WISCONSIN COURT OF APPEALS
District IV

In the matter of the refusal of Keith D. McEvoy:

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

Appeal No. 2015AP0001262
Circuit Court Case No. 2015TR001433

KEITH D. McEVOY,

Defendant-Appellant.

On appeal from an Order Entered
in the Circuit Court for Dodge County,
the Honorable Joseph G. Sciascia, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S BRIEF and APPENDIX

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ISSUE PRESENTED

Whether the government can pursue a driver's license revocation after it has first pursued and obtained a suspension of that same license.

Answered by the trial court: Yes.

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STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issue in this case, oral argument is not recommended.

STATEMENT ON PUBLICATION

Because this appeal will be decided by one judge it should not be published. Wis. Stats. § 809.23(1)(b)4.

STATEMENT OF THE CASE

On January 30th of this year, the City of Watertown Police Department arrested Keith McEvoy for allegedly operating a motor vehicle while under the influence of intoxicants, contrary to § 346.63(1)(a), Stats. (R14:1-2).

The arresting officer advised McEvoy of his rights and obligations under the implied consent law, read him the Informing the Accused Form, and asked whether he would submit to an evidentiary test of his blood. (*Id.* at 2). McEvoy said no. (*Id.*).

The officer promptly procured a search warrant and obtained a sample of McEvoy's blood involuntarily. (*Id.* at 5). Shortly after doing so the officer gave McEvoy a Notice of Intent to Revoke his operating privileges because he had refused to consent to blood testing. (*Id.* at 6).

A few days later, on February 5th, McEvoy requested a refusal hearing. (*Id.*). Although the police department forwarded the Notice of Intent to Revoke to the clerk of courts, for reasons that remain unexplained the clerk did not process the notice and, consequently, no refusal hearing was scheduled. (*Id.* at 11). This was so even though the clerk allegedly received the notice on February 4th. (*Id.*).

On March 11th, at McEvoy's arraignment of the underlying OWI charge, the assistant district attorney and defense counsel wondered why the clerk had not yet scheduled a refusal hearing. (*Id.* at 10, 13). So the ADA launched an investigation. (*Id.*). He called the police department and he called the clerk, at which point he learned that the paperwork had been languishing on the clerk's desk since February 4th. (*Id.* at 11).

With that prompting the clerk set McEvoy's refusal hearing for April 28th. (*Id.*).

Meanwhile, on February 18th, the police department received the results of McEvoy's blood test. (*Id.* at 11). On that same date it completed a Notice of Intent to Suspend and sent the same to the Department of Transportation for processing. (*Id.*).

On March 20th DOT notified McEvoy that his license had been administratively suspended for a period of six months pursuant to § 343.305(8), Stats. (*Id.* at 7).

On April 9th, defense counsel notified the ADA that DOT had curiously suspended McEvoy's license as of March 20th. (*Id.* at 12). The ADA was stunned by the news. (*Id.*). So, on his own volition he called DOT to inquire how to

reverse the suspension. (*Id.* at 13). A simple letter from the police department would suffice and consequently the ADA had the police department send that letter. (*Id.*). On or about April 14th DOT reinstated McEvoy's license. (*Id.* at 8, 14). All of this was done without McEvoy's knowledge. (*Id.* at 18-19).

Believing that the government (here, the Assistant District Attorney and the Watertown Police Department) could not pursue revocation once it had procured an administrative suspension, defense counsel filed a motion to dismiss the refusal action. (R6). The motion was heard at the time set for the refusal hearing, April 28th. (R14).

At the hearing, the parties stipulated to the basic facts, but disagreed on the law. Defense counsel argued that estoppel prevents the state from pursuing a revocation once it obtained a suspension, as the two actions were wholly inconsistent. (*Id.* at 8). The ADA argued otherwise. (*Id.* at 20).

The court, unaware of any authority one way or the other, nevertheless ruled that an administrative suspension temporarily entered does not preclude the state from proceeding with a refusal action. (*Id.* at 26). On that basis it found that McEvoy had refused to submit to a chemical test of his blood in violation of the statute and ordered that McEvoy's driver's license be revoked for three years. (*Id.* at 28).

It is from this order that McEvoy appeals.

STANDARD OF REVIEW

The interpretation of Wisconsin's implied consent law and its application to undisputed facts present questions of

law which this Court reviews independently. *State v. Sutton*, 177 Wis.2d 709, 713, 503 N.W.2d 326 (Ct. App. 1993).

ARGUMENT

This case involves two statutes contained within chapter 343, Stats., the section that governs operating licenses.

The first is § 343.305(9) which reads:

> **(9)** REFUSALS; NOTICE AND COURT HEARING. (a) If a person refuses to take a test under sub. (3) (a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.

The second is § 343.304(7) which reads:

> **(7)** CHEMICAL TEST; ADMINISTRATIVE SUSPENSION. (a) If a person submits to chemical testing administered in accordance with this section and any test results indicate the presence of a detectable amount of a controlled substance in the person's blood or a prohibited alcohol concentration, the law enforcement officer shall report the results to the department. The person's operating privilege is administratively suspended for 6 months.

The administrative suspension procedure represents one half of the legislature's scheme to deal swiftly with those suspected of drunk driving. An accused who submits to the tests and is found to have a prohibited alcohol concentration is promptly suspended for a 6-month period by the arresting officer. It is the officer, not the Department of Transportation, that imposes the suspension. *Village of Oregon v, Bryant*, 188 Wis.2d 680, 689, 524 N.W.2d 635 (1994).

