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WISCONSIN COURT OF APPEALS
DISTRICT IV

02-12-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

VILLAGE OF DEFOREST,

Plaintiff-Respondent,

Appeal No.: 2014 AP 2398

MICHAEL D. BRAULT,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S RESPONSIVE BRIEF

Appeal from the Circuit Court for Dane County, the
Honorable Stephen Ehlke, Judge.

REUTER, WHITISH & EVANS, S.C.



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STATEMENT OF ISSUES

Did the circuit court have sufficient evidence to find the Appellant guilty of Operating a Motor Vehicle Under Influence of Intoxicant - 1st Offense, contrary to a Village of DeForest ordinance in conformity with Wis. Stat. §346.63(1)(a)?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appeal addresses only the sufficiency of the evidence presented at trial. The standard of review of such determinations is well-established and neither oral argument nor publication are warranted.

STATEMENT OF THE CASE

A. Procedural Posture.

The Defendant-Appellant, Michael Brault ("Brault") was found guilty by the DeForest-Windsor Municipal Court on June 11, 2014, of Operating Under the Influence of an Intoxicant, Possession of Open Intoxicants and Failure to Stop for a Stop Sign, as well as of improper refusal to take a test in compliance with Wis. Stat. §343.305(3). (R.1).

Brault appealed his conviction and a new trial was held before the circuit court for Dane County. (R.2). On September 30, 2014, Circuit Judge Stephen Ehlke found Brault guilty on all counts. (Trial Court Minutes, R.12).

The circuit court's findings of fact, conclusions and judgment were stated orally on the record. (R.17 at 29:10 to 32:5).¹

Brault seeks review only of the conviction for Operating Under the Influence of an Intoxicant. (Brault's Br. 1).

B. Statement of Facts.

Brault did not present any testimony or other evidence (R.17 at 26:23 to 27:7), nor did he raise any objections to the evidence offered by the Village. (R.17 at 10:23, 23:2-3, 24:22, 26:12-13). Therefore, the transcript constitutes the undisputed factual record.

ARGUMENT

I. This Court Must Affirm the Trial Court's Judgment if Any Reasonable View of the Evidence Supports It.

Brault's appeal challenges the sufficiency of the evidence to support his conviction. The standard of review is well-established in the law. A trier of fact is entitled to great deference with respect to its factual findings. "If more than one inference can reasonably be drawn from the historical facts presented at the trial, we accept the inference drawn by the fact-finder, even if other

¹ R.17, the trial transcript, is also attached in full as the Appendix to Brault's Brief, using the same page numbering as in the Record.

inferences could be drawn." *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 490, 736 N.W.2d 530, 535. The "appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757-58 (1990). "An appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *State v. Smith*, 2012 WI App 91, ¶36, 342 Wis. 2d 710, 733, 817 N.W.2d 410, 421.

II. Brault's Argument is Undeveloped, Without Legal Authority, Lacking in Substance, and Should Not be Considered.

To the extent that we can follow Brault's argument on appeal, he seems to contend that the circuit court's reliance on the credibility of a single opinion offered by the arresting officer, by itself, constitutes reversible error. (Brault's Br. 5-6). Brault does not address the totality of the evidence as being insufficient, nor argue that the decision would have been different had the opinion been ignored by the trial judge.

The argument fails for several reasons. First, it assumes, without any basis, that the trial court relied on

the officer's initial opinion of Brault's intoxication. Secondly, it ignores the full extent of the evidence presented at trial supporting the conviction. Thirdly, it asks this Court to re-evaluate the credibility of the arresting officer's testimony.

A. Nothing in the Record Suggests the Trial Court Relied on Officer Stage's Initial Opinion.

Brault's sole challenge to the evidence involves the initial opinion formulated by Officer Stage before Brault failed several field sobriety tests, that Brault was intoxicated. (App. Br.at 5-6). The trial court, however, never addressed that tentative opinion, but rather the opinion Officer Stage formed after the tests were completed. (R.17 at 30:8-23). Moreover, the court did not indicate that it relied at all on the officer's conclusion, but merely mentioned it in discussing the decision to make the arrest. (R. 17 at 30:19-23). Nothing in the record suggests that the court placed any weight at all on the opinion Brault challenges.

B. The Circuit Court Properly Based its Decision on the Totality of the Evidence.

The trial court found Brault guilty "based on the totality of evidence" presented at trial. (R.17 at 31:17). Brault does not dispute the essential facts of the traffic stop and subsequent arrest. His argument rests solely on

his view that the Officer formed an opinion of his intoxication too early in the process.

