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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2015 AP 1262

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KEITH D. McEVOY

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 3,
THE HONORABLE JOSEPH G. SCIASCIA, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN,

Plaintiff-Respondent,

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ON APPEAL FROM THE CIRCUIT COURT OF DODGE COUNTY, BRANCH 3, THE HONORABLE JOSEPH G. SCIASCIA, PRESIDING

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not required because it will not assist the court. Publication is not requested.

ARGUMENT

1. THE TRIAL COURT'S DETERMINATION THAT KEITH D. McEVOY IMPROPERLY REFUSED TO TAKE A BLOOD TEST SHOULD BE AFFIRMED.

A. Relevant Statutes Were Correctly Applied by the Court

On January 30, 2015, Keith D. McEvoy was arrested for operating a motor vehicle while under the influence of an intoxicant (OWI), fifth offense, in violation of Wis. Stat. §§346.63(1)(a) & §346.65(2)(am)5. (R14:4). After McEvoy was arrested, the police officer read McEvoy the "Informing the Accused" form which advised McEvoy of information required by Wis. Stat. §343.305(4). *Id*. at 4-5.

After reading this form to McEvoy, the officer asked McEvoy if he would consent to a chemical test of his blood. *Id*. at 5. McEvoy refused. *Id*.

The officer immediately prepared a Notice of Intent to Revoke form as required by Wis. Stat. §343.305(9)(a). *Id.* at 6. McEvoy made a timely request for a refusal hearing on the refusal under Wis. Stat. §343.305(9)(a)4 on February 5, 2015. *Id*. The refusal hearing was held on April 28, 2015. *Id*. at 1. At the refusal hearing, McEvoy did not contest the allegation that his refusal was improper; therefore, the Court ordered a three year revocation of McEvoy's operating privilege in accordance with Wis. Stat. §343.305(10)(b)4. *Id*. at 3, 28.

B. McEvoy's Reliance on the Government's Conduct was Unreasonable

McEvoy asserts that he relied on the Notice of Intent to Suspend he received on February 28, 2015, and the subsequent Notice of Administrative Order he received on March 20, 2015, to form the belief that the government had given up on pursuing a revocation because of his refusal to provide a blood sample, and that the government was just going to give McEvoy a suspension. *See Defendant-Appellant's Brief* at 6. This reliance allegedly caused McEvoy to choose not to contest the administrative suspension. *Id*. This alleged reliance, however, is unreasonable and unjustifiable.

The administrative suspension process does not involve the District Attorney's Office. If a person submits a blood sample in accordance with the Implied Consent Law (i.e., if a person arrested for OWI says "yes" when asked to give a blood sample) and if the blood sample indicates a prohibited alcohol concentration, then the "law enforcement officer shall report the results to the department. The person's operating privilege is administratively suspended for 6 months." Wis. Stats. Section 343.305(7). The District Attorney's Office has nothing to do with this process – if no hearing is requested then the Department of Transportation will automatically suspend the operating privilege. If a hearing is requested, the District Attorney's Office has nothing to do with that process, either – Wis. Stats. Section 343.305(8)(b) sets forth the process whereby a department employee (a "hearing examiner") conducts the hearing in an informal manner, considers all of the relevant evidence and then issues a written decision.

McEvoy correctly states the factors required for a court to apply estoppel in a case involving a *non-governmental agency*: (1) action or non-action which, (2) induces reliance on the part of one against whom estoppel is asserted, (3) either in action or non-action, (4) which is to his detriment. *DOR v. Moebius Printing Co.*, 89 Wis.2d 610, 634, 279 N.W.2d 213 (1979). However, the *Moebius* court immediately followed this list of factors with the caveat that, "**(i)t is elementary, however, that the reliance on the words or conduct of the other must be**

reasonable and justifiable." *Id*. McEvoy's reliance on the Notice of Intent to Suspend and subsequent Notice of Administrative Order was unreasonable and unjustifiable.

McEvoy was arrested for OWI on January 30, 2015. (R14:2). Following his arrest McEvoy was asked to provide a sample of his blood after being properly informed of his rights, and McEvoy refused. *Id*. McEvoy was then given a Notice of Intent to Revoke. *Id*. at 6. On February 5, 2015, McEvoy requested a hearing to contest the refusal. *Id*.

McEvoy later received the Notice of Intent to Suspend dated February 28, 2015. (R8:Ex. 3). At this point in time, McEvoy had *already* received a Notice of Intent to Revoke, and had *already* requested a refusal hearing on that matter. (R14:6). **McEvoy consulted with his attorney and made the decision not to request a hearing on the administrative suspension**, even though he could have made such a request under Wis. Stat. §343.305(8)(am). *Id.* at 29. Instead, McEvoy unreasonably chose to assume that the "government had opted for a 6-month suspension," simply based off of the Notice of Intent to Suspend. By not requesting the hearing McEvoy knowingly subjected himself to the automatic six month suspension imposed by Wis. Stats. Section 343.305(7).

When McEvoy appeared at his arraignment on **March 11, 2015**, Assistant District Attorney Gilbert Thompson and McEvoy's attorney, Jennifer Weber, discussed the problem of the refusal hearing not having been scheduled. *Id*. at 11. It should be noted that McEvoy was still able to drive at this time under Wis. Stat. §343.305(8)(a). Based off of this discussion, ADA Thompson immediately took steps to get a refusal hearing scheduled. *Id*. These actions included an investigation into the matter that involved contacting the Watertown Police Department, the Department of Transportation, and the Clerk of Courts. *Id*. ADA Thompson did succeed in getting the refusal hearing scheduled for April 28, 2015.

