STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

In re: The Matter of the Refusal of Michael T. Sheedy

OZAUKEE COUNTY,

Plaintiff – Respondent,

v.

Appeal Case No. 2015AP000172
Trial Case No. 2014TR003860

MICHAEL T. SHEEDY,

Defendant – Appellant.

BRIEF OF PLAINTIFF-RESPONDENT OZAUKEE COUNTY
ON APPEAL FROM OZAUKEE COUNTY CASE NO. 2014TR003860
HONORABLE SANDY A. WILLIAMS
CIRCUIT COURT JUDGE PRESIDING

Respectfully submitted,

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502
1201 South Spring Street
Port Washington, WI 53074
(262) 284-8380

Attorney for Plaintiff - Respondent

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Appellant neither requests oral argument nor publication.

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix. The margins of the brief correspond with Wis. Stats. § 809.19(8)(b)3c. The page margins are 1.5 inches on the left, with 1 inch on the remaining margins. The body of this brief is printed in Times Roman proportional 13 point font, block quotes are in 11 point Times Roman font. The applicable portions of Appellant's brief have a total of 2843

words and the whole brief consists of 9 pages. An appendix is attached.

Dated this 22nd Day of April, 2015,

_____

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19 (12).

I further certify that:

The electronic brief is identical in content and format to the printed form of the brief that I am filing today; and

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

Dated this 22nd Day of April, 2015,

_____

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502

Statement of Facts

Appellant was arrested for operating while intoxicated on September 20, 2014 in the Town of Grafton, Ozaukee County, Wisconsin. Appellant was served a copy of the notice of intent to revoke his operating privileges following his refusal to submit to a chemical test. (R.1) This document explained that he had ten days to demand a hearing on his refusal. (R.1)

Appellant wrote a check for the forfeiture amount on the operating while intoxicated citation and was defaulted on October 6, 2014, after the deadline to demand a refusal hearing had expired. (R. 2,3,4,5,6) On October 20, 2014, Appellant wrote a letter to the Clerk of Courts, without a cover copy to the District Attorney's Office, referencing a phone conversation with the Clerk of Court the previous Thursday[1]. (R.6) Appellant claimed that he had sent a request for a refusal hearing along with his check for the underlying OWI[2]. Appellant followed up with a similar letter to the Ozaukee County Court Commissioner on October 28, 2014, which referenced an earlier request for a hearing. (R. 7) Again, Appellant did not send a copy of this letter to the District Attorney's Office. None of these letters were accompanied by a copy of the demand that Appellant claimed had been filed.

On November 7, 2014, Judge Williams denied Appellants request for a hearing as untimely. (R. 9). On December 8, 2014 Appellant again wrote to the courts stating that he had not received notice of any action by the courts. (R.10) This was the first correspondence which included a copy to the District Attorney's Office[3]. To this point, all communications or correspondence was only between the Clerk of Courts and Appellant.

Argument

1. **The issues framed by the Appellant are not relevant**.

This is a refusal case, however Appellant frames the issues presented as:

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[1] The previous Thursday would have been October 16, 2014. As there was never any hearing on this matter, the nature and content of this discussion are not available on appeal.

[2] The records of this file are not currently part of this record, however are the subject of the County's motion to enlarge time and supplement the record filed on April 17, 2015.

[3] While not part of the record on appeal at this time, the Plaintiff-Respondent would ask the Court of Appeals to take judicial notice, pursuant to Wis. Stats. § 902.01(4), of the CCAP entries for Ozaukee County Case Number 2014TR003860 which reflect that the Ozaukee County District Attorney's Office was not involved in this controversy until after Appellant initiated this appeal. Plaintiff-Respondent's Appendix 1:1-3. ; Kirk v. Credit Acceptance Corp., 2013 WI App 32, 346 Wis.2d 635, 829 N.W.2d 522

> Whether the Deputy Sheriff of Ozaukee County who made the arrest is guilty of False Swearing according to Wisconsin Statute § 846.32, (Sic.) a Class H Felony, and is aiding and abetting the District Attorney and his staff of Ozaukee County, mainly the Clerk of Ozaukee Courts, Mary Lou Mueller.

None of these issues would be relevant to a refusal hearing. Refusal hearings are limited to whether there was probable cause to believe that the driver was under the influence, whether proper information was given to the driver about a chemical test, and whether the driver refused to take the test. Wis. Stats. § 343.05(9)(a)5; Washburn County. v. Smith, 2008 WI 23, ¶ 2, 308 Wis.2d 65, 746 N.W.2d 243. A circuit court may also consider the whether the initial traffic stop itself was lawful. In Re Refusal of Anagnos, 2011 Wi App 118, 337 Wis.2d 57, 70, 805 N.W.2d 722, review granted, 2012 WI 64, ¶15 341 Wis.2d 576, 815 N.W.2d 675.

