State of Wisconsin

Court of Appeals

District III

City of Rhinelander,

Plaintiff-Respondent,

v Cases No. 2020AP1120
& 2020AP1121

Zachery T. LaFave-La Crosse

Defendant-Appellant.

Respondent's Brief

Appeal from Oneida County Circuit Court
The Honorable Michael H. Bloom, Circuit Court Judge
Oneida County Circuit Court Case Nos. 20TR68 & 20TR69

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. The issues are not complex and the briefs should fully develop the parties' positions.

This case does not merit publication; the relevant law is well settled.

STATEMENT OF FACTS

On January 18th 2020 Rhinelander Police Officer Claire Decker came upon a vehicle at 2:35am. (R56:4) The vehicle was in the snowbank. There was one person present with the vehicle. The officer identified the person as Zachery LaFave-La Crosse. (R56:5) The officer noticed an odor of intoxicants coming from his breath. He stated that he was coming from the Jailhouse Bar and had consumed a couple of drinks. The officer asked him to perform field sobriety tests and he agreed. (R56:6) Because of the snow-covered conditions the officer asked him if he would rather perform the tests at the police department and he responded that he would be willing the perform the tests at the scene. The officer noted that he had slow and slurred speech. (R56:6-7)

The officer first performed the horizontal gaze and nystagmus test on him. (R56:7) Officer Decker indicated that she is certified in administering field sobriety tests. In administering the test, the officer observed 6 out of 6 clues for intoxication. (R56:8-10)

The officer then administered the walk and turn test. She noted 4 out of 8 clues as evidence of intoxication. (R56:10-11). The third test was the one-legged stand. Officer Decker observed two out of four clues, again, indicating intoxication. (R56:11-12). She then requested that he submit to a preliminary breath test; which he refused. (R56:12). Officer Decker testified that based on her training and experience he was intoxicated and she placed him under arrest. She asserted that LaFave-La Crosse did not offer any explanation for how the vehicle came into the snowbank and further that she did not

recall him indicating that he was driving. (R56:12-13) He was then transported to the Oneida County Jail where the officer read him the informing the accused and the he refused. (R56:14)

LaFave-La Crosse testified that he was present at the location described by the officer but that he was not the driver but that he had a designated driver. He was reluctant to the identity of the designated driver, but after being advised by the court of the ramifications of not answering, he indicated that his mother was driving. (R56:18-19)

He testified that at the time the officer arrived, his mother was walking to her house, a mile and a half away, to get her boyfriend to pull the vehicle out. (19) He stated that he was on the phone with his mother when the officer arrived. Further that she had previously called her boyfriend but he would not leave the 10-month-old child. Therefore, she had to walk to the house. (R56:20) He indicated that he remained on the scene with the officer for about half an hour and at no time did his mother or her boyfriend show up. (R56:20-21) He stated that when he was speaking to his mother when the officer arrived, he told her that the police were there and she said she would wait. He indicated that the next time he tried to contact her was when he was at the county jail. (R56:21)

LaFave-La Crosse indicated that he and his mother had been at the Jailhouse Bar together. Further that he is 25 years old and she is 43. He indicated that she made the decision to walk home. He testified that at no time did he advise the officer that his mother had been driving because he did not want to get her into trouble. Although, he

indicated that his mother had not been drinking. (R56:22) He asserted that he was concerned that his mother would have received a non-registration citation and would have to pay for towing. Although he conceded that his mother as the owner of the vehicle could receive a citation whether she was there or not. (R56:23)

He agreed that the officer had read to him the informing the accused form and that he refused to take the test. At first indicating it was because he had a couple of drinks but later indicating that he is from Arizona where a person has the right to refuse the test. (R56:24)

He asserted that his defense was that his mother was driving. When asked why his mother was not in court, he indicated she was home watching the baby. He admitted that without his mother present there was no verification of his story. (R56:25) He finally admitted that at no time had his mother contacted law enforcement indicating that she was driving. (R56:25-26)

STATEMENT OF CASE

On March 13, 2020 a trial was conducted before the Honorable Michael H. Bloom on the charges of operating while under intoxicated and on the reasonableness of LaFave-La Crosse's refusal to take the test for intoxication.