On the other hand, an accused who refuses to submit to testing is subjected to anywhere from a 12-month to a 3-year revocation. Wis. Stats. § 343.305(10)(b)2. In refusal situations the court, not the officer, revokes the license. *Id.* Not only

does a refusal carry a larger penalty, but it carries additional sanctions like mandatory AODA counseling, ignition interlock compliance, and driver safety plan participation to name a few. Wis. Stats. § 343.305(10).

The purpose of the legislative scheme is to encourage drivers, upon request by law enforcement, to submit to chemical testing. *State v. Brooks*, 113 Wis.2d 347, 348, 335 N.W.2d 354 (1983). This allows for the efficient gathering of evidence that may be used to secure drunk-driving convictions. (*Id.*).

The question in this case is whether the government, after choosing one sanction over the other, is free to change its mind and pursue and impose the other, particularly if the penalty under its first choice already has begun to run. McEvoy submits the answer is "no."

The reason therefore is fundamental fairness – that the government should be estopped from changing positions.

In Wisconsin, a party may raise an estoppel defense against the government even when it acts in its governmental capacity. *DOR v. Moebius Printing Co.*, 89 Wis.2d 610, 634, 279 N.W.2d 213 (1979). This is so if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel. *Id.* at 638. In each case the court must balance the injustice that might be caused if estoppel is not applied against the public interests at stake if it is applied. *Id.* at 639. Typically our courts have not applied estoppel if it interferes with the protection of public health, safety or general welfare. *Id.* But if it does not expose a significant number of people to a risk the legislature has determined to be contrary to their safety, welfare, health or morals then it may be applied. *Id.* at 641.

The estoppel defense consists of (1) action or inaction on the part of the one against whom estoppel is asserted, (2) which induces reliance thereon by the other, (3) either in action or non-action, (4) which is to his detriment. *Id.* at 634.

We find all four elements in McEvoy's case. First, we have action by the government to first suspend McEvoy's driver's license using the procedures under § 343.304(7), Stats. That is, the arresting officer chose to suspend McEvoy's license once he discovered that McEvoy's blood contained a prohibited alcohol concentration. (R8:Ex. 3).

Second, after receiving the Notice of Intent to Suspend dated February 28, 2015, and after receiving a Notification from the Department of Transportation dated March 20, 2015 saying his driving privileges had been suspended, McEvoy relied on those notices to believe the government had opted for a 6-month suspension. (R8:Ex. 3; R7:Ex. 7). He began serving his suspension and continued serving it up to April 28th, the date of the hearing, when the ADA informed him his license had been reinstated. (R14:7-8, 14).

Third, believing the government's suspension was its official response to him violating the driving regulations, he chose not to challenge it, which, of course, was his right to do. Wis. Stats. § 343.305(8)(a). By statute, the suspension is automatically stayed for 30 days to allow the accused to obtain administrative or judicial review of the government's decision. *Id.* Content with its decision McEvoy took no action, as he was willing to accept the lower 6-month penalty. (R14:29).

Fourth, his failure to act now works to his detriment. That is, believing he would suffer only the smaller penalty, he

gave up his right to challenge the government's decision in the first instance. But now, after deliberately giving up that right, he still faces the larger penalty. (R14:29). This outcome is fundamentally unfair.

The court must remember, the errors in this case had nothing to do with McEvoy. He was not the clerk who dropped the ball on the paperwork. (*Id.* at 24-25). He was not the officer who mistakenly sent paperwork to DOT. (*Id.* at 23). He was not the person who certified McEvoy failed to submit to a breath test then certified that he did. (R8:Exs. 2-3). He was not the ADA who failed to prosecute his case. (*Id.* at 24-25). All these gaffes must be laid at the government's feet.

On balance there seems to be no compelling reason why estoppel should not lie under these circumstances. The public interest is not unduly harmed. McEvoy loses his driver's license regardless. Therefore, the legislative goals are still met. Whatever efficiency the government lost by McEvoy's refusal it recovered by use of the warrant procedures. No incriminating evidence was lost.

But McEvoy suffers a serious injustice if estoppel is not applied. He gave up his due process right to challenge the government's suspension – a right the legislature gave him. The worst of it is, he gave up that right under false pretenses believing that the government had chosen to suspend his license, not revoke it.

Similarly, he gave up his driving privileges for a full 40 days, from March 20th, when he received the DOT notice, until April 28th, when the ADA first told him his license had been reinstated. That it had been officially reinstated on April 14th was no benefit to McEvoy because no one told him he had been reinstated until April 28th.

Likewise, contrary to the ADA's representation to the court McEvoy did not lose his license for a mere 25 days. (R14:19). Rather, it was 40 days. Consequently, the 25-day credit the court gave him against the 3-year revocation never made McEvoy whole. (*Id.* at 29). Nor will it ever make him whole.

Weighed against the harm to the public interest, surely McEvoy's losses are far greater and for that reason estoppel should have applied.

So when the trial court said that despite the suspension having been entered nothing prevented the state from proceeding with the refusal, it basically ignored the whole estoppel argument. (R14:26). Estoppel was a valid defense and it should have prevented the government from proceeding with the refusal.

CONCLUSION

For the foregoing reasons Keith McEvoy respectfully asks this Court to reverse the order of the trial court and to remand with instructions to vacate the 3-year revocation and to reinstate the administrative suspension.

Dated this _____ day of July 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,910 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding 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 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 _____ day of July 2015.

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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 on July 31, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 31st day of July, 2015.

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