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 REPLY BRIEF

ZICK&WEBER LAW OFFICES, LLP
Vicki Zick
State Bar No. 1033516
Attorneys for Defendant-Appellant

475 Hartwig Boulevard
PO Box 325
Johnson Creek, WI 53038
920-699-9900

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ARGUMENT

In its response, the District Attorney's Offices says the police department should not have pursued the administrative suspension. (Resp. Br. at 3). But the fact of the matter is, it did and, as a result, the government (its many parts acting collectively) officially suspended McEvoy's license on March 20, 2015. (R14:7).

Instead of accepting responsibility for this fact, the DA's office now tries to throw the police department under the bus or, even worse, shift the blame to McEvoy. It says McEvoy acted unreasonably when he assumed the State had chosen to suspend, not revoke. (Resp. Br. at 3). But how one acts unreasonably in assuming one's license has been suspended after receiving an official-looking document that says "Your privilege to drive a motor vehicle is suspended," the government does not say. (Ex. 7).

Obviously, the suspension occurred without the DA's knowledge and consent, because the DA is not involved in the suspension process. (Resp. Br. at 2). But McEvoy does not know that. He would have no way of knowing this. Therefore, when he received the official suspension paperwork it was entirely reasonable for him to think the government had elected to suspend, not revoke. In fact, it would be unreasonable for him to think otherwise or to think anything other than the police department, the DA, and DOT were all acting together, in harmony.

This is precisely why estoppel should apply here. Like it or not, official government action was taken in McEvoy's case and McEvoy reasonably relied on the fact that the government wished to suspend, not revoke. Maybe the police department did make a mistake, but this does not mean the

government gets a do-over. This would not be the first time law enforcement's mistakes were imputed to the DA's office resulting in undesirable consequences for the DA. *See, e.g., State v. Johnson,* 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993) (unlawful police searches result in dismissal of prosecutor's case); *State v. DeLao*, 2002 WI 49, 252 Wis.2d 289, 643 N.W.2d 480 (State charged with knowledge of discovery material in hands of the police); *State v. Matson*, 2003 WI App 253, 268 Wis.2d 725, 674 N.W.2d 51 (police undercutting a plea agreement is the same as the prosecutor undercutting it).

Nor should the court lose sight of the fact that all of this revocation/suspension business was going on behind McEvoy's back. Even after the government learned on April 9 that it could undo (and had undone) McEvoy's suspension it never shared this information with McEvoy in a timely manner. It waited until the date of the refusal hearing, April 28, before letting him know. (R14:8). This is why McEvoy actually suffered a 40-day license suspension (March 20 to April 28), not a 25-day suspension like the government wants the court to believe.

As for the government's claim that estoppel cannot be had unless McEvoy proves fraud or manifest abuse of discretion (Resp. Br. at 5), McEvoy disagrees. Insofar as the government cites to the *Wisconsin Patients* case for this claim, *Wisconsin Patients* seems to misstate the law.

Wisconsin Patients accurately cites to the *Ryan* case for this proposition and *Ryan* cites to the *Surety Savings* case for the same, but *Surety Savings* misquoted the *Eiffler* case where this proposition originated. *Wisconsin Patients Compensation Fund v. St. Mary's Hosp. of Milwaukee*, 209 Wis.2d 17, 37, 561 N.W.2d 797 (Ct. App. 1997); *Ryan v. Wisconsin Dept. of Revenue*, 68 Wis.2d 467, 471, 228 N.W.2d 357 (1975); *Surety Sav.*

& Loan Ass'n v. State Dept. of Transportation, 54 Wis.2d 438, 445, 195 N.W.2d 464 (1972).

What the *Eiffler* case said about estoppel was this:

> The rule is never applied as freely against the public as against private persons. It is only when some affirmative action has been taken, or when there has been some great negligence or delay with relation to some matter upon which the parties have a right to rely, that the court will be authorized to apply the rule, so as to prevent manifest injustice or wrong. An abuse of discretion by the common council in the instant action was not firmly established by the facts ... .

City of Jefferson v. Eiffler, 16 Wis.2d 123, 133, 113 N.W.2d 834 (1962).

As is apparent, the rule is applied in cases where a manifest injustice would result, not in cases where a manifest abuse of discretion by the government occurs. Although the *Eiffler* court did use the words "manifest abuse of discretion," it used the phrase in a different context, namely when and where a court could intervene in a purely legislative matter. *Id.* The *Eiffler* court's statement that estoppel will lie to prevent a "manifest injustice" correlates with the *Moebius* court's statement that estoppel will lie if the government's conduct would work a serious injustice. *DOR v. Moebius Printing Co.*, 89 Wis.2d 610, 634, 279 N.W.2d 213 (1979). Accordingly, the *Moebius* case seems to be a more accurate statement of when estoppel will lie against the government and it never mentions proving up fraud or a manifest abuse of discretion. *Id.* Thus, pursuant to *Moebius*, McEvoy need not prove up fraud or a manifest abuse of discretion before estoppel can be had.

Finally, as to the government's claim that McEvoy fails to explain how a 25-day credit toward his revocation sentence

will never make him whole, McEvoy will re-explain. (Resp. Br. at 4).

One, he lost his license for a total of forty days, not twenty-five, so a 25-day credit will not make him whole. He explained this in his brief-in-chief. (McEvoy Br. at 8).

Two, and staying in tune with the whole inept tenor and tone of the government's handling of his case, the government gave him absolutely no credit whatsoever on his Judgment of Conviction. (R11). Although the court said McEvoy should get twenty-five days credit (R14:29), the Judgment says *It is adjudged that 0 days sentence credit are due* on a three-year sentence (R11). So like it or not, McEvoy will never be made whole under the circumstances.

CONCLUSION

For the foregoing reasons and for the reasons set forth in his brief-in-chief, Keith McEvoy respectfully asks this Court to reverse the order of the trial court and to remand with instructions to vacate the revocation and reinstate the suspension back to its original effective date of March 20, 2015.

Dated this _____ day of September 2015.

ZICK&WEBER LAW OFFICES, LLP
Attorneys for defendant-appellant

_____
Vicki Zick
SBN 1033516
475 Hartwig Boulevard
PO Box 325
Johnson Creek, WI 53038

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 1,058 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 September 2015.

ZICK&WEBER LAW OFFICES, LLP
Attorneys for defendant-appellant

_____
Vicki Zick
State Bar No. 1033516

475 Hartwig Boulevard
P.O. Box 325
Johnson Creek, WI 53038
920-699-9900