STATE OF WISCONSIN
IN SUPREME COURT

Appeal No.: 2011AP002888

VILLAGE OF ELM GROVE,

Plaintiff-Respondent,

v.

RICHARD K. BREFKA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Oder of the Circuit Court for Waukesha County, Branch 11, the Honorable Mark Gundrum, Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Andrew Mishlove
State Bar # 01015053

Lauren Stuckert
State Bar # 1074005

LAW OFFICES OF ANDREW MISHLOVE
4425 N. Port Washington Road, Suite 110
Glendale, WI 53212
(414) 332-3499 Fax: (414) 332-4578

Attorneys for the Defendant-Appellant-Petitioner

TABLE OF CONTENTS

Summary of Elm Grove's Arguments 1

The Plain Meaning of Wis. Stat. § 343.305 Allows for Relief from the Ten-Day Time Limit 1

***In re Refusal of Anagnos* and *State v. Nordness* are Not Applicable 3**

The *Karow* Factors Favor Brefka 3

Allowing a Court Discretionary Power to Extend the Ten-day Time Limit does Not Encourage Drunk Driving 6

Conclusion 7

Certification as to Form/Length 8

Certificate of Compliance with Rule 809.19(12) 8

TABLE OF AUTHORITIES

Cases

Appleton v. Outagamie County, 197 Wis. 4, 220 N.W. 393 (1928). 4

In re Refusal of Anagnos, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675 (2012) 1, 3

In Re Termination of the Parental Rights to Joshua S., 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631 (2005) 5

In the Interest of C.A.K, 154 Wis. 2d 612, 453 N.W.2d 897 (1990) 5

In the Interest of R.H., 147 Wis. 2d 22, 433 N.W.2d 16 (Ct. App.1988) 5

Karow v. Milwaukee County Civil Service Commission, Wis. 2d 565, 263 N.W.2d 214 (1978) 1, 3, 4, 5

State v. Nordness, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) 1, 3

State v. Schoepp, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App 1996) 2, 4

Village of Butler v. Fricano, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60 ..... 5, 6

Statutes

Wis. Stat. § 343.305 ..... 1, 3

Wis. Stat. § 343.305(9)(a)4 ..... 1, 2

Wis. Stat. § 346.63(1) 6

Wis. Stat. § 800.115(1) 3

Wis. Stat. § 801.02 2

Wis. Stat. § 801.15(2)(a) 2, 3, 5

Wis. Stat. § 806.07 3

Wis. Stat. § 806.07(1)(a) 2

Summary of Elm Grove's Arguments

The Village of Elm Grove has made the following arguments: (1) the plain meaning of Wis. Stat. § 343.305 prohibits a court from granting relief from the ten-day time limit of Wis. Stat. § 343.305(9)(a)4; (2) allowing a court to grant relief would violate *In re Refusal of Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675 (2012) and *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986)*;* (3) the factors set forth in *Karow v. Milwaukee County Civil Service Commission*, Wis. 2d 565, 263 N.W.2d 214 (1978), regarding time limits for hearings conducted by administrative agencies apply to the ten-day time limit to file a request for a refusal hearing[1]; and, that those *Karow* factors favor the Village's interpretation of Wis. Stat. § 343.305; and (4) Brefka's position will encourage drunken driving.

Brefka will address each of these arguments.

The Plain Meaning of Wis. Stat. § 343.305 Allows for Relief from the Ten-Day Time Limit.

The plain meaning of Wis. Stat. § 343.305 permits a court to grant relief upon request. Wis. Stat. § 343.305(9)(a)4 states:

> **(10)** Refusals; court-ordered revocation.
> **(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

[1] We will refer to this hereinafter as the ten-day time limit.

determination that the refusal was improper, whichever is later.

A refusal proceeding is a special proceeding, subject to the rules of civil procedure, unless contrary to a specific statutory provision. *State v. Schoepp*, 204 Wis.2d 266, 554 N.W.2d 236 (Ct. App 1996). There is no language in Wis. Stat. § 343.305(9)(a)4, however, that prohibits courts from granting relief from the ten-day time limit. To the contrary, the statutes specifically allow such relief on the grounds of excusable neglect. Wis. Stat. § 801.15(2)(a), states[2]:

When an act is required to be done at or within a specified time, the court may order the period enlarged, but only on motion for cause shown and upon just terms. The ninety day period under Wis. Stat. § 801.02 may not be enlarged. If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion.

