COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2010

David R. Schanker
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. 2009AP2608-FT **Cir. Ct. No. 2009CV898**

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

IN THE MATTER OF THE REFUSAL OF BRADLEY K. DARWIN:

BRADLEY K. DARWIN,

PLAINTIFF-APPELLANT,

V.

CITY OF MONONA,

DEFENDANT-RESPONDENT.

BRADLEY K. DARWIN,

PLAINTIFF-APPELLANT,

V.

CITY OF MONONA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Bradley K. Darwin appeals his judgment of conviction for operating a motor vehicle while intoxicated (OWI), first offense, entered upon a verdict of the City of Monona municipal court. Darwin also appeals an order of the City of Monona municipal court revoking his operating privileges for refusal to submit to an intoximeter test. Darwin argues that the circuit court failed to employ the proper standard of review by performing a transcript review under WIS. STAT. § 800.14(5) when he had not withdrawn his request for a trial de novo under § 800.14(4). Darwin also argues that the officer lacked probable cause to arrest him, that his refusal to submit to an intoximeter test was reasonable, and that there was insufficient evidence to convict him of OWI. We conclude that the circuit court employed the proper standard of review and that the record supports the decisions of the municipal court. We therefore affirm.

¶2 On September 25, 2008, Darwin was arrested for OWI and other traffic violations, and issued citations for violations of City of Monona ordinances. A trial was held before the City of Monona municipal court wherein Darwin was convicted of operating a motor vehicle while intoxicated, contrary to a city ordinance adopting by reference WIS. STAT. § 346.63(1)(a), and speeding. Concurrent with the trial, the court held a refusal hearing and determined that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Darwin's refusal to submit to an intoximeter test was unreasonable, pursuant to WIS. STAT. § 343.305(10). Darwin timely appealed the municipal court ruling to the circuit court and requested a trial de novo before a jury. A hearing was held in Dane County Circuit Court at which Darwin, by counsel, withdrew his request for a trial de novo and stipulated that the court decide the case based on the transcript. The parties submitted briefs to the court, and the court upheld the municipal court's decision.

¶3 Darwin first argues that the circuit court erred by deciding the case under WIS. STAT. § 800.14(5). Darwin asserts that, contrary to the court minutes, he did not withdraw his request for a trial de novo under WIS. STAT. § 800.14(4). Instead, Darwin claims that he merely withdrew his jury demand and stipulated to the use of the municipal court transcript by the circuit court in lieu of taking new testimony. The court minutes contained in the record indicate that the trial de novo request under § 800.14(4) was withdrawn and that the case was converted to a transcript review under § 800.14(5). The transcript of that hearing is absent from the record. We are bound by the record before us and where it is incomplete we assume that the missing material supports the circuit court's decision. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). Consequently, we conclude that the circuit court properly reviewed the municipal court's decision under § 800.14(5).

¶4 Darwin alleges several errors stemming from his municipal court trial. We review the decision of the municipal court under the same standard of review as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 362, 369 N.W.2d 186 (Ct. App. 1985). Review under WIS. STAT. § 800.14(5) is limited "to an examination of the transcript to determine whether the evidence supports the municipal court decision" and "is analogous to appellate review of a

trial to a circuit court under sec. 805.17(2)." ***Id.*** at 361. We will uphold the municipal court's findings of fact unless clearly erroneous and give "due regard … to the opportunity of the municipal court to judge the credibility of the witnesses." ***Id.*** Darwin's remaining arguments present questions of law that we review *de novo*.

¶5 Darwin argues that the officer lacked probable cause to arrest him for OWI. The municipal court made the following findings of fact with respect to probable cause: Darwin signaled a turn, but failed to complete it; he denied drinking; he emitted an odor of intoxicants, his eyes were red, and his speech was slurred; he refused to perform field sobriety tests; and the officer observed bad driving. The municipal court based its findings on the testimony of the arresting officer, Darwin, and two of Darwin's friends, and found the officer's testimony more credible than the testimony of the other witnesses. Given our highly deferential review of the municipal court's determinations of credibility, and our examination of the record, we cannot say that the municipal court's findings of fact are clearly erroneous. We conclude that these facts, when viewed objectively and taken together with the officer's experience, rose to the level of probable cause to arrest Darwin for OWI.

¶6 Darwin next argues that his refusal to submit to the intoximeter test was reasonable. At the refusal hearing, the issues were limited to whether the officer requesting the test had probable cause to arrest Darwin for OWI, whether the officer complied with the notice requirement, and whether the test was refused. WIS. STAT. § 343.305(9)(a)(5). Here, only probable cause is disputed. Therefore, because we have already determined that the officer had probable cause to arrest Darwin for OWI, we conclude that Darwin's refusal was unreasonable and his operating privileges were properly revoked pursuant to § 343.305(10).

¶7 Finally, Darwin argues that there was insufficient evidence to support his conviction for OWI. In addition to those findings discussed above supporting probable cause to arrest, the municipal court found that Darwin improperly refused a request to perform a chemical test of his breath. We will not set aside a conviction for insufficiency of the evidence "unless the evidence, viewed most favorably to the [City] and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt" by clear, satisfactory and convincing evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Based on the evidence available to the municipal court, including the substantial findings already discussed, we conclude that the municipal court, acting reasonably, could have been convinced that Darwin operated a motor vehicle while intoxicated.

By the Court.—Judgment and order affirmed.

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