

RECEIVED

05-12-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
2017AP000207

In the matter of the refusal of Daniel John McKee:

CITY OF CHETEK,

Plaintiff-Respondent,

V.

DANIEL JOHN. MCKEE,

Defendant-Appellant,

ON APPEAL FROM A DECISION MADE BY THE
HONORABLE JAMES BABLER JUDGE BRANCH I OF
BARRON COUNTY CIRCUIT COURT

BRIEF AND APPENDIX OF APPELLANT

By: Michael M. Rajek
Attorney for Defendant-Appellant
State Bar No.1015231
306 South Barstow St., Suite 105
Eau Claire, WI 54701
(715)835.6111

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES.....pg.3

II. STATEMENT OF ISSUES.....pg. 4-5

1. Was his alleged refusal is justified under the circumstances and should not be considered a “refusal” as such?

2. Did the Circuit Court Judge commit prejudicial error by not admitting Defendant-Appellant’s medical records and prescription evidence when there was no question as to their reliability and relevance to the issues at the Refusal Hearing?

3. Did the Court error by believing an officer who changed his story under oath several times and

**ignoring the testimony of Defendant-Appellant
completely?**

III. STATEMENT OF CASE.....pg.5-7

IV. STATEMENT OF FACTSpg.7-8

V. PUBLICATION STATEMENT.....pg.7

VI. ARGUMENT.....pg.8-13

VII.CONCLUSION.....pg.13-16

VIII. CERTIFICATIONpg.17

IX. ELECTRONIC FILING
CERTIFICATION.....pg.18

X. CERTIFICATION OF MAILING.....pg.19

XI. APPENDIX TABLE OF CONTENTS.....pg.20

I. TABLE OF AUTHORITIES

Wis.Stat § 343.305(5)(c).....pg 9 &10
Wis.Stat§343.305(9)(a)5.....pg 8 &10
Wis. Stat.§908.03(4).....pg 10
Wis. Stat § 908.03 (6).....pg10
Wis. Stat. § 908.045(6).....pg10
Wis. Stat § 908.03(24).....pg 10

II. STATEMENT OF ISSUES

- 1. Was his alleged refusal justified under the circumstances and should not be considered a “refusal” as such?**

The preponderance of the evidence received at the Refusal Hearing showed that the Appellant-Defendant Daniel John McKee suffers from Barrett’s Esophagus, an advanced and very serious version of Gastroesophageal Reflux Disease which is unrelated to the use of alcohol rendering him physically incapable of taking a normal breath test for alleged intoxication. (Appx 6-12)

2. **Did the Circuit Court Judge commit prejudicial error by not admitting Defendant-Appellant's medical records and prescription evidence when there was no question as to their reliability and relevance to the issues at the Refusal Hearing?**

A copy of the Defendant-Appellant's medical records with a certification from the G.I Associates of Chicago with a facsimile transmittal was put into evidence but not received due to a hearsay objection. Trial court did not allow the defense an opportunity to respond to the hearsay objection of the prosecution and was cut off.

3. **Did the Court error by believing an officer who changed his story under oath several times and by ignoring the testimony of Defendant-Appellant completely?**

III. STATEMENT OF CASE

Defendant- Appellant's driver's license was revoked by the Barron County Court on December 21, 2016 after an evidentiary refusal hearing. Defendant-Appellant gave uncontradicted testimony that he suffers from a disease called Barrett's Esophagus an advanced and serious complication of Gastroesophageal Reflux Disease. The testimony was corroborated by medical history and prescription medication verification which was received but not admitted due to a hearsay objection. The Defendant-Appellant's attorney was cut off and not allowed to respond to the hearsay objection. (Appx. 13) Defendant's counsel had no opportunity for their admission. Defendant-Appellant feels the records were a clear exception to the hearsay rule and were improperly excluded. The Defendant-Appellant was allowed to testify as to his condition and explain why he could not take a breath test as requested by an arresting officer. (Appx. 10, 11 & 13) Testimony was that the officer was informed of the

Defendant- Appellant's medical condition which is corroborated by the Alcohol Influence Report (Appx 1) which was received in evidence. Despite the evidence presented and despite the obvious circumstantial guarantee of trustworthiness the medical records supporting Defendant-Appellant's position were not admitted by the Judge (Appx 11,13, 16, &17). Defendant-Appellant believes this was prejudicial error. Also, and very importantly, the arresting officer did not make any attempt to obtain an alternative test for alcohol despite the fact he could have easily obtained a warrant for blood if in fact Appellant truly did "refuse" a test.(Appx. 15) In addition the officer refused to record the encounter with the Defendant, and failed to review his own report prior to testifying. (Appx. 3-4). No Alternative test was offered. (Appx. 13)

IV. STATEMENT OF FACTS

Daniel McKee, a firefighter in the City of Chicago was arrested for first offense operating under the influence by a Chetek, Wisconsin police officer in June, 2016. Mr. McKee informed the arresting officer of a medical condition, a serious disease, Barrett's Esophagus that he suffers from that prevents him from taking a standard breath test. Therefore, Mr. McKee told the officer, "no" when asked to take such a test. The officer, despite obvious knowledge of a medical condition causing significant problems for providing an accurate breath sample, chose not to use an alternative test for blood or urine. At the refusal hearing Mr. McKee gave testimony concerning his condition. This testimony was ignored by the court though totally unrefuted. Medical and prescription records supporting defendant's testimony were not admitted by the court. The defendant- appellant was found by the court to have "refused" and his driver's license revoked. Mr. McKee appeals this result.

