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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

COUNTY OF FOND DU LAC,
Plaintiff-Respondent,

v.

Appeal No. 2017AP000343
Circuit Court Case No.
2016TR009784

CHRISTY ANN KASTEN,
Defendant-Appellant

BRIEF OF PLAINTIFF-RESPONDENT

On appeal from a Judgement of Conviction entered on February 2, 2017
Circuit Court for Fond du Lac County
Honorable Dale L. English Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County of Fond du Lac believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

Respondent disagrees with the statement of facts in regards to the following omissions or misstatements. Paul Kiser testified that he called the non-emergency number for the Sheriff's Department, not 911. (CR 40:9-12). Further we would add that Appellant wasn't just charged with operating while intoxicated, first offense, as the Appellant's statement of the case would indicate (Defendant-Appellant's Brief, p. 2), she was also charged with operating with a prohibited alcohol concentration >= 0.15, first.

While the CAD report was not admitted into evidence (CR 88:24-25), Deputy Prahl testified that she was contacted by dispatch twice, the first time being at 8:30 P.M.. (CR89:23-90:2). Defense did not object to this testimony. Further, Appellant states that Deputy Prahl went to an unknown location at 8:30 p.m.. (Defendant-Appellant's Brief, p. 1). This is not accurate, Deputy Prahl testified that she first received notice from dispatch of an attempt to locate a vehicle at 8:30 p.m.. (CR 90:5-9). She was not able to respond, however, until after she finished the call she was currently on, which was at 9:15 p.m.. *Id.* She arrived at Appellant's house at approximately 9:30 p.m.. (CR 61:8).

STANDARD OF REVIEW

The appropriate standard to be applied is that appellate courts "will uphold findings of evidentiary or historical fact unless they are clearly erroneous." See Wis. Stat. § 805.17(2), *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d (1998)(citation omitted). Because there are disputed facts, appellant errs in her standard of review.

ARGUMENT

I. THE COURT DID NOT ERR IN FINDING THE TIME OF DRIVING.

The court relied on the testimony of Deputy Prahl, who stated she was contacted by dispatch at 8:30 p.m. on August 16, (CR 90:1-2), so for the court to use this as a starting point is not speculation, but a reasonable inference based on reliable testimony.

A. The factual finding of the time of driving is not clearly erroneous.

Appellant's brief suggests that because she draws different inferences than the court does, the court's ruling is erroneous and should be reversed. "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record," *Bray v. Gateway Ins. Co.*, 2010 WI App 22, ¶ 24, 323 Wis. 2d 421, 779 N.W.2d 695 (Citation omitted), and this is exactly what appellant suggests. In *Bray*, we have a similar situation in which the Court of Appeals found that

> ultimately, the problem with Bray's argument on causation is that it requires us to weigh the credibility of the witnesses, something we may not do. *See Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶ 10, 253 Wis.2d 588, 644 N.W.2d 269. The trial court clearly explained its causation finding, and we do not agree with Bray that the court's reasoning was contrary to the evidence. Rather, it reflected a view of the evidence that differed from Bray's. This is not a basis to overturn the court's findings. Accordingly, we affirm.

Id. ¶ 28.

The same problem exists with Appellant's argument in the sense that it would require the Court of Appeals to weigh credibility of witnesses, as it states that the court erred in rejecting her testimony because it was not contradicted. (Defendant-Appellant's Brief, p. 23). The credibility of a witness is to be determined by the trier of fact, and only when the evidence that is relied upon is "inherently or patently incredible" will the appellate court substitute their judgment for that of the trier of fact's judgment. *State v. Kucharski*, 2015 WI 64, ¶ 24, 363 Wis. 2d 658, 866 N.W.2d 697. There is nothing to suggest that the evidence that was relied upon was "inherently or patently incredible."

Appellant suggests that because the court used 8:30 p.m. as a starting point, that the court relied on inadmissible hearsay to infer the time of driving. (Defendant-Appellant's Brief, p. 18). Deputy Prahl testified, without an objection by defense counsel, that she was contacted by dispatch at approximately 8:30 p.m. on August 16. (CR 90:2, 90:5). Appellant, similarly, states in her brief that it is undisputed that Deputy Prahl was first dispatched to the area at 8:30 p.m.. (Defendant-Appellant's Brief, p. 18). An 8:30 p.m. starting point is a reasonable inference based on evidence. It is not "inherently of patently incredible."

Although appellant views the evidence differently, that does not mean that the court's ruling rose to the level of "clearly erroneous." The Court of Appeals "will not overturn the trial court's findings unless they are 'clearly erroneous,' that is, unless they are against the great weight and clear preponderance of the evidence." *U.S. Oil Co., Inc. v. City of Milwaukee*, 2011 WI App 4, ¶ 11, 331 Wis. 2d 407, 794 N.W.2d 904. The court clearly explained it's finding based off Appellant's admission to driving, drinking a third of a bottle of vodka, the blood results, the standard field sobriety tests, and the timeline reasonably inferred by the court. (CR 138:9-13, 139:14-17, 141:2-8). The well-articulated findings by the court do not rise to the "clearly erroneous" standard used by the court.

B. Even if the reviewing court could draw a different inference from the evidence, the reviewing court must accept the inference drawn by the trial court because it was drawn from credible evidence.

