

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP002423

Racine County Circuit Court Case No: 2003CF000002

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

MICHAEL R. HESS,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

**ON APPEAL FROM AN ORDER REVOKING
APPELLANT'S OPERATING PRIVILEGES, ENTERED IN
RACINE COUNTY CIRCUIT COURT, THE HONORABLE
CHARLES H CONSTANTINE PRESIDING**

LILLIAN V. LEWIS

Assistant District Attorney

Attorney for the Petitioner-Respondent

State Bar #1086838

W. Richard Chiapete, District Attorney
Racine County District Attorney's Office
730 Wisconsin Avenue
Racine, WI 53403
(262) 636-3172
(262) 636-3346 (fax)
lillian.lewis@da.wi.gov

TABLE OF CONTENTS

ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	2
SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS	2
ARGUMENT	7
THERE IS AN ABSENCE OF NEWLY DISCOVERED EVIDENCE, THEREFORE, THERE IS NO LEGAL BASIS FOR APPEAL	7
THE DEFENDANT WAS PROVIDED SUFFICIENT NOTICE OF THE INTENT TO REVOKE HIS OPERATING PRIVILEGE	10
CONCLUSION.....	13
CERTIFICATION	14

TABLE OF AUTHORITIES

CASES CITED

<i>Danielson v. Brody Seating Co.</i> , 71 Wis.2d 424, 429, 238 N.W.2d 531, 533 (1976).	12
<i>State v. Boyce</i> , 75 Wis.2d 452, 457, 249 N.W.2d 758 (1977)	7
<i>State v. Krieger</i> , 163 Wis.2d 241, 255, 471 N.W.2d 599 (Ct.App.1991).	8
<i>State v. Love</i> , 2005 WI 116, ¶ 44, 284 Wis.2d 111, 700 N.W.2d 62.	8
<i>State v. McCallum</i> , 208 Wis.2d 463, 474, 561 N.W.2d 707 (1997)	8,9
<i>State v. Moline</i> , 170 Wis.2d 531, 489 N.W.2d 667 (1992)	11
<i>State v. Nordness</i> , 128 Wis.2d 15, 34, 381 N.W.2d 300, 308 (1986).	12
<i>State v. Polinski</i> , 96 Wis.2d 43, 291 N.W.2d 465 (1980).	12

STATUTES CITED

Wisconsin Statute Sec. 343.305	5, 6, 10
Wisconsin Statute Sec. 801.01	9, 11

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2015AP002423

Racine County Circuit Court Case No: 2013CF000002

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

MICHAEL R. HESS,

Defendant-Appellant.

**APPEAL FROM AN ORDER REVOKING
DEFENDANT-RESPONDENT'S OPERATING
PRIVILEGES, ENTERED IN RACINE COUNTY
CIRCUIT COURT, THE HONORABLE CHARLES H
CONSTANTINE PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

Is a copy of a citation that has been in existence for more than 11 years sufficient to form newly discovered evidence entitling the defendant to an appeal of a default judgment revoking his operating privileges on January 1, 2003?

The trial court answered no. (See RAP pg. 1)

Did the mailing of a notice of intent to revoke operator's driving privilege provide sufficient procedural notice to an accused?

The trial court did not reach this answer because it found that the Defendant was delinquent in requesting relief.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

Officer Fisher of the City of Burlington Police Department responded to a call for service on January 1, 2003, at approximately 8:33 p.m., at 716 Milwaukee Avenue, in the City of Burlington, County of Racine, State of Wisconsin, for a report stating that Michael Hess, the defendant, was at that residence and was trying to get in. Officer Fisher arrived at the scene and observed S.S., who was standing off to the side of the driveway, and the

defendant exiting a porch area located in front of the residence with blood dripping from his hand. At this time, the defendant stated that he had broken the front door window and was not going to cause officers any problems and he was taken into custody. (See accompanying Appendix, pages 7-11)

Officer Fisher then spoke with J.S. and B.C., who indicated that they had been in the inside the residence at 716 Milwaukee Avenue, when the defendant came over to the residence and tried to get into the side door of the residence. They stated that when the defendant was unable to get into the side door he walked over to the front door where he punched his hand through the window, which prompted J.S.'s call to the police. J.S. further stated that she did not consent to the defendant damaging her window.

Officers then spoke to S.S., who indicated that the defendant had driven to the location at 716 Milwaukee Avenue and that S.S. had accompanied the defendant as a passenger. S.S. further stated that Hess was intoxicated, and had told S.S. he was taking S.S.'s vehicle whether S.S. wanted him to or not, so S.S. accompanied the defendant as a passenger.