V. PUBLICATION STATEMENT

Yes, this matter is of statewide importance and involves significant legal issues.

VI. ARGUMENT

Under Wis. Stat. §343.305(9)(a)5 the scope of a refusal hearing is limited to whether there was probable cause for the arrest, whether law enforcement complied with Wisconsin

Implied Consent law and read the person arrested the informing the accused form and whether the person actually refused the evidentiary test. The burden of proof is upon the prosecution to establish the elements at the refusal hearing.

The Plaintiff, the City of Chetek, has not met its burden
To prove all of the elements of a “refusal”. There exists in the
record uncontroversial evidence of a serious medical
condition. The Defendant-Appellant suffers from
Barrett’s Esophagus making it impossible for the Defendant
to take an evidentiary breath test (Appx. 8 & 11). The
arresting officer was told this as evidenced by the Alcohol
Influence Report (Appx 1). Despite this serious physical
condition, law enforcement failed to act in an appropriate
manner and issued a “refusal” to the Defendant-Appellant.
It should be clear from the testimony that the Defendant-
Appellant has this condition and his records should have been
admitted in exception to the hearsay rule under Chapter 908
Wisconsin Statutes 908.03(4), 908.03(6), 908.045(6), & Wis.
Stat § 908.03(24).

The arresting officer despite obvious knowledge of the defendant's medical condition offers no alternative test and made no attempt to secure either a blood or urine sample. Instead the officer indicated refusal. Wisconsin Statutes 343.305(9)(c) states:

whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by preponderance of the evidence that the refusal was due to a physical disability or disease unrelated to the use of alcohol.

Testimony from the Appellant was that he has suffered from GERD Gastroesophageal Reflux Disease since at least 1998, has been provided a life coach to deal with this disease and has been diagnosed with Barrett's Esophagus only 3 weeks prior to his arrest after a scope and testing at a Chicago Gastroenterology Clinic (Appx 5). Appellant has special dietary restrictions and severe limitations because of his disease. This testimony is uncontroverted. The Chetek officer who affected the arrest told a different story. But considering


the officer's prior statements made under oath he appears to be inventing a story. Irregardless of this false and exaggerated testimony, the Alcohol Influence Report (Appx 1) indicates the officer was in fact told of the G.E.R.D issue. If he was trained in D.U.I procedure at all, which he claims, he should have known enough to ask for another form of test. He failed to do so. This case is full of surprises at the judge who was a District Attorney for almost two decades and a judge for 13 years claims to have known nothing of G.E.R.D insinuating that Appellant made all this up and quite abruptly found that he illegally refused a chemical test. Appellant claims prejudicial and reversible error and request the appellate court to overturn the findings of the Barron County Court in total.

(Appx 16 &17)

VII. CONCLUSION

Defendant-appellant showed by a preponderance of the evidence that he has a physical disability or disease unrelated to the use of alcohol and the consequences of a refusal are not appropriate. His "refusal" was not and should not be considered a legal "refusal" of an alcohol test.

Dated this 11 day of May, 2017.



Michael M. Rajek State
Bar No.:1015231
306 South Barstow Street Suite, 105
Eau Claire, WI 54701
(715)835.611

VIII. CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points , maximum of 60 characters per full line of body text. The length of the brief is 2,295 words. This brief was prepared using *Microsoft Office* word processing software. The length of the brief was obtained by the use of Word Count Function of the software.

Dated this 11 day of May, 2017



Michael M. Rajek- 1015231
306 South Barstow St. Suite, 105
Eau Claire, WI 54701
(715)835.6111

IX. ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of the
brief is identical to the text of the paper copy of the brief.

Dated in Eau Claire, Wisconsin this 11 day of
May, 2017




Michael M. Rajek- 1015231
306 South Barstow Street Suite, 105
Eau Claire, WI 54701
(715)835.6111

X. CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of Court of Appeals by first-class mail, or other class of mail that is at least expeditious, on the 11 day of May, 2017.

Dated this 11 day of May, 2017


Michael M. Rajek- 1015231
306 South Barstow Street Suite, 105
Eau Claire, WI 54701
(715)835.6111

XI.APPENDIX

Exhibit Three Alcohol Influence Report	App.1-2
Trial Transcript Page 20	App. 3
Trial Transcript Page 22	App.4
Trial Transcript Page 31	App 5
Trial Transcript Page 36	App 6
Trial Transcript Page 37	App 7
Trial Transcript Page 43	App. 8
Trial Transcript Page 44	App. 9
Trial Transcript Page 45	App 10
Trial Transcript Page 46	App 11
Trial Transcript Page 47	App 12
Trial Transcript Page 48	App 13
Trial Transcript Page 49	App 14
Trial Transcript Page 50	App 15
Trial Transcript Page 63	App 16
Trial Transcript Page 64	App17