Brault's argument is undeveloped and makes no sense. His characterizations of the evidence are inaccurate and unsupported in the record. For example, Brault falsely contends that he refused to submit to a preliminary breath test (App. Br. at 3), although the undisputed evidence included the results of the preliminary breath test he took. (R.17 at 19:4-21).

Brault also misrepresents the evidence available to Officer Stage when he first formulated his opinion regarding Brault's intoxication as "two scant and very general observations." (App. Br. 5). The undisputed testimony shows that, at the time the initial opinion was formed, Officer Stage had observed: (1) Brault running a stop sign (R17 at 7:14-21); (2) Brault reaching for the passenger side floorboard when stopped (R17 at 7:25 - 8:4); (3) Brault claiming he did not know why he was stopped (R17 at 8:18-21); (4) Brault stating he ended up in DeForest en route from Mt. Horeb to Sun Prairie (R17 at 8:22 - 9:10); (5) an odor of intoxicants on Brault's breath (R.17 at 9:11-15); (6) Brault's bloodshot and watery eyes (*Id.*); Brault having admitted to drinking (R.17 at 16-20); and (7)

a bottle opener in the cup holder in the center of the truck (R:17 at 9:24 - 10:1).

Brault's contention that the trial court relied on Officer Stage's initial opinion is belied by the record. The court discussed only the conclusion later reached by the officer after the above observation and following Brault's failure of the field sobriety tests. (R.17 at 29:9 - 30:23). Most significantly, Brault never discusses the totality of the evidence, which is the only standard relevant to his appeal. Beyond the facts leading to Officer Stage's conclusions, the trial court also considered the fact that an open bottle of beer was found in the vehicle (R.17 at 31:2-5) and that Brault improperly refused to submit to an evidentiary test of his breath. (R.17 at 31:7-16).

Based on the "totality of the evidence," (R.17 at 31:17-19) the trial judge appropriately found Brault guilty.

Brault provides no legal authority in support of his argument that one piece of evidence, even if improperly considered, somehow negates the overwhelming evidence of his guilt. "Arguments unsupported by references to legal authority will not be considered." *State v. Pettit*, 171

Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). The trial court's decision should be affirmed.

C. The Credibility of Witnesses is a Determination to be Made Only by the Trial Court.

Brault argues that the trial court erred by relying on the testimony of Officer Stage, which he calls "completely lacking in probative value." (App. Br. 6). In essence, he argues that the circuit court erred in affording weight and credibility to the officer's testimony. Again, it should be noted that Brault did not cross-examine the officer, and offered no witnesses or evidence refuting the officer's testimony. (R.17. at 26:23 to 27:9). Nor did Brault offer any argument to the circuit court. (R.17 at 29:7-9).

The credibility of witnesses and the weight to be accorded their testimony is a matter committed to the trier of fact. *State v. Young*, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 125-126, 762 N.W.2d 736, 741. A reviewing court will not "reweigh the evidence or reassess the witnesses' credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not." *Id.*, quoting *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 250, 736 N.W.2d 202, 207. This long-standing rule is well-established in case law.

An appeal based on a trial court's credibility determination is frivolous. An appeal is frivolous when:

The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Wis. Stat. §809.25(3)(c). In *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1, 3-4 (Ct. App. 1998), the court found that the appellant "should have known that an appeal to reverse the trial court's credibility determinations could not be successful under the long-standing law of this state." *Lessor*, 221 Wis. 2d at 669, N.W.2d at 5. The court concluded the appeal to be frivolous. *Id.* Similarly, this court should hold Brault's appeal frivolous.

CONCLUSION

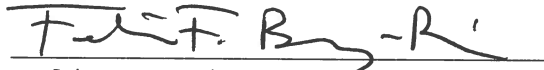
This appeal is based solely upon the trial court's determination of the credibility of the undisputed evidence. The appellant attacks only one piece of evidence which he misrepresents both factually and in its presumed impact on the trial court's decision. More significantly, he completely ignores the totality of the evidence, which is the relevant consideration on an appeal based on the sufficiency of the proof at trial.

No legal authority is cited for the arguments raised by the appellant, and no new legal theory is offered to

supplant the long-standing rules to be applied in reviewing the trial court's determination. The appeal is frivolous, and the respondent should be awarded cost and fees in defending this appeal.

Respectfully submitted this 12th day of February, 2015.

REUTER, WHITISH & EVANS, S.C.



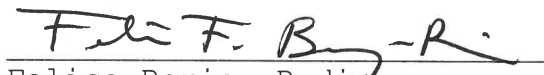
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 1,627 words and 9 pages.

Dated: February 12, 2015.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (F)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (f).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 12, 2015.

REUTER, WHITISH & EVANS, S.C.

A handwritten signature in black ink, appearing to read "Felice Borisy-Rudin", written over a horizontal line.

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