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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

VILLAGE OF ELM GROVE,
Plaintiff-Respondent,

Appeal No. 2011AP002888

RICHARD BREFKA,
Defendant-Appellant

APPELLATE BRIEF OF PLAINTIFF-RESPONDENT
VILLAGE OF ELM GROVE

On appeal from the Waukesha Circuit Court,
Case No. 2011CV002837
The Honorable Mark Gundrum, presiding

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The material facts in this case are not in dispute. The present action involves an appeal from a Waukesha Circuit Court dismissal of an implied consent adjudication stemming from a December, 2010 traffic stop. The defendant, Richard Brefka (hereinafter "Brefka"), was issued a "Notice of Intent to Revoke Operating Privilege" on December 12, 2010. The Notice of Intent to Revoke stated that Brefka had 10 days to request a refusal hearing. Brefka requested a refusal hearing on December 28, 2010.

The Village of Elm Grove Municipal Court scheduled a hearing on the matter. The Village of Elm Grove moved to strike the defendant's refusal request as untimely. Brefka conceded that his refusal hearing request was not timely submitted, and asked the court to extend the time limit.

The municipal court, citing *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60, determined that Brefka's failure to request a refusal hearing within the ten day statutory deadline resulted in the municipal court losing competency to proceed. Consequently, the municipal court dismissed Brefka's

request for a refusal hearing and Motion to extend the statutory time limit to request a refusal hearing. Brefka immediately filed an appeal to Waukesha Circuit Court.

The Village of Elm Grove filed a Motion to Dismiss the circuit court proceeding. On October 31, 2011, the Circuit Court held a motion hearing. The Circuit Court, citing *Fricano* and Wis. Stat. § 343.305, concluded that it lacked competence to hear the case, and dismissed the appeal. The underlying OWI charge is being tried separately from the refusal proceeding.

ISSUES PRESENTED FOR REVIEW

Does a court have competence or jurisdiction to hold a refusal hearing if the defendant does not meet the Wis. Stat. § 343.305 precondition of requesting a hearing within ten days?

Trial Court Answered: No.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent does not recommend oral argument or publication.

INTRODUCTION

The Court should affirm the circuit court's dismissal of the refusal hearing because the material facts are identical to *Village of Butler v. Fricano*, 2010 WI App. 84, 326 Wis. 2d 267, 787 N.W.2d 60, an unpublished decision which held that courts lack competence to adjudicate a refusal if the ten day statutory precondition is not met.¹

Wis. Stat. § 343.305 clearly and unambiguously states a legislative policy that the exercise of a right to challenge a refusal is conditioned upon a defendant requesting a refusal hearing within ten days. To defeat this policy, the Court would either have to conclude that § 343.305 does not mean what it says, or that the statute is unconstitutional. The Court should do neither. The defendant's attempts to distinguish *Fricano* are meritless. *Schoepp* is simply not as broad as Brefka claims.

ARGUMENT

- 1. The Court should affirm the circuit court's dismissal of the refusal proceeding because the material facts are identical to *Fricano*.**

¹ The Village of Elm Grove cites *Fricano* for persuasive authority only.

The Court should affirm the circuit court's dismissal of the refusal proceeding because the material facts are identical to *Fricano*. On September 3, 2008, Bryan Fricano was stopped and cited by the Village of Butler Police Department for OWI. *Id.* at ¶ 2. Fricano refused to submit to an evidentiary chemical blood test as required by Wisconsin's implied consent law, Wis. Stat. § 343.305(2), and he was issued a notice of intent to revoke his operating privilege. *Id.* The notice informed Fricano that he had the right to request a hearing on the revocation within ten days. *Id.* Fricano engaged legal representation on September 9, 2008, but no request for a refusal hearing was made. *Id.* at ¶ 4.

Approximately one month later, Fricano received a notice from the Wisconsin Department of Motor Vehicles informing him that his license was revoked. *Id.* at ¶ 3. Fricano sought to reopen the refusal matter in the Village of Butler Municipal Court on the grounds that his attorney should have requested a refusal hearing prior to missing the 10 day deadline. *Id.* at ¶ 3. The Municipal Court denied Fricano's Motion to Reopen, and Fricano appealed from the municipal court order to Circuit Court. *Id.* at ¶ 4.