The issues framed for appeal by the Appellant are not relevant, either to a refusal hearing or the trial court's decision on any claimed motion to reopen a default judgment. While allegations of criminal wrongdoing by the arresting officer could be relevant to a different investigation, a refusal hearing has a very limited scope. Any ability to explore probable cause provided by Anagnos does not invite a broader inquiry into the conduct of an officer during an investigation, or after.

Arguably, it's not even the role of a trial court at a refusal hearing to determine the credibility of witnesses, let alone investigate whether they were committing other crimes.

> The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing. At the refusal hearing, "the state must only present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant." *Nordness*, 128 Wis.2d at 35, 381 N.W.2d at 308. The State need only show that the officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. *Id.* at 36, 381 N.W.2d at 308. Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible. Thus, the *Nordness* court held,
>
> > We view the [refusal] hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the [refusal] hearing to a determination of probable

> cause — as opposed to a determination of probable cause to a reasonable certainty — we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account. *See, e.g., Vigil v. State*, 76 Wis.2d 133, 144, 250 N.W.2d 378, [384] (1977).[fn5]
>
> *Nordness*, 128 Wis.2d at 36, 381 N.W.2d at 308.
>
> Determining probable cause for a warrantless arrest in the context of a suppression motion is another matter. Plausibility is not enough. The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. It necessarily determines the credibility of the officers and other witnesses. *State v. Pires*, 55 Wis.2d 597, 602-03, 201 N.W.2d 153, 156 (1972). The court then finds the historical facts and determines whether probable cause exists on the basis of those facts.

State v. Wille, 185 Wis. 2d 673, 681-682, 518 N.W.2d 325 (Ct. App. 1994). Simply put, the Appellant could not have developed his argument that the arresting officer had committed a crime. Neither could he develop any allegations of criminal wrongdoing by the District Attorney' Office or the Clerk of Courts[4].

Recognizing a disconnect between the issues as framed by the Appellant, and the claims he made to the trial court, the County will also address whether a request for a refusal hearing was made, the timeliness of any purported demand, and the ability of a trial court to grant relief for failure to demand a hearing in a timely fashion.

a. Absence of a timely demand for a refusal hearing.

The procedure to be followed when a driver refuses to take a chemical test is described in Wis. Stats. §§ 343.305(9) & (10). If no request for a hearing is made within 10 days, the court shall revoke the driver's operating privileges. Wis. Stats. §343.305 does not provide any mechanism for relief if someone fails to follow these procedures and time limits.

Here, Deputy Schmidt provided the Appellant with the required notice. (R. 1) Appellant claims that he included a request for a hearing when he paid the $887.50 forfeiture on the underlying operating while intoxicated case. (R.6,7)

[4] Throughout this brief the County does not concede the allegations made by the Appellant, but does address how these claims might relate to a legal context.

Brief at 2. If so, that demand would have been timely. However, there is no evidence that Appellant actually made a timely demand. Appellant's claims are not supported by any materials in the record. The Appellant did not at any point provide copies of the purported missing demand to the trial court, file stamped or not. Further, no copy of the purported timely demand can be found with the materials that Appellant has included in his appendix. Simply put, there is nothing to support this claim.

b. The capacity of a trial court to grant relief for failure to demand a hearing in a timely fashion.

The burden is on the driver to make the request for a hearing under Wis. Stats. § 343.305. Appellant's failure to bring the matter before the trial court in a timely fashion caused the trial court to lose competency to proceed. In other words, when the Appellant failed to abide by the statutory time limits the trial court lost the ability to even hear the case. Green County DHS v. H.N., 162 Wis.2d 635, 656, 469 N.W.2d 845 (1991); Miller Brewing Co. v. LIRC, 173 Wis.2d 700, 706, 495 N.W.2d 660 (1993).

The Appellant then attacks the denial of his motion to reopen by the trial court. However, the trial court did not have the ability to grant him that relief. At some point in time Appellant may have been lead to believe that the matter could be reopened, however a refusal hearing is not a traffic matter as the Ozaukee County Clerk of Court may have erroneously asserted. Refusal hearings are special proceedings. Village of Elm Grove v. Brefka, 2013 WI 54, ¶ 36, 348 Wis. 2d 282, 832 N.W2d 121 The various statutory provisions that provide for relief from default judgments, civil, traffic, or otherwise, do not apply to refusal hearings. Id at ¶¶36 – 40.

