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OF WISCONSIN**

DISTRICT I

Appeal Case No. 2017AP000668

In the matter of the refusal of Hector Miguel Ortiz Martinez:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

HECTOR MIGUEL ORTIZ MARTINEZ,

Defendant-Appellant.

ON APPEAL FROM AN ORDER ENTERED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY, THE
HONORABLE JEAN KIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Whether the circuit court had competency to hold an evidentiary hearing on a refusal where Ortiz Martinez failed to request a refusal hearing within ten days.

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b).¹ Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Hector Ortiz Martinez was arrested for Operating While Intoxicated on September 6, 2016. (R1). The arresting deputy complied with the requirements of Wis. Stat. § 343.305(4) and Ortiz Martinez subsequently refused to submit to a chemical test of his breath. (R1; R3:3). The deputy then issued Ortiz Martinez a Notice of Intent to Revoke Operating Privilege which complied with all the requirements of Wis. Stat. § 343.305(9)(a), including notice that a refusal hearing must be requested within ten days. (R1).

Ortiz Martinez submitted a written request for a refusal hearing 24 days later on September 30, 2017. (R3). He included the written notice he received from the arresting deputy with his written request for refusal hearing. (R3:2).

On January 26, 2017, Ortiz Martinez filed a motion with the circuit court requesting that the court grant Ortiz Martinez a refusal hearing. (R7:1-5). In his motion, Ortiz Martinez acknowledged that his request for a refusal hearing was not timely. (R7:4). Nevertheless, Ortiz Martinez requested to “perfect his right to a refusal hearing” by providing evidence related to his alleged unawareness the ten-day time limit. (R7:3-5).²

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

² Ortiz Martinez makes a variety of factual assertions that are not supported by the record, including that it is “undisputed” that he is illiterate in English. (Def. Appellant Br. 8.) However, the only basis cited in support of that proposition is the affidavit of Ortiz Martinez. (Def. Appellant Br. 2; R8:1-2).

On April 10, 2017, the trial court ruled that it was without competency to hear Ortiz Martinez's motion because he failed to request a refusal hearing within the ten-day time period. (R16:7-8). The trial court specifically noted that Ortiz Martinez submitted a written request in English for a refusal hearing, but did not do it in a timely manner. (R16:8). The court denied Ortiz Martinez's request for a refusal hearing and ordered the revocation of his operating privileges for one year effective from the date of the refusal. (R11; R16:9). This appeal follows. (R15:1-2).

STANDARD OF REVIEW

Whether a court has competency presents a question of law to be reviewed independently of the circuit court. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. The issue of competency involves the interpretation of Wis. Stat. § 343.305, which also presents a question of law to be reviewed independently by the appellate court. *State v. Leitner*, 2002 WI 77, ¶16, 253 Wis. 2d 449, 646 N.W.2d 341.

ARGUMENT

I. THE TRIAL COURT LACKED COMPETENCY TO HOLD AN EVIDENTIARY HEARING DUE TO ORTIZ MARTINEZ'S FAILURE TO REQUEST A REFUSAL HEARING WITHIN THE TEN-DAY LIMIT.

The Wisconsin Supreme Court has held that the ten-day limit set forth in Wis. Stat. § 343.305(9)(a)4 is mandatory. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶44, 348 Wis. 2d 282, 832 N.W.2d 121. Therefore, the trial court is without competency to hear a request to extend the time limit. *Id.*

In *Brefka*, the motorist was issued a Notice of Intent to Revoke Operating Privilege on December 12, 2010, for refusing to submit to a chemical test following his arrest. *Id.*, ¶6. The motorist filed an untimely request for a refusal hearing on December 28, 2010. *Id.* While acknowledging that the request was not timely, Brefka requested that the municipal court extend the time limit for "excusable neglect." *Id.*, ¶8. The

municipal court held that it was without competency to even hold a hearing on the request due to the failure to timely request a refusal hearing. *Id.*, ¶9. Brefka appealed to the circuit court, which also held that it was without competency to hear the request. *Id.*, ¶11.