At the Circuit Court hearing, Fricano testified that he provided his initial attorney with a copy of the informing the accused form which indicated Fricano had refused the blood test, and the notice of intent to revoke his operating privileges. *Id.* at ¶¶ 4-5. Fricano further testified that he informed his attorney that he refused to take the blood test. *Id.* at ¶ 5. The Circuit Court dismissed Fricano's appeal on the grounds that Fricano's failure to act within the prescribed time period deprived the court of subject matter jurisdiction. *Id.* at ¶ 6. Fricano appealed the Circuit Court's decision to the Court of Appeals. *Id.* at ¶ 6.

The Court of Appeals affirmed the Circuit Court's dismissal on the grounds that Fricano's failure to meet the statutory deadline resulted in the circuit court losing competency to proceed. *Id.* at ¶¶ 9-10. Furthermore, the Court of Appeals, quoting the Wisconsin Supreme Court, stated that "we have consistently ruled that a court's loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived." *Id.* at ¶ 9.

The Court should dismiss Brefka's appeal because, like *Fricano*, the Court lacks competency to hear Brefka's appeal. The

facts in *Fricano* are on point with the facts of the present case. Like *Fricano*, there is no dispute that Brefka missed the statutory deadline. Like *Fricano*, Brefka's failure to submit a request for a refusal hearing may have been due to the actions of the defendant's prior attorney. Because of the similarity of the facts of *Fricano* and the present case the Court should reach the same result and affirm the circuit court's dismissal of the refusal proceeding.

2. Wis. Stat. § 343.305 clearly and unambiguously states a legislative policy that the exercise of a right to challenge a refusal is conditioned upon a defendant requesting a refusal hearing within ten days.

Wis. Stat. § 343.305 clearly and unambiguously states a legislative policy that the exercise of a right to challenge a refusal is conditioned upon a defendant requesting a refusal hearing within ten days:

(a) If the court determines under sub. (9)(d) that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court shall proceed under this subsection. If no hearing was requested, the revocation period shall begin 30 days after the date of the refusal. If a hearing was requested, the revocation period shall commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.

(emphasis added). Consequently, Brefka can only prevail if the Court concludes that either § 343.305 does not mean what it says, or that the statute is unconstitutional. The Court should do neither.

3. Brefka's attempts to distinguish *Fricano* are meritless. *Schoepp* is not as broad as Brefka claims.

Brefka's attempts to distinguish *Fricano* are meritless. *State v. Schoepp*, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996), is not as broad as Brefka claims. Moreover, although *Fricano* did not discuss *Schoepp*, both parties in *Fricano* cited *Schoepp*. Consequently, Brefka's assertion that *Fricano* did not consider *Schoepp* is meritless.

Wis. Stat. § 801.01(2) states that the Wisconsin Statutes Chapter 801 to 847 govern procedure and practice in circuit courts "except where different procedure is prescribed by statute or rule." Preconditions and time limits for requesting refusal hearings are prescribed by Wis. Stat. § 343.305.

Schoepp is not as broad as Brefka claims. *Schoepp* did not hold that Wis. Stat. § 806.07 applies to refusal hearing preconditions or time limits. Instead, *Schoepp* merely held that the discovery procedures in Wisconsin Statute Chapter 804 apply to refusal

hearings because § 343.305 does not prescribe specific discovery procedures.

In the present case, the issue of preconditions and time limits to request refusal hearings are prescribed by a specific statute: Wis. Stat. § 343.305. The language of the specific statute clearly and unambiguously preconditions the right to a refusal hearing on a defendant bringing a request within ten days. Accordingly, the Court should neither look outside of the specific statute for guidance on the issue of refusal hearing preconditions or time limits, nor should the Court expand the time limit of the specific statute in question. For all these reasons the holding of *Schoepp* does not apply.

CONCLUSION

For all the foregoing reasons the Court should affirm the judgment of the circuit court.

Dated this 2nd day of May, 2012.

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 1462 words.

Dated this 2nd day of May, 2012

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**CERTIFICATION 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 s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of May 2nd, 2012.

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

Dated this 2nd day of May, 2012

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on May __, 2012. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 2nd day of May, 2012

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1.Unpublished opinions cited for persuasive authority í í .A-1