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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

REPLY BRIEF AND APPENDIX OF APPELLANT

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II. 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Defendant- Appellant's driver's license was revoked by the Barron County Court on December 21, 2016 after an evidentiary refusal hearing.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. (Appx 7) 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.

10) 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. 8-10) 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 9-10 & 14-15) 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. 14) In addition the officer refused to record the encounter with the Defendant, and failed to review his own report prior to testifying. (Appx. 4-5). No Alternative test was offered. (Appx. 14)

III. STATEMENT OF ARGUMENT AND ORAL PUBLICATIONS

The Appellant reiterated the request for oral argument and publication as Appellant believes this case is of statewide importance.

IV. ARGUMENT REPLY TO STATE’S BRIEF

1. **The Plaintiff, City of Chetek has shown nothing to dispute Appellant Mckee’s testimony concerning his inability to take a breath test.** Despite receiving a certified copy of Appellant Mckee’s very recent medical exam including test results (Appx 2), the City of Chetek objected to the entrance into evidence of records certified

by his medical care giver showing that appellant suffers from Barrett's syndrome, a severe and advanced form of Gastro Esophageal Reflux Disorder (GERDs). Appellant previously set out arguments in pages 9-12 of Appellant's brief and this writer won't repeat it here other than to say that the records should have been admissible as a hearsay exception as previously argued and would have substantiated Appellant's testimony. Appellant Mckee's testimony remains unrefuted. The City of Chetek offered no evidence whatsoever questioning Appellant Mckee's medical condition. Hence by preponderance of evidence Appellant should have prevailed. An issue to be determined at a refusal hearing is whether or not the person, in this case the Appellant, refused to permit the test. Wisconsin Statues clearly state in Wis. Stat. § 343.305(9)(a)(c) The Person, Appellant in this case, "shall not be considered to have refused the test if it is shown by 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." The trial judge errored in not admitting and in considering Appellant's recent medical records. (Appx 2, and 11).

2. **<u>Police indifference and incompetence to Appellant's medical condition was a major error in this case.</u>** Judicial error in not admitting Appellant's medical records prevented Appellant from putting forth irrefutable proof of his medical condition to wit his inability to take a breath test but the real culprit was the arresting officer who when he found out about Appellant's GERD medication did not inquire further and did not offer a blood test. (Appx 6). If in fact the Chetek officer had any training at all he would know that people suffering from GERD can and will contaminate a breath sample with regurgitated mouth alcohol. It is elementary in breath testing that a 20 minute

observation period be used to prevent mouth alcohol contamination and eliminate any chance of burping or regurgitation that would contaminate a breath sample. Wisconsin State Patrol Breath Testing Manual Page 16 (Appx 3) states,

> "A 20 minute minimum observation period is required prior to test (Chapt. Trans. 311.06 (3) (9))
>
> - No alcohol ingested
> - Subject did not regurgitate, vomit or smoke
> - Belching or burping is not a significant issue
> - When during a breath test there becomes any concern about this process, determine if test is a refusal or if not, change the primary to blood and obtain evidence that way. This will filter out the real refusal attempts from those who aren't. Obviously, those who are not effusing the breath test will take the blood test as required. Remember, read another Informing the Accused to have the appropriate documentation available. "

If in fact police officers are trained to protect and serve the public, all citizens should receive the benefit of properly functioning law enforcement and the competent and professional ollection of evidence. It wouldn't have been any problem to collect a blood sample. Once the officer knew of the Appellant Mckee's condition, the officer failed to act professionally and failed to "protect" a citizen. His competence is questionable and his indifference is glaring.

3. **The officer had no video or audio of either Appellant driving, the arrest or of any conversations with Appellant McKee.** (Appx 4-5). It should also be noted that the officer took no field notes, and testified that his recollection was totally from memory when he testified. It is almost incomprehensible that in 2016-2017 no officer video is available. Appellant argues that the City of Chetek's failure to make a visual and audio recording of their officer's contact with Appellant Mckee affects the quality of the City's evidence in that no "truth insuring device" was used. It seems easy to see that an officer can

testify to anything he wants to with impunity, when no video exists to show the real truth. Combine these omissions with compromised field sobriety tests, as found by the Judge (trial transcript page 61 lines 16 through 22. Appendix 13) example not walking in a painting line and overhead police lights flashing during the field testing, spotty testimony at the motion hearing including evidentiary doubt raised about reading the Informing the Accused and enough red flags are raised to make Appellant's testimony much more believable by the trial judge. Instead the Court found the opposite and cut off the Appellant's counsel and did not allow Appellant's counsel to argue admission of critical evidence in his favor, this particular case the medical records. (Appx 11)

V. ARGUMENT

Both the Wisconsin Statues and the Chapter Trans 311.06(3)(9) of the Wisconsin Transportation Administrative Code, require an observation period in breath testing in order to avoid a contaminated and thus inaccurate breath sample of an accused citizen's breath. If as here the person (Appellant), has a serious disease or disorder (Barrett's syndrome) unrelated to the consumption of alcohol that prevents a breath sample from being take is not considered a refusal. (Wis. Stat. § 343.305(9)(a)(c) and The Wisconsin State Patrol CT 5/2000 "Observation Period Required Refusal before a Quantitative Test") The actions of the Appellant and the advice of his Union Representative are legitimate. The Union Representative gave good advice to firefighter McKee because of his medical condition. Unfortunately, the actions of an apparently ill trained small town cop put a citizen's livelihood in jeopardy. Even the State Patrol Training Manuel tries to alert law enforcement to these situations (Appendix 3) . There can be no mistake as to the Appellant's reason for not accepting a breath test. He was and is unable to do so. Defendant/Appellants declining of Officer Fick's breath test was justified and legally proper under these circumstances. Barron County Circuit Judge Babler's ruling should be reversed.

VI. CONCLUSION

A citizen Firefighter is caught between an unfair judicial ruling and an incompetent policeman. In *Utah v. Strieff* a 2016 U.S. Supreme Court case is a dissenting opinion Justice Sotemayer succinctly describes the type of behavior of an officer of the law as here although the facts are not the same.

> "By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the

violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must pretend that the countless people who are routinely targeted by police are "isolated" They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in the atmosphere. See L. Guinier & G. Torres, The Miner's Canary 274-283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but. "

Dated this 25 day of Sept, 2017.

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VII. 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 **2,034** 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.

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VII. 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 25 day of Sept, 2017

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IX. 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 25 day of Sept, 2017.

Dated this 25 day of Sept, 2017

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