Brefka is directly on point to this issue. In Brefka, the driver was arrested for operating while intoxicated, refused, and was given the required notice of his right to a hearing. Id at ¶6. Brafka's demand for a hearing was several days late, and the trial court concluded that the failure to make a timely demand prevented the trial court from even entertaining the issue. Id at ¶9. The Supreme Court agreed with this conclusion, stating:

> … The court of appeals noted that the ten-day time limit is a "different procedure" from the general rules of civil procedure, and that pursuant to Wis. Stat. § 801.01(2), the rules of civil procedure that allow for relief due to excusable neglect do not apply. *Id.* Ultimately, it concluded that the circuit court lacked competency to hear Brefka's request to extend the ten-day time limit, stating that "failure to observe statutory time limits deprives a court of competency." *Id.*, ¶ 13.

Brefka at ¶12. The Wisconsin Supreme Court stated that the 10 day deadline for requesting a refusal hearing cannot be extended.

> ¶4 We conclude that the circuit court is without competency to hear Brefka's request to extend the ten-day time limit set forth in Wis. Stat. §§ 343.305(9)(a)4. and (10)(a). The ten-day time limit is a mandatory requirement that may not be extended due to excusable neglect. Because the mandatory ten-day time limit is central to the statutory scheme, the circuit court lacked competency to hear Brefka's request to extend it.

Id at ¶4. See also discussion at ¶¶32-44.

c. No basis to craft any equitable relief in this case.

The remainder of Appellants arguments are attacks on law enforcement, the District Attorney, and court officials. All of these complaints are directed at behavior that is claimed to have occurred after, sometimes long after, the revocation was ordered by the trial court. To the extent that these arguments constitute a plea for some type of equitable relief, or an invitation to recognize an as yet unarticulated inherent power of the trial court, such relief should be denied. There is no need to engage in this analysis because the Appellant never made a motion for relief to the trial court, or suggest any mechanism by which such relief could be granted. Appellant, a licensed attorney, never actually developed any argument or any claim through any filing, affidavit or other offer of proof. Appellant's only filings consisted of letters to the trial court or Clerk of Courts asking for a hearing. None of these constitute a legal motion. Wis. Stats. § 971.30 provides the requirements for a valid motion.

> 971.30 Motion defined.
>
> (1) "Motion" means an application for an order.
> (2) Unless otherwise provided or ordered by the court, all motions shall meet the following criteria:
> (a) Be in writing.
> (b) Contain a caption setting forth the name of the court, the venue, the title of the action, the file number, a denomination of the party seeking the order or relief and a brief description of the type of order or relief sought.
> (c) **State with particularity the grounds for the motion and the order or relief sought.**

The Wisconsin Supreme Court has outlined the requirements of a sufficient motion.

> Wisconsin law requires movants to "[s]tate with particularity the grounds for the motion. . . ." Wis. Stat. § 971.30(2)(c). The rationale underlying § 971.30's particularity requirement is notice - notice to the nonmoving party and to the court of the specific issues being challenged by the movant. Both the opposing

> party and the circuit court must have notice of the issues being raised by the defendant in order to fully argue and consider those issues. …

State v. Caban, 210 Wis.2d 597, 605, 563 N.W.2d 501 (1997). In State v. Garner, 207 Wis.2d 520, 558 N.W.2d 916 (Ct. App. 1996), the Court of Appeals sustained the denial of a motion hearing, stating:

> Invoking the standards of Nelson v. State, 54 Wis.2d 489, 195 N.W.2d 629 (1975), the trial court concluded, "Perfunctory allegations are insufficient to warrant a hearing[;] the moving party must allege specific facts, by affidavit, reference to the record, or other offer of proof, which warrant the relief sought."

Garner, at 528. Here, the trial court denied Appellants application for relief in a perfunctory fashion as untimely. While the trial court's reasoning was not recited, this record demonstrates ample reasons for that decision. To the extent that Appellant's letters can be construed as motions, the County points out that Appellant has never touched on the ultimate question, where is the document that he claims was a demand for a hearing, what did it look like, and when and how was it filed? Absent from anything Appellant has wrote or said is anything purporting to be a copy of the timely demand that he has continued to insist was filed and apparently lost. Without that minimal showing, there was simply nothing for the trial court to act on.

2. Conclusion

For these reasons the County of Ozaukee prays that this court deny this appeal.

Dated this 22nd Day of April, 2015,

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Adam Y. Gerol

Ozaukee County District Attorney

State Bar No. 1012502