STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2017 AP000207

In the matter of the refusal of Daniel John McKee:

CITY OF CHETEK,

Plaintiff-Respondent,

v.

DANIEL JOHN MCKEE,

Defendant-Appellant.

ON APPEAL FROM RULING OF THE HONORABLE JAMES C. BABLER, BARRON COUNTY CIRCUIT COURT JUDGE

BRIEF OF PLAINTIFF-RESPONDENT

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I. Was the defendant's refusal justified?
The Circuit Court Answered "No."

II. Did the Circuit Court Judge commit prejudicial error by not admitting Defendant-Appellant's medical records and prescription evidence without authentication?
The Circuit Court Answered "No."

III. Did the Court error by believing the testimony of the officer over the defendant?
The Circuit Court Answered "No."

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Respondent City of Chetek does not request oral arguments or publication of this matter as the controversy can be adequately briefed and deals with a well-settled area of law.

STATEMENT OF CASE

On June 2, 2016, Appellant Daniel J. McKee ("McKee") was operating a motor vehicle and stopped by Officer Jon Fick of the City of Chetek Police Department.

(R18 at 7) Upon making contact with McKee, Officer Fick noted signs of impairment and the smell of intoxicating beverages. (R 18 at 8) Fick subsequently requested that McKee complete field sobriety tests which McKee did. (R18 at 9) Fick then requested McKee submit to a preliminary breath test to which McKee responded "under the advisement of my union rep, I will not submit to any breath tests." (R18 at 18) Fick then placed McKee under arrest. (R18 at 19) The facts as presented above are not contested.

Fick then completed the pertinent paperwork including the Informing the Accused form which was read verbatim. (R18 at 18) When Fick asked McKee whether or not he would submit to an evidentiary chemical test of his breath, McKee answered "no." (R18 at 18) Fick later completed the Alcohol/Drug Influence Report which McKee did answer that he had GERD and had been drinking at a bar. (R8 at 3)

McKee, through counsel, timely requested a refusal hearing which was held on December 21, 2016 in front of the Honorable James C. Babler. (R2) During the refusal hearing, Officer Fick testified on for the City of Chetek and Mr.

McKee testified on his own behalf. Both were cross-examined by opposing counsel. No medical professionals testified. (See R18)

Officer Fick's testimony was consistent with the above facts. (See R18) McKee testified to his diagnosis of acid reflux and that he cannot submit to breath tests "under the advice of his union." (R18 at 18) McKee, through counsel then tried to enter medical records into evidence. (R18 at 48) The City of Chetek objected based upon lack of foundation and the Court sustained indicating the medical records contained inadmissible hearsay. (R18 at 49) Of further importance is the fact that McKee disagreed with some of the testimony of Fick, including his statement that he had "four to five beers." (R18 at 50)

Officer Fick was then recalled and testified that McKee indicated he "was not to submit to a breath test for any field sobriety due to facing termination from his job." (R18 at 53)

After evidence was closed the Court found that the City of Chetek had established probable cause for the arrest

of Mr. McKee. The Court then found that McKee was read the Informing the Accused form and that Officer Fick's testimony was more credible than McKee's.

The Court next found that he was not familiar with GERD and that the defendant had not shown by a preponderance of the evidence that the refusal was due to inability.(R18 at 61) The Court ultimately ruled the refusal unreasonable and issued the appropriate penalties. (R18 at 61)

McKee now appeals the ruling.

ARGUMENT

On appellate review, a trial court's factual findings will not be set aside unless they are clearly erroneous, and this court must give due regard to the court's determination of a witness's credibility. *See* Wis. Stat. 805.17(2). Also, reversal is not required simply because some evidence might support a contrary finding. *See* In re Estate of Becker, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

I. THE DEFENDANT'S REFUSAL WAS NOT DUE TO A PHYSICAL INABILITY TO SUBMIT TO THE TEST.

Under Wis. Stat. 343.305(3)(a)," a law enforcement officer may request that a person arrested for OWI provide one or more samples of the person's blood, breath, or urine for testing." Wis. Stat. 343.305(3)(a) A law enforcement officer must then read the implied consent warning to the person, explaining the nature of implied consent, warning of the consequences of a prohibited alcohol concentration…" Id.

"[T]he issues of the hearing are limited to: whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol…; whether the officer complied with sub. (4); whether the person refused to permit the test." Wis. Stat. 343.305(9)(a)(5)(a-c).

A "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…." Id. at c. Moreover, failure to submit to a breathalyzer test for any reason other than a physical inability

to submit to the test is a refusal to take the test. Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d at 191.

The defendant does not argue that Officer Fick did not have the requisite probable cause. Instead, he argues that the officer did not read the form known as "Informing the Accused" and that the defendant did not "refuse" the test due to his medical condition. Def Br. at 4 Neither argument is supported by the facts.