The court found that there was no dispute that the officer came upon the vehicle in the snowbank in the City of Rhinelander at 2:35am and the appellant was present and no one else was present. (R56:28-29)

Other facts that the court found were not in dispute included: the appellant indicated that he had been at the Jailhouse Bar and that he had had a couple of drinks. That the officer observed and odor of alcohol and slow slurred speech. The officer administered field sobriety tests that she was certified to administer. In administering the horizontal gaze and nystagmus test she observed 6 out of 6 clues suggestive of intoxication. She further administered the walk-and-turn test and she observed four clues and two clues on the one-legged stand test. She then requested a preliminary breath test which was refused. (R56:28.29) The court found that none of these facts was refuted by appellant. (R56:30)

In regard to the defense of not driving, the court found that nobody, including his mother, had attempted to contact law enforcement indicating that Mr. LaFave-La Crosse was not driving. Further that he did not bring his mother in to testify which the court found to be "a smart decision on his part." (R56:30)

The court stated: "the standard is a preponderance of the evidence; a reasonable certainty based on a preponderance of the evidence." (R56:31)

In conducting its analysis, the court noted: it strains reason that an individual confronted with an OWI arrest would not declare "I did not drive the vehicle." (R56:31). The court found that the appellant's explanations for why he didn't want to tell the officer that his mother was driving didn't make any sense. Nor did it make any sense that a 43-year-old woman fresh off a pregnancy would be the one walking on a winter night rater that an overly protective son. (R56:31) Finally, the court stated "it's to Mr. La Crosse's credit that he didn't bring his mother here to commit perjury." (R56:32)

The court found the defendant guilty of operating while intoxicated. (R56:32)

The court then addressed the refusal to submit to a chemical test. The court found that the appellant had been lawfully placed under arrest after a finding of probable cause. Further that the officer did properly read the informing accused to the defendant and that she did comply with the statutory requirements. Finally, the court found that LaFave-La Crosse did refuse the test. (R56:32-33)

On May 15, 2020 a motion to reconsider was convened. In affirming its ruling, the trial court addressed the defendant appellant's argument that no one saw him driving by discussing the concept of circumstantial evidence. Noting that circumstantial evidence can be potentially as strong as direct evidence. (R57:8) The court reviewed the circumstantial evidence and found that there was no reasonable inference other than that

the appellant had driven that morning. (R57:9-10). The court affirmed its previous rulings.

THE FACTS ADDUCED AT TRIAL DEMONSTRATE THAT THE APPELLANT OPERATED A MOTOR VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE.

On appeal, this court will not set aside the trial court's findings unless they are clearly erroneous. Wis. Stats. 805.17(2). Further, when the trial court acts as the finder of fact, due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. Where there is conflicting testimony the trial judge when acting as the finder of fact, is the ultimate arbiter of the credibility of the witnesses, Cogswell v Robertshow Controls Co., 87 Wis.2d 243,250, 274 N.W.2d 647 (1979). Whether the evidence was sufficient to sustain a conviction, is a question of law which the appellate court reviews de novo. State v Booker 2006 WI 79,12,292 Wis.2d 43, 717 N.W. 2d 676.

To sustain a conviction under 346.63 (1) (a) Wis. Stats., evidence must be presented that (1) the person operated a motor vehicle (2) under the influence of an intoxicant which rendered the person incapable of safely driving. The burden of proof at trial is whether the evidence is clear, satisfactory and convincing. Wis. Stats. 345.45

The appellant raises three issues regarding whether he was intoxicated: (1) snow conditions (Ap B:13); (2) A concussion he received 12 days earlier (Ap B:14) and the limitations of the field sobriety tests (Ap B:18)

In regard to snow conditions, the appellant quotes the transcript which indicates that the officer had concerns about the appellant performing the tests at the scene (Ap B:13). However, he fails to complete the quote which reads as follows:

> A. I did. I asked him if he was willing to walk on the snow-covered road or if he would like to go back to the police department and take the test. He advised he was okay walking on the road. (R56:6-7)

The appellant is asking the court to disregard the field sobriety tests because of the conditions which he chose to perform the tests under. This argument is of no merit. Further, in his testimony, the appellant does not offer even a suggestion of how the conditions may have actually affected his performance.

The concussion apparently occurred on January 1st. In his testimony, the appellant does not give any description of the type of impairment he was experiencing or how it affected his performance on the tests. Just the general statement that his "balance will be impaired." (R56:27) The evidence is not sufficient to support his assertion that the concussion 12 days earlier caused his poor performance on the field sobriety tests.

In regard to the limitations of the field sobriety tests, the trial court acknowledged these limitations but found that the sum total of the evidence was sufficient to find the appellant guilty of operating while intoxicated (R56:11)

The overwhelming evidence of intoxication, included these undisputed facts: the vehicle was found in the snowbank at 2:35 am; the appellant admitted that he had been at

the Jailhouse Bar and that he had been drinking; the officer noted an odor of alcohol and administered three field sobriety tests, which she was certified in administering and each test resulted in the finding of clues of intoxication; the appellant refused to submit to a chemical test having been read the informing the accused and the appellant asserted that someone else was driving which the court construed to be an admission that he was intoxicated. (R57:10).