Wis. Stat. § 806.07(1)(a) states:

Relief from judgment or order.
(1) On motion and upon such terms as are just, the court,

[2] The municipal court, circuit court, court of appeals, Village of Elm Grove and Brefka have considered the matter under Wis. Stat. § 806.07; as, the ten-day time limit had expired months before Brefka made his motion. It appears to have been an oversight on the part of the municipal court that judgment was entered after Brefka's motion. Brefka's trial court motion invoked excusable neglect, but did not specify § 801.15(2)(a) or § 806.07. Subsequent proceedings considered § 806.07. For the purpose of this appeal, the distinction is unimportant; as, the issue remains whether a trial court has authority to extend the ten-day time limit on the grounds of excusable neglect.

> subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
> **(a)** Mistake, inadvertence, surprise, or excusable neglect;

The word "shall" is in Wis. Stat. § 343.305. It does not, however, limit a court's discretion to extend a time limit under Wis. Stat. § 801.15(2)(a) or to grant relief from judgment under Wis. Stat. § 800.115(1) or Wis. Stat. § 806.07 (depending on the particular court in which relief is sought and the stage of the proceeding). The plain meaning of "shall" simply sets thirty days as the date upon which the revocation period starts; it says nothing about whether a court is prohibited from granting relief from the ten-day time limit.

Even if "shall" is construed as mandating that the court order a revocation (rather than setting the date of the revocation) it does not limit the court's authority to grant relief. Wis. Stat. § 801.15(2)(a), § 800.115(1) and § 806.07 all still apply.

In re Refusal of Anagnos and *State v. Nordness* are Not Applicable.

The Village argues that Brefka is attempting to inappropriately expand the scope of a refusal hearing. This is a misconception. The issue before the court is not whether Brefka can raise the ten-day time limit at a refusal hearing. Rather, the issue is whether the court has authority to extend the time limit to request a hearing so that a hearing subject to *Nordness* and *Anagnos* may, in fact, take place. Brefka's motion to extend the ten-day time limit was not entertained. A refusal hearing never occurred. *Nordness* and *Anagnos*, therefore, are not germane.

The *Karow* Factors Favor Brefka.

Karow v. Milwaukee County Civil Service Commission held that the statute requiring the police commission to hold a disciplinary hearing within a time limit was mandatory, not

directory. *Karow* concerns the time limits for administrative proceedings. Administrative agencies operate under different constitutional authority than the courts. A refusal proceeding is a special proceeding under *Schoepp*; and hence, it is subject to the rules of civil procedure. This case involves the authority of courts to administer civil procedure, rather than the duty of agencies to hold timely hearings.

Nevertheless, *Karow* thoughtfully discusses the issue of mandatory versus directory time limits. In *Karow*, the time limit for a civil service hearing was held to be mandatory, so that an aggrieved citizen could have a hearing on the loss of his job. Similarly, *Karow* discusses other situations where time limits were held to be mandatory, so that an aggrieved citizen was afforded a timely opportunity to be heard.

> We have said that a time limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury. *Appleton v. Outagamie County*, 197 Wis. 4, 9, 220 N.W. 393 (1928). But where the failure to act within the statutory time limit does work an injury or wrong, this court has construed the time limit as mandatory. In *State v. Rosen*, 72 Wis. 2d 200, 240 N.W.2d 168 (1976), we held that the statutory time limit for holding a hearing on the forfeiture of a car under the Uniform Controlled Substances Act was mandatory; the car owner's legitimate interest in having use of the car is jeopardized unless there is strict compliance with the statutory procedure for the time of the hearing. Construing the time provision as mandatory did not impede the legislature's objective of protecting the public from drug traffic.
>
> *Karow*, 82 Wis.2d at 572, 573.

This is very different from this case, where Brefka was denied his day in court. In fact, every case cited by Elm Grove (except *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis.2d

267, 787 N.W.2d 60) stands for the proposition that a citizen is entitled to a timely hearing, not that a citizen may be denied a hearing for a technical defect of excusable neglect. See, e.g., *In the Interest of C.A.K*, 154 Wis.2d 612, 453 N.W.2d 897 (1990), (twenty-day time limit for the state to file a delinquency petition is mandatory); *In the Interest of R.H.*, 147 Wis.2d 22, 433 N.W.2d 16 (Ct.App.1988), (thirty-day time limit for juvenile delinquency dispositional hearing); *In Re Termination of the Parental Rights to Joshua S.*, 2005 WI 84, 282 Wis.2d 150, 698 N.W.2d 631 (2005), (forty-five day time limit for hearing on petition to terminate parental rights).