When referring to the Informing the Accused, Office Fick testified:

> I read this form word for word starting with the first paragraph as stated under Wisconsin Implied Consent Law, all the way through where it says will you submit to an evidentiary chemical test of your – at which point I indicate which test I am requesting which in this case was breath and then I note their answers.
>
> R18 at 17

Fick then went on to testify that the defendant responded "no." Id. Fick testified that the defendant never mentioned any medical conditions that prevented him from submitting to a breathalyzer test. Id. The defendant's testimony was not inconsistent with the officer's regarding the reading of the informing the accused form. The defendant testified that he

did not recall being read the aforementioned form, not that the form was not read. (R18 at Lack of recollection is not inconsistent with an individual under the influence of an intoxicant. Regardless, the Court found that McKee had been read the requisite information.

Further, the defendant has not shown a physical inability to submit to the breath test requested by Officer Fick. Instead, he points to having "GERD" and purports it to be a prima facie showing that he was unable to submit to the breath test. While there was testimony that the Defendant had GERD, his specific condition is not so obvious that a court could take judicial notice of the effects of the disease. In fact, Officer Fick testified that the Defendant's only stated apprehension as to submitting to the breath test was that his union representative advised him not to. (R18 at 17) Regardless, the Court correctly found that Mr. McKee's refusal was done for employment reasons and not due to a physical inability.

II. THE COURT CORRECTLY PROHIBITED THE UNAUTHENTICATED MEDICAL RECORDS FROM ENTRY INTO EVIDENCE.

At trial, the defendant, through counsel, attempted to introduce purported medical records into evidence. The defendant has correctly asserted that certain medical records can be introduced through the hearsay exception, but fails to specifically state as to why the medical records should have been introduced and where the court errored. It is uncontroverted that the defendant did not serve exact copies of the medical records upon the City nor that the medical records the defendant sought to introduce were certified.

Further, in Wisconsin, a medical record containing a diagnosis or opinion is admissible, but may be excluded if the entry requires explanation or a detailed statement of judgmental factors. Noland v. Mutual of Omaha Insurance Co. 57 Wis. 2d 633, 205 N.W.2d 388 (1973). Here, the defendant fails to account for the second part of the Noland holding that the medical records can be excluded if the entry requires explanation or a detailed statement of judgmental factors. Again, the City did not offer testimony that the defendant was inflicted with acid reflux. What the City contested was the fact that the defendant's GERD diagnosis

precluded him from providing an adequate breath sample. While there was testimony that the defendant made statements to his doctor regarding his condition, those statements would have been made after the fact and were not necessarily indicative of the defendant's ability to provide a breath sample on the date and time in question. For answers regarding the date and time of the refusal, the medical records would have required an explanation. Additionally, the City would have likely questioned the judgmental factors going into the doctors opinion as to whether or not Mr. McKee physically could have provided an adequate breath sample. For this reason, the defendant's argument as to why the medical records should have been admissible under Wis. Stat. 908.03. Since the medical records have not been shown to fall under a hearsay exception, the Court correctly prohibited admission of the defendant's purported medical records under Wis. Stat. 908.02.

III. THE COURT DID NOT ERROR IN FINDING THE OFFICER MORE CREDIBLE THAN THE DEFENDANT.

In all actions tried upon the facts without a jury… the court shall find the ultimate facts and state separately its conslusions of law thereon….Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given " Wis Stat. 805.17 (2).

Here, the defendant cites to nothing in the record that shows Judge Babler's finding of credibility was clearly erroneous. *See generally* Def's Br. In fact, the defendant does not even cite the clearly erroneous standard.

Instead the defendant cites to the officers knowledge of the defendant's GERD as proof that the officer knew the defendant was incapable of physically providing a breathe sample. The defendant contradicts his assertion that GERD is a condition so obvious as to prohibit providing a physical breath sample by attempting to offer medical records to further describe his medical diagnosis. If the condition was so obvious that the officer should have known exactly what GERD entailed why would the defendant have brought medical records to further explain said condition?

IV. MANY OF THE DEFENDANT'S ARGUMENTS ARE UNSUPPORTED BY LEGAL AUTHORITY

Arguments unsupported by references to legal authority will not be considered. *See* State v. Lindell 2000 WI APP 180, 23 n.8, 238 Wis. 2d 422, 617 N.W. 2d 500, aff'd, 2001 WI 108, 245 Wis. 2d 689, 629 N.W. 2d 223. While the defendant's brief is full of critiques of law enforcement and the circuit court, he cites to no apparent authority supporting his allegations. Nor does he show how the ruling of the Court was clearly erroneous. Instead he relies on conclusory statements as his "authority." There are instances when the defendant does cite to authority, and misstates the law. See Def.'s Br. at 13. Given the Defendant's strong positions against the law enforcement officer and circuit court without citing to authority, the City of Chetek believes that the arguments of the defendant failing to cite to authority should not be considered, consistent with State v. Lindell.

CONCLUSION

For the reasons given above, the City of Chetek respectfully requests that the ruling of the Honorable James C. Babler finding the refusal unreasonable be affirmed.

Dated this 14th day of August 2017

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2, 354 words.

Dated this 14th day of August, 2017.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 16th day of August, 2017.

Signed:

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