Sgt. Thurin located on the defendant a set of keys that fit the vehicle that was in the driveway of the residence. Officer Fisher noticed an odor of intoxicants on the defendant's breath, his eyes were red in color, and his speech was slurred. Officer Fisher asked the defendant to take field sobriety tests. The defendant agreed to submit to field sobriety tests, and failing the One Leg Stand, the HGN, and the Heel to Toe test. The defendant was also asked to submit to a blood test and having been read the "Informing the Accused" form, the defendant refused to consent to the test of his blood. The defendant was then told that he would be transported to the Burlington Memorial Hospital for a forced blood draw and the defendant submitted to the blood draw without any problems. The defendant then requested that the officers perform a second test on him and the defendant consented to a test on his breath at approximately 10:30 p.m., on January 1, 2003, which showed a prohibited alcohol concentration .24.

Records of the State of Wisconsin Department of Transportation revealed that the defendant's driving privileges were revoked on January 1, 2003, and the records of the State of Wisconsin Department of Transportation

revealed that the defendant has prior convictions for operating while intoxicated on September 27, 1995, in Kenosha County, May 3, 2000, in Kenosha County, June 4, 2002, in Illinois, and January 23, 2002, a conviction for implied consent violation in Illinois.

At the time of the incident, officers issued citation #C509994-2, a felony operating motor vehicle while intoxicated citation. Court records show that the officer read the Defendant the “informing the accused” documents and on January 1, 2003, the State provided a criminal complaint outlining the penalties associated with each count. Further, records indicate that on January 9, 2003, a notice of intent to revoke operator’s license was filed with the court and mailed to the Defendant’s last known mailing address in accordance with Wis. Stat. § 343.305. The first citation was based upon the facts above, encompassing the officer’s knowledge of the defendant’s alcohol level from the breath test (which was immediately available) as well as the alleged facts outlining the defendant’s driving.

Following the initial charges against the Defendant, blood test results came back from the laboratory. The Defendant’s blood revealed a .29 blood alcohol content,

above the legal limit of .08. On January 17, 2003, following the Defendant's refusal for the blood draw and the receipt of the results, Officer Fischer issued citation #D339451-0 for operating a motor vehicle with a prohibited alcohol content as well as a notice of intent to revoke operator's privilege to the Defendant. The address on the first citation bears the same address as the second citation and is the same address the defendant provided to the court by the defendant, listed as follows:

MICHAEL R HESS, DOB 6/29/23

250 S EDWARDS BLVD 86

LAKE GENEVA WI 53147

Following the mailing of the second citation and notice of intent to revoke, on January 31, 2003, the court entered default judgment against the defendant based upon his refusal, citing citation C509994-2 and Wis. Stat. § 343.305(9)(a) with a start date of January 31, 2003, 3 years in length.

On August 6, 2014, or 11 years, 6 months, 6 days after the entry of the revocation order, the defendant filed a motion to vacate the 2003 revocation order. The defendant argues he has obtained newly discovered evidence in the form of

Officer Fischer's handwritten notes accompanying the second citation indicating that a notice of intent to revoke was mailed to the defendant after the first operating while intoxicated citation was issued. The defendant also points out that the underlying felony case of operating while intoxicated was ultimately dismissed by the State.

The defendant argues that the court lacks personal jurisdiction because the State failed to effectuate personal service of the notice of intent to revoke operator's privilege thereby rendering the court's order void.

ARGUMENT

THERE IS AN ABSENCE OF NEWLY DISCOVERED EVIDENCE, THEREFORE, THERE IS NO LEGAL BASIS FOR APPEAL

The defendant requests an appeal through his contention that his discovery of Officer Fischer's handwritten notes on the second citation constitutes newly-discovered evidence. The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion. *State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758 (1977). A circuit court erroneously exercises

its discretion when it applies an incorrect legal standard to newly-discovered evidence. *State v. McCallum*, 208 Wis.2d 463, 474, 561 N.W.2d 707 (1997). In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a “manifest injustice.” *State v. Krieger*, 163 Wis.2d 241, 255, 471 N.W.2d 599 (Ct.App.1991). When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: “(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.” *McCallum*, 208 Wis.2d at 473, 561 N.W.2d 707. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.* 678 ¶ 33 “A reasonable probability of a different outcome exists if ‘there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.’ ” *State v. Love*, 2005 WI

116, ¶ 44, 284 Wis.2d 111, 700 N.W.2d 62 (citation omitted).

