failed in meeting his evidentiary burden to show he properly refused the breath test.

¶17 Finally, McKee contends for the first time on appeal that the officer was required to provide McKee with the option to take an alternative test to a breath test when McKee said he had GERD. In support, he cites a Wisconsin State Patrol document attached to the appendix filed with his reply brief. This document does not appear in the record, and we will not consider it on appeal. *See* ***Roy***, 305 Wis. 2d 658, ¶10 n.1. McKee also provides no legal authority in support of this argument, and we reject it as undeveloped. *See* ***M.C.I.***, 146 Wis. 2d at 244-45.

By the Court.—Judgment affirmed.

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