The crux of the appellant's argument is that there is no direct evidence that he operated a motor vehicle. (Ap B:10) This is based on his mistaken belief that direct evidence is necessary and that circumstantial evidence is insufficient.

In State v Johnson, 11 Wis.2d 130,140 N.W.2d379, 381-82, (1960), the Supreme Court explained that:

> Circumstantial evidence has its inherent defects but human testimony, too, has its infirmities. A notion exists that all circumstantial evidence should be viewed with distrust because it can establish, at most, only a possibility of guilt. Such an opinion, based on the theory that circumstantial evidence can only be the basis for conjecture and is impotent to correctly indicate or to satisfactorily establish the facts upon which guilt must rest to the required degree of certainty, is unwarranted. It is true circumstantial evidence in many cases may be so weak as not to meet the standard of proof. But circumstantial evidence may be and often is stronger and more satisfactory than direct evidence.

The circumstantial evidence at bar is overwhelming: the appellant is the only person at the scene; he submitted to field sobriety tests and is arrested without at anytime indicating that he was not the driver; At no time did his mother come forward and indicate that she was not the driver and the mother did not appear at trial to testify.

The trial court's assessment of the credibility of the appellant's assertion that his mother was driving can be summarized in one statement: "And it's to Mr. La Crosse's credit that he didn't bring his mother here to commit perjury." (R56:32)

In making its ruling the court stated the standard as "a preponderance of the evidence; a reasonable certainty based on a preponderance of the evidence." (R56:31) The City acknowledges that the standard is clear, satisfactory and convincing evidence. Wis Stats 345.45 The use of the lesser standard is not relevant on appeal since whether the evidence established at trial is sufficient to meet the correct burden is a question of law which the appellate court reviews de novo. State v Booker id.

Clearly the evidence outlined above demonstrates that the appellant operated a motor vehicle by clear, satisfactory and convincing evidence; if not beyond a reasonable doubt.

EVIDENCE AT TRIAL DEMONSTRATED PROBABLE CAUSE TO ARREST THE APPELLANT; THE OFFICER COMPLIED WITH WIS. STATS. 343.305(9)(a) AND THE APPELLANT REFUSED TO SUBMIT TO A CHEMICAL TEST.

Under Wis. Stats. 343.305 (9) (a) the issues to be resolved at a refusal hearing can be summarized as:

a) Did the officer have probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant.
b) Did the officer properly read the informing the accused form.
c) Did the person refused to permit the test.

The appellant raises three issues in this regard. (1) that he was not driving; (2) that he was not read the informing the accused in a timely manner and (3) that he had an Arizona drivers license. (Ap B:28)

The issue of his not driving has been completely refuted above.

His objection to the timeliness of the reading of the informing the accused is based on his mistaken belief that the informing the accused must be read before the administration of the preliminary breath test. (Ap B:15) He does not offer any legal authority for his belief. He does not dispute that he was properly read the informing the accused but that it was only after he was arrested and taken to jail. (Ap B:15).

The trial court found that he was properly read the informing the accused and the appellant admitted that he refused after being read the form (R56:32-33) The evidence clearly shows that all these elements of Wis Stats 343.305(9)(a) were met and that the defendant did refuse under Wisconsin law.

His contention that he did not know that Wisconsin was an implied consent state because he had an Arizona license is without merit. The appellant does not dispute that he was read the informing the accused. The whole point of reading the informing the accused form is to inform the accused that Wisconsin is an implied consent state and the consequences of refusing the test.

CONCLUSION

The facts adduced at trial demonstrate that by clear, satisfactory and convincing evidence that the appellant operated a motor vehicle while under the influence of an intoxicant and that the officer complied with the requirements of Wis. Stats. 343.305(9)(a) and that the defendant refused to submit to a chemical test and therefore, the rulings of the trial court should be affirmed.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with proportional serif font.

The length of this brief is 2847

Dated this the 3rd day of January 2023

Steven M. Michlig/ Electronically signed

CERTIFICATION OF MAILING AND ELECTRONIC FILING

I certify that 10 copies of this brief were deposited with the United States Postal Service for delivery to the Clerk of the Wisconsin Supreme Court and Court of Appeals by first class mail on January 3, 2023.

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I further certify that the brief electronically filed on January 3, 2023 is identical to the paper submissions.