Karow lists four factors in determining whether a time limit is mandatory or directory.

> First, the legislature's failure to state the consequences of noncompliance with an established time limit lends support for construing the statute as directory. The second factor is the consequences resulting from one construction or the other. Third, is the nature or purpose of the statute. Finally, the court should consider "the evil to be remedied, and the general object sought to be accomplished" by the legislature. *Karow*, 82 Wis.2d at 572.

The implied consent statute does state consequence for a party's failure to meet the ten-day time limit: the revocation commences in thirty days. This is, however, but one of four factors. Moreover, this provision ought to be read in light of the general rules of civil procedure in special proceedings.

The Village's argument that permitting courts to extend the ten-day time limit would lead to chaos is mere bombast. Courts are capable of exercising their discretion in an appropriate matter. Further, allowing courts to extend time limits in appropriate situations will not lead to administrative problems. Relief under Wis. Stat. § 801.15(2)(a) and Wis. Stat. § 806.07 has existed in civil

and traffic procedure for many years with no untoward results, including cases under Wis. Stat § 346.63(1), the operating while intoxicated statute. In fact, the consequences of Brefka's position are laudable. Citizens will get their day in court. Procedure will be uniform and fairly administered; and courts will exercise their discretion appropriately. The Village's argument invalidly presumes that courts have routinely been applying the *Fricano* holding. In fact, Brefka submits that *Fricano* is a departure from established procedure.

The purpose of the implied consent statute is to deter refusals and facilitate the prosecution of drunken drivers. The Village has appropriately argued this point. The Village, however, misses the point that all Brefka seeks is a hearing on the allegation that he violated the implied consent statute. There is nothing about affording Brefka a hearing that is contrary to the purpose of the statute. Similarly, the purpose of Wis. Stat. § 346.63(1), the drunken driving statute, is to deter drunken driving. No one has suggested that courts lack authority to grant relief from judgment in a drunken driving case. The Village's argument entails the anomaly that a court may grant relief for a default in a drunken driving case, but not an implied consent case.

Allowing a Court Discretionary Power to Extend the Ten-day Time Limit does Not Encourage Drunk Driving.

Finally, allowing a court to extend the ten-day time limit does not diminish the objective to deter the evil of drunk driving. Brefka's former attorney missed the ten-day deadline by a single day, over the Christmas holiday weekend. Allowing the deadline to be extended does not threaten the government's ability to remedy the evil of drunk driving; it only allows Brefka the right to be heard on the issue of whether there was excusable neglect. The Village's

hyperbolic argument that allowing a party his day in court will encourage antisocial behavior is unsupported.

Conclusion

The issue before this court is one of the authority of trial courts to exercise their discretion to allow a party the right to be heard. There is simply no reason to conclude that the legislature deprived the courts of this authority.

Therefore, Brefka respectfully prays that this court reverse the holding of the court of appeals and the circuit court; and that the matter be remanded for further proceedings, allowing Brefka's motion for extension of the ten-day limit to be entertained.

Dated this _13_ day of January 2013.

Respectfully submitted:

___/s/_____
Andrew Mishlove
State Bar # 01015053

Respectfully submitted:

___/s/_____
Lauren Stuckert
State Bar # 1074005

Law Offices of Andrew Mishlove
4425 N. Port Washington Road, Suite 110
Glendale, WI 53212
Phone: (414) 332-3499 Fax: (414) 332-4578
andrew@mishlovelaw.com, lauren@mishlovelaw.com
Attorneys for Defendant-Appellant-Petitioner

Certification as to Form/Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7 pages and 1,943 words.

Certificate 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 §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _13_ day of January 2013.

Respectfully submitted:

___/s/_____
Andrew Mishlove
State Bar # 01015053

Respectfully submitted:

___/s/_____
Lauren Stuckert
State Bar # 1074005

Law Offices of Andrew Mishlove
4425 N. Port Washington Road, Suite 110
Glendale, WI 53212
Phone: (414) 332-3499 Fax: (414) 332-4578
andrew@mishlovelaw.com, lauren@mishlovelaw.com
Attorneys for Defendant-Appellant-Petitioner