The inference drawn by the trial court was based on credible evidence, therefore even if another inference could reasonably be drawn, the reviewing court must accept the inference drawn by the trial court. *Village of Big Bend v. Anderson*, 103 Wis. 2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981). As previously stated the trial court relied on multiple pieces of evidence before entering its judgment. The court relied on the testimony of Deputy Prahl in regards to the field sobriety tests and the conclusions she drew as well as the .197 blood result, the timeline inferred from the evidence, Appellant's admission to drinking a third of a bottle of vodka, and Appellant's admission to driving. (CR 141:1-12). There is nothing to suggest that the evidence relied upon is not credible. So even if the reviewing court could find that the evidence fairly justifies Appellant's version of events, the court must accept the inference drawn by the trial court.

II. THE EVIDENCE WAS SUFFICIENT TO FIND THAT KASTEN DROVE WITHIN THREE HOURS OF THE 10:52 P.M. BLOOD DRAW.

The court reasoned that Deputy Prahl testified that she was first contacted by dispatch at 8:30 P.M., and she arrived at 9:30 P.M.. (CR 135:3-7) She performed the standard field sobriety tests sometime after that. (CR 135:23-25). Based on the timeline, reasonably inferred by the court, the evidence was sufficient to find that Appellant drove within three hours of the 10:52 P.M. blood draw.

III. THE EVIDENCE WAS SUFFICIENT TO FIND THAT KASTEN HAD A PROHIBITED ALCOHOL CONCENTRATION AT THE TIME OF DRIVING.

For the reasons stated above, the evidence was sufficient to find that Appellant had a prohibited alcohol concentration at the time of driving.

IV. APPELLANT LACKS STANDING ON APPEAL TO CHALLENGE THE ADMISSIBILITY OF THE BLOOD RESULTS ON THE ISSUE OF BAC.

Appellant states that "[t]he 10:52 p.m. test results of 0.197 were not admissible on the issue of Kasten's BAC more than three hours earlier." (Defendant-Appellant's Brief, p. 26). Appellant states that she objected, (Defendant-Appellant's Brief, p. 26), however that objection did not come until after the close of evidence when the court entered its ruling on the case. (CR 143:14-21). Appellant did not object in a timely manner or raise this issue before trial with a motion in limine, and therefore Appellant failed to preserve it on appeal.

In *L.M.S. v. Atkinson*, 2006 WI App 116, ¶ 30, 294 Wis. 2d 553, 718 N.W.2d 118, this court found that

> by failing to object to the admission of the evidence in question, or to request the court to limit its consideration of the evidence in some way, Atkinson effectively waived his claim that the court improperly considered it. Atkinson's appellate argument rests entirely on evidentiary rules that he failed to call to the trial court's attention. As a result, there is no basis in the present record to support a reversal of the trial court's decision. *See State v. Rogers*, 196 Wis.2d 817, 827, 539 N.W.2d 897 (Ct.App.1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

This is exactly what's happening in this case. Appellant failed to timely raise this issue at the trial court level, and now seeks to raise it on appeal, because a majority of their argument relies on this issue. Appellant in this case has effectively waived this issue, and therefore does not have standing to raise it at the appellate level.

V. THE COURT PROPERLY IMPOSED THE IGNITION INTERLOCK DEVICE.

Pursuant to Wis. Stat. § 346.65(2m)(a), in imposing a sentence for a violation of 346.63(1)(b), operation with a prohibited alcohol concentration, the court shall review the record and consider the aggravating and mitigating factors in the matter. Further if the amount of alcohol in the person's blood is known the court ***shall*** consider that amount as a factor in sentencing. *Id*. The court in this case applied the non-aggravated guidelines for the 4th Judicial District when it crafted the sentence based on the .197 blood results (CR 143:10-13).

Further, Appellant improperly relies on *State v. Jorgensen*, 2003 WI 105, ¶ 27, 264 Wis. 2d 157, 667 N.W.2d 318, stating that it is "inappropriate to apply the guidelines

as the sole basis for a sentence." (Defendant- Appellant's Brief, p. 27). *Jorgensen* does state it is inappropriate for a trial court to apply guidelines as a sole basis for a sentence, however it refers to Wis. Stat. § 346.63(1)(a), operating under the influence of an intoxicant. *Jorgensen*, 2003 WI 105, ¶ 27. The Court in Jorgensen states "[s]ince the legislature specified that guidelines were to be established for use in sentencing under § 346.63(1)(b), not § 346.63(1)(a), circuit courts should not apply the guidelines by rote to (1)(a) convictions." *Id*. In other words when the Court in *Jorgensen* states that the guidelines should not be the sole basis for sentencing, they refer to operating under the influence of intoxicant, not operating with a prohibited alcohol concentration, which is what the appellant was convicted of.

CONCLUSION

For the reasons stated above, the County of Fond du Lac respectfully requests that this court uphold Christy A. Kasten's conviction for operating with a prohibited alcohol concentration, and deny her appeal.

Respectfully submitted this ___ day of July, 2017.

_____

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CERTIFICATION TO FORM AND LENGTH

I hereby certify that this brief confirms to the rule contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional and serif font. The length of this brief's body is 7 pages and 1,812 words.

Dated:_____

_____

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CERTIFICATION OF ELECTRONIC COPY

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

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CERTIFICATION OF MAILING

I hereby certify that on the date below, I mailed 10 copies of this brief (original plus 9) to:

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and three copies to Appellant's attorney at:

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and one copy to:

The Honorable Dale L. English
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by depositing the same in a mailbox designed for deposit by the United States Postal Service, contained in packaging with the proper amount of prepaid postage thereon.

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