

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2492

Cir. Ct. No. 2005TR7398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF ROBERT W. TALAJKOWSKI:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT W. TALAJKOWSKI,

DEFENDANT.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Affirmed.*

¶1 BROWN, J.¹ This appeal effectively begins and ends with the standard of review. Robert Talajkowski claims that his diabetes level was so high

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06).

that it clouded his ability to understand and conform to the implied consent law and therefore he had a medical reason for his refusal. He asserts that his testimony on that score was undisputed and therefore the issue before us is simply one of applying the implied consent statute to his undisputed testimony, a question of law. But the weight and credibility to be given to the testimony of witnesses is uniquely within the province of the trial court. A trial court may reject even uncontroverted testimony of a witness or may choose to believe some assertions and disbelieve others. *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W. 2d 752. This is what the trial court did here and the court's finding is not clearly erroneous. See *Olen v. Phelps*, 200 Wis. 2d 155, 160, 546 N.W.2d 176 (Ct. App. 1996). We affirm.

¶2 Talajkowski was stopped by a Sheboygan county sheriff's deputy after the deputy observed him backing around the corner of an intersection at 12:20 a.m. The deputy noticed an odor of intoxicants and also that Talajkowski's speech was a bit slurred. The deputy asked Talajkowski to exit his vehicle and when he did, the deputy observed that he put his hands on the truck to help keep his balance. Talajkowski was asked how much he had to drink and he replied that he thought he had too much and was over the legal limit. Talajkowski failed the field sobriety tests and also registered a .156 PBT. He was then arrested for operating a vehicle while under the influence of an intoxicant.

¶3 What occurred next was the subject of the refusal hearing. Talajkowski testified that he had Type 1 diabetes, used insulin and felt that his blood sugar levels were getting dangerously low and he was in need of taking a test with a kit that he had in his possession so that he could determine whether or not he needed insulin. The trial court indicated that it believed Talajkowski as to this.

¶4 But Talajkowski also testified that because his blood sugar levels were low, he was so confused, disoriented and in mental distress that he could not comprehend the implied consent form and could not understand what was going on and what was being asked of him. The trial court did not believe Talajkowski. The trial court noted that Tajkowski responded appropriately to all the inquiries made by the deputy and this demonstrated to the trial court's satisfaction that Talajkowski was aware of the circumstances. This awareness was also shown by his being of such sound mind as to ask the deputy for his kit. The trial court further commented on Talajkowski's ability to respond to directions as additional evidence that he was not of such a confused state of mind as to be in no condition to accept or refuse a test. Finally, the trial court noted that Talajkowski had indicated to the deputy that he believed he was capable of driving and in fact was in the process of driving himself and two friends home when he was stopped.

¶5 Based on the findings of the trial court, it is evident that the court did not believe Talajkowski's assertions of a confused state of mind brought on by the need of insulin. This finding is supported by the testimony.

¶6 Talajkowski cites *State v. Disch*, 129 Wis. 2d 225, 385 N.W. 2d 140 (1986), a case where the driver was held to have been of such medical condition as to have been incapable of withdrawing implied consent, as support for reversing the trial court here. *See id.* at 236. In fact, that case supports affirmance. In *Disch*, the trial court suppressed the evidence based on its *acceptance* of undisputed evidence that the driver had been given an unidentified drug, that she was unable to state her name and address to hospital attendants, could not seem to concentrate, appeared to be dozing off and was in a stupor. The trial court's acceptance was no doubt helped by the police officer's observation that he was not sure the defendant understood what was being said to her. All of this testimony

was over and above the defendant's own testimony that she was not sure what people were saying to her. The supreme court decision on the law is based on those facts as found by the trial court. Here, we have a completely different situation. The only testimony on the effect of the diabetes came from the defendant himself. There is no independent corroborative testimony like there was in *Disch*. The trial court's findings were obviously not clearly erroneous in *Disch* and they are not clearly erroneous here either.

By the Court.—Order affirmed.

This case will not be published in the official reports.