At an **April 9, 2015** bail modification hearing ADA Thompson first learned of the six month administrative suspension. Id at 12. The administrative suspension should not have been pursued by the Watertown Police Department as McEvoy's blood sample was obtained not via his consenting to the blood drawn but rather via a search warrant. Id. at 17. The administrative suspension is only appropriate in those instances in which the driver "submits to chemical testing" under the Implied Consent Law, i.e., the driver says "yes" when asked to give the blood sample rather than refusing it. Wis. Stats. Section 343.305(7). ADA Thompson immediately spoke with the Department of Transportation and learned that the Watertown Police Department would need to write the Department, requesting that the administrative suspension be vacated. Id at 13. The

Watertown Police Department wrote such a letter and the defendant's operating privilege status was valid as of **April 15, 2015**, just five days after ADA Thompson learned of the six month suspension. Id at 14.

Under Wis. Stat. §343.305(8)(a), the Notice of Intent to Suspend serves as a 30-day temporary license. Therefore, McEvoy was not without his operating privilege at the time of his arraignment on March 11, 2015. Neither McEvoy nor his attorney made any comment on the record about the erroneous administrative suspension until the April 9, 2015 arraignment, i.e., after the 30-day temporary license had expired. (R14:12). This compounds the unreasonableness of McEvoy's reliance on the Notice of Intent to Suspend (and subsequently the Notice of Administrative Order received on March 20, 2015), because this shows that McEvoy did not take any action until he had started serving the suspension. Had McEvoy's attorney mentioned the suspension to ADA Thompson sooner, it could have been resolved without McEvoy ever losing his operating privilege. Instead, McEvoy continued to unreasonably rely on just the Notice of Intent to Suspend – in spite of ADA Thompson's words and actions – until he suffered real consequences, before saying or doing anything about it.

Given all these facts and circumstances, it was unreasonable and unjustifiable for McEvoy to rely on the Notice of Intent to Suspend and Notice of Administrative Order to not contest his administrative suspension or notify ADA Thompson of the suspension, in light of all of the actions of ADA Thompson and the underlying statutory law.

C. McEvoy's Reliance on the Government's conduct did not act to his detriment

In order for estoppel to be applied, McEvoy's actions based on his reliance on the government's actions must have been to his detriment. *See Moebius Printing,* 89 Wis.2d at 634. McEvoy argues that the only reason he did not contest the suspension was because he believed that he would only receive the suspension instead of the larger penalty for the refusal. *Appellant-Defendant's Brief* at 6-7. Therefore, the detriment that McEvoy suffered was the time he spent without a license as a result of his suspension. However, ADA Thompson agreed that McEvoy should receive credit for the time he was suspended toward his revocation, which the court did order. (R14:26). Given that McEvoy did not contest the facts, and even agreed that his refusal was improper, it was inevitable that McEvoy's operating privilege would be revoked for thirty six months. *Id*. at 6, 26. McEvoy fails to explain how credit towards his revocation for the time spent with his license suspended can "never make him whole." *Appellant-Defendant's Brief* at 8. Similar practices involving the application of jail credit for time spent in pre-sentence custody towards a sentence for a criminal conviction have long been accepted.

D. McEvoy has failed to identify any acts by the state that amount to fraud or manifest abuse of discretion

The *Moebius* factors McEvoy listed in his brief for determining whether estoppel should be applied are for *non-governmental actors*. These same factors are also used by a court when determining whether estoppel should be applied to governmental actors, but the *Moebius* court itself warned that, "estoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals." *Moebius Printing*, 89 Wis.2d 610, 638. Thus, in addition to the *Moebius* factors, "a party attempting to invoke equitable estoppel against a state agency must establish that the acts of the agency amounted to a fraud or manifest abuse of discretion." *Wisconsin Patients Compensation Fund v. St. Mary's Hosp. of Milwaukee*, 209 Wis.2d 17, 37, 561 N.W.2d 797 (Wis. App. 1997).

McEvoy has not alleged that the Watertown Police Department, DOT, the Clerk of Courts, or ADA Thompson have attempted to defraud McEvoy or abuse their discretion. There is nothing in the record to suggest this. On the contrary, the record supports the facts that the officer made a mistake by notifying the Department of Transportation as to the blood test results (and sending a Notice of Intent to Suspend form to McEvoy). (R14:12-13). This action, when combined with McEvoy's decision not to request a hearing with a Department hearing examiner, resulted in a short-term suspension of operating privilege. Upon learning of this mistake ADA Thompson took steps so that within days of the error being made known to the District Attorney's Office, McEvoy's operating privilege was reinstated.

CONCLUSION

The Trial Court correctly determined that McEvoy improperly refused to submit to a blood draw. The Trial Court also correctly ruled that, "the fact that administrative suspension was temporarily entered does not preclude the State from proceeding with the refusal." Id. at 26.

For the foregoing reasons, the Trial Court's order that McEvoy's refusal was improper should be affirmed.

Dated this the 18th day of September, 2015.

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 1,843 words.

Dated this the 18th day of September, 2015.

Signed:

_____

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CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 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 18th day of September, 2015.

_____

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