COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2003

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. 02-2755 **Cir. Ct. No. 02-TR-1564**

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

IN THE MATTER OF THE REFUSAL OF PAUL D. MARTIN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL D. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Paul Martin appeals from an order revoking his driver's license for one year for refusing to submit to chemical testing of his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

breath, pursuant to WIS. STAT. § 343.305. The trial court found that Martin failed to prove by a preponderance of the evidence that his refusal to submit to the test was reasonable. We agree and therefore affirm.

Background

¶2 The parties stipulated that on January 15, 2002, Martin was arrested by Dane County Sheriff's Deputy Matthew Flynn upon probable cause of violating WIS. STAT. § 346.63(1)(a), operating while intoxicated. At the refusal hearing, Flynn testified that he took Martin to the Waunakee Police Department and read him the "Informing the Accused" form in compliance with § 343.305(4). Flynn asked Martin if he would submit to an evidentiary chemical test of his breath and Martin answered "No." Martin did not state why he would not take the breath test, but offered to take a urine test. Flynn believed that Martin stated that he did not think the breath tests were accurate. Although Martin had a small cut on his forehead, Flynn did not observe any reason why Martin would be physically unable to submit to a breath test.

¶3 Martin was then taken to the Intoxilyzer room, where Waunakee Police Officer Duane Brehmer asked him if he would submit to the breath test. Again Martin refused. According to Brehmer, Martin did not provide any reason why he would be medically unable to take the test, nor did Brehmer notice anything about Martin physically, such as difficulty breathing, that indicated that it would be difficult for Martin to provide a breath sample.

¶4 Martin testified that he was diagnosed with asthma in 1984 and that he declined the breath test because, given his asthma and decreased lung function, he did not believe the test would be accurate. To treat his asthma he has several prescribed medications, including two inhalers that he takes morning and night,

and a Proventilin or "rescue inhaler." Martin did not think that he could give the same sample that a normal person could and stated that at the time of his arrest, the therapeutic effects of his morning inhaler had probably worn off. He believed that without medication his lung capacity was about seventy percent of normal and only increased to a bit over eighty percent with medication. Thus he did not believe that he could have provided a deep lung sample to the machine. In addition, he feared that if he did submit to the breath test, he would suffer "strict physical consequences." Martin testified that the Intoxilyzer resembled a spirometer and "when I'm required to give a deep lung sample [for a spirometer], I usually go into a severe coughing spasm for which they have a rescue inhaler which I take at the end of the test." Although he did not know whether or not he could provide a sufficient breath sample, it did not occur to him to attempt the test to see if he could. He admitted that he did provide a breath sample for a preliminary breath testing device just before Officer Flynn arrested him, and that he never told either Flynn or Brehmer about his asthma.

¶5 While Martin agreed that the State had shown that he had refused the breath test, he argued that his refusal was reasonable because his asthma made him physically unable to submit. The State countered that Martin had not demonstrated a physical inability to submit because his testimony merely speculated about his ability to give an adequate breath sample and he failed to tell the officers that he had asthma at the time of the refusal.

¶6 The trial court found that Martin refused to submit to the breath test. The court further found that at the time of his refusal, Martin failed to mention his asthma, and his claims that he could not produce a sufficient breath sample were not supported by any medical testimony or documentation. Nor did Martin's testimony that his lung capacity is impaired necessarily lead to the conclusion that

he could not produce an adequate breath sample for the Intoxilyzer. For these reasons the trial court concluded that Martin had not met the burden of proof required to establish physical inability to submit as an affirmative defense. The trial court held that Martin's refusal was unreasonable and revoked his driving privileges for one year. Martin appeals.

Discussion

¶7 Once the State has established that a defendant has refused to submit to the breath test, the burden shifts to the defendant to prove physical inability to submit by a preponderance of the evidence. WIS. STAT. § 343.305(9)(a)5.[2] Based on the testimony at the refusal hearing, the trial court found that Martin had not met this burden and therefore his refusal was not reasonable.