A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt. *McCallum*, 208 Wis.2d at 474, 561 N.W.2d 707. This latter determination is a question of law. See *McCallum*. Manifest injustice has been shown and a new trial must be ordered when: (1) the four factors of newly-discovered evidence are established; and (2) a court determines that had a jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. See *State v. Krieger*, 163 Wis.2d 241 at 255, 471 N.W.2d 599.

The issue at hand is not a conviction. It is, rather, a civil default judgment, and Wisconsin rules of civil procedure apply because a refusal action is either a civil action or a special proceeding. See sec. 801.01, Stats. The State, therefore, argues the Defendant's claim is without legal basis. Regardless, should the court consider the defendant's argument alleging newly discovered evidence, it is apparent that the appellant has been negligent in obtaining this

evidence. The document evinces a date of 2003, allowing more than 11 years for the appellant to procure the document and make his argument.

**THE DEFENDANT WAS PROVIDED SUFFICIENT
NOTICE OF THE INTENT TO REVOKE HIS
OPERATING PRIVILEGE**

Should the court move to the second portion of the appellant's argument, the State contends that officers provided the defendant with adequate notice of intent to revoke the defendant's operating privileges. Further, as the defendant has subsequent convictions for operating while intoxicated following the case at bar, there is no prejudice to the defendant for any issues concerning his 2003 operating privilege revocation.

Wis. Stat. § 343.305(9) states in pertinent part that:

(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 officer shall issue a copy of the notice of intent to revoke the privilege to the person and submit or mail a copy to the circuit court for the county in which the arrest under sub. (3) (a) was made or to the municipal court in the municipality in which the arrest was made if the arrest was for a violation of a municipal ordinance under sub. (3) (a) and the municipality has a municipal court... The notice of

intent to revoke the person's operating privilege shall contain substantially all of the following information:

1. That prior to a request under sub. (3) (a), the officer had placed the person under arrest for a violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25 or had requested the person to take a test under sub. (3) (ar).
2. That the officer complied with sub. (4).
3. That the person refused a request under sub. (3) (a).
4. That the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.”

The appellant argues that the circuit court was deprived of personal jurisdiction in which to revoke his operating privileges in 2003 because the defendant was not personally served with a notice of intent to revoke. An officer’s failure to immediately serve notice of intent to revoke driver’s license on an arrestee does not deprive the court of personal jurisdiction. *State v. Moline*, 170 Wis.2d 531, 489 N.W.2d 667 (1992). While the statute contemplates immediate preparation and service following refusal, it is directory, not mandatory. *Id.* Wisconsin rules of civil procedure apply because a refusal action is either a civil action or a special proceeding. *See* sec. 801.01, Stats. *Id.*

These civil procedure rules require that “[t]he service of a summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction.” *Danielson v. Brody Seating Co.*, 71 Wis.2d 424, 429, 238 N.W.2d 531, 533 (1976). The essence of the statute is to give notice and the giving of the notice to the person charged satisfies due process. *State v. Polinski*, 96 Wis.2d 43, 291 N.W.2d 465 (1980). This procedural due process requires that the State afford the Defendant notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *State v. Nordness*, 128 Wis.2d 15, 34, 381 N.W.2d 300, 308 (1986).

In this case, court record shows that a notice of intent to revoke was filed with the court and mailed to the defendant. Further, Officer Fischer read the “informing the accused” documentation to the defendant at the time of the stop, forewarning him of the possible actions taken against him. Finally, the second citation issued indicates that a notice of intent to revoke was sent to the defendant to his last known home address. This is the same address provided used for the first citation, the criminal complaint, and the criminal

information. The Defendant had notice and the court, therefore, retained jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully requests the court affirm the circuit court's default judgment dated January 31, 2003.

Dated at Racine, Wisconsin, this ____ day of May, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov

W. Richard Chiapete, District Attorney
Racine County District Attorney's Office
730 Wisconsin Avenue
Racine, Wisconsin 53403-1274
General: (262) 636-3172
Facsimile: (262) 636-3346

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,381 words.

I hereby 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 this electronic brief is identical in content and format to the printed form of the brief 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 at Racine, Wisconsin this _____ day of May, 2016.

Respectfully submitted,

Attorney Lillian V. Lewis
Assistant District Attorney
State Bar No. 1086838
lillian.lewis@da.wi.gov