¶8 Martin concedes that he refused to submit to the breath test, and therefore he bears the burden of showing by a preponderance of the evidence that his refusal was due to physical inability. While he admits that he never informed either Flynn or Brehmer about his asthma, he contends that his testimony at the refusal hearing satisfies the evidentiary standard and was not rebutted by the State. Martin also argues that the trial court held him to a higher burden than a preponderance of the evidence, as evinced by its conclusion that his asthma "does not necessarily mean he could not produce an adequate sample of his breath." In

[2] WISCONSIN STAT. § 343.305(9)(a)5.c provides in pertinent part:

> 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.

other words, Martin claims that the trial court required him to present evidence that would negate the possibility that he was physically able to submit to the breath test, when a preponderance of the evidence only requires a showing that a physical inability caused by his asthma was supported by the greater weight of the evidence. Finally, Martin asserts that the statute does not require that the driver actually attempt to blow into the Intoxilyzer in order to demonstrate that his refusal was reasonable.

¶9 Whether or not Martin's asthma, at the time of his refusal, prevented him from submitting to the Intoxilyzer presents a question of fact. The factual findings of the trial court will not be upset on appeal unless those findings are clearly erroneous. WIS. STAT. § 805.17(2). When the trial court sits as the finder of fact, it is the ultimate arbiter of the credibility of witnesses and the weight to be given to their testimony. ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). Thus, we review the record for credible evidence that will support the findings of the trial court.

¶10 We begin by agreeing with Martin that a driver is not required to attempt to blow into the Intoxilyzer in order to establish a reasonable refusal. It is axiomatic that if the driver attempts the test, there has been no refusal, unless the driver acts with the intent to render any reading inaccurate, for example, by blowing improperly or only pretending to blow. *See* ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997) (driver's conduct may serve as basis for a refusal). Thus Martin's refusal was not unreasonable on the ground that he did not attempt the breath test.

¶11 However, other testimony at the hearing amply supports the trial court's finding that Martin failed to establish his affirmative defense by a

preponderance of the evidence. Martin's credibility as a witness is central to the determination of whether he was physically unable to comply with the request for a breath test. The trial court found:

> The defendant refused to take a breath test. The defendant made no mention of his condition that he suffers from asthma. He now testifies and claims he is incapable of producing an adequate breath sample for the test. There is no medical testimony or documentation to support this contention. The defendant testified that his lung capacity is impaired, but that does not necessarily mean he could not produce an adequate sample of his breath.

In short, the trial court doubted Martin's credibility when Martin testified that his asthma was severe enough to cause him to be concerned about an asthma attack if he took the breath test. By arguing that his testimony regarding the severity of his asthma stands unrebutted by the State, and therefore the trial court's finding is not supported by the evidence, Martin is essentially asking us to revisit the trial court's credibility determination. That we will not do. 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 (1974).

¶12 Moreover, even if we were to accept Martin's testimony as a reasonable basis upon which the trial court could conclude that the severity of his asthma constituted an inability to submit, the undisputed evidence also reasonably supports the opposite inference. When more than one reasonable inference can be drawn from the credible evidence, "the reviewing court must accept the inference drawn by the trier of fact." ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). We may not overturn that decision even if we disagree with it, or would not have drawn that inference ourselves. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). But here we agree with the trial court.

¶13 First, Martin's assumptions about the inaccuracy of the Intoxilyzer do not speak to his physical inability to submit. A personal belief in the unreliability of the breathalyzer is not sufficient to show that a driver reasonably refused a breath test. ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 900-01, 266 N.W.2d 618 (1978). Further, Martin's inability defense is undercut by his admissions that he really did not know if he could provide a sufficient breath sample, and he only assumed that blowing into the Intoxilyzer would cause a reaction similar to that caused by a spirometer. Apart from his own statements, there was no medical testimony or documentation to substantiate the severity of his asthma. Nor did Martin produce evidence at the hearing to suggest that only an individual with normal lung function could provide an adequate sample for the Intoxilyzer.

¶14 Second, as noted by the trial court, it is only after the fact that Martin argues that his asthma was so severe that he could not blow into the Intoxilyzer, even though he never attempted to do so. There was uncontroverted testimony that Martin made no reference to his asthma when asked to take the test, neither officer observed any shortness of breath, wheezing, or other sign that he could not provide a breath sample, and Martin's statements at the time questioned the accuracy of the test but never suggested that he feared any negative physical consequences from blowing into the breathalyzer. On that evidence the trial court was entitled to infer that Martin's asthma defense was thought of only after his refusal. This is a question of credibility, and the trial court is the ultimate arbiter of witness credibility. ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App 1995).

¶15 The trial court correctly applied the provisions of WIS. STAT. § 343.305(9)(a)5.c. On this record we cannot conclude that the trial court's

finding was clearly erroneous, and we may not interfere with the trial court's credibility determination. We agree that Martin unreasonably refused to submit to the Intoxilyzer test.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.