In *Brefka*, the Wisconsin Supreme Court held that the circuit court was without competency to hear the request due to Brefka's failure to request a refusal hearing within ten days. *Id.*, ¶44. The Court found that the time limit was "central to the statutory scheme" and that failure to strictly enforce the ten-day limit would run counter to legislative purposes. *Id.*, ¶43.

Specifically, the Court noted that the statute directs that the one-year license revocation shall begin 30 days after the date of refusal where no hearing was requested within ten days. *Id.*, ¶28; Wis. Stat. § 343.305(10)(a). Conversely, where a timely request for hearing was made, the one-year revocation shall begin 30 days after the refusal or immediately upon determination that the refusal was improper, whichever is later. *Id.* The Court emphasized that allowing extensive litigation where there was no request for a refusal hearing within ten days would "inject...ambiguity into an otherwise precise penalty structure" and frustrate the legislative purposes in enacting the implied consent law. *Id.*, ¶30. Therefore, *Brefka* held that the time limit Wis. Stat. § 343.305(9)(a)4. and (10)(a) was mandatory. *Id.*, ¶44.

In a subsequent case, the Wisconsin Supreme Court reaffirmed *Brefka* by holding that the circuit court lacks discretionary authority to dismiss a refusal "when the defendant fails to request a refusal hearing within the ten-day limit." *In re Refusal of Bentdahl*, 2013 WI 106, ¶26, 351 Wis. 2d 739, 840 N.W.2d 704.

There is no issue related to notice in the present case. Ortiz Martinez was served with a valid Notice of Intent to Revoke Operating Privilege. (R1). He was provided notice of his opportunity to contest the refusal by requesting a refusal hearing within ten days. (*Id.*) However, Ortiz Martinez submitted his written request for a hearing after the time limit had expired. (R3). The very fact that Ortiz Martinez filed a written request in English for a refusal hearing along with all of

his notice paperwork demonstrates that he was provided notice and understood the requirements. He simply failed to comply with the ten-day time limit. For that reason, the circuit court was without competency to hear his request for a refusal hearing.

Contrary to Ortiz Martinez's assertions, *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, and *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, do not entitle a person who merely alleges a lack of understanding of the ten-day time limit to an evidentiary hearing. These cases have nothing to do with the Notice of Intent to Revoke Operating Privilege under Wis. Stat. § 343.305(9)(a). Instead, these cases articulate the requirements upon officers to inform an accused person of their rights prior to attempting to obtain consent for a chemical sample. *Piddington*, 241 Wis. 2d 754, ¶18; *Begicevic*, 2004 WI App 57, ¶20. In *Piddington*, the Wisconsin Supreme Court analogized these Informing the Accused warnings with *Miranda* warnings prior to custodial interrogation. *Piddington* and *Begicevic* do not apply to the facts of this case.

The statutory requirements regarding the Notice of Intent to Revoke Operating Privilege is functionally identical to the process for notice of administrative suspension under Wis. Stat. § 343.305(7) and (8), where a person's chemical test reveal a detectable amount of a restricted controlled substance or prohibited alcohol concentration. Notably, the administrative suspension process also includes a ten-day time limit to request administrative review by the department. Both processes include precise timeframes, penalties, and limitations on the scope of the hearing. Like the other provisions within the implied consent law, the administrative suspension provisions serve a legitimate purpose by "keep[ing] drunk drivers off the roads for the safety and well-being of the general public." *State v. McMaster*, 206 Wis. 2d 30, 49, 556 N.W.2d 673 (1996).

The concerns raised in *Brefka* about undermining the legislative purpose of the implied consent law are particularly relevant in this case. Ortiz Martinez was issued the Notice of Intent to Revoke Operating Privilege on September 6, 2016. Under Wis. Stat. § 343.305(10)(a), the revocation period should have begun thirty days after the date of refusal and can

only last one year from that date. However, as a result of the extended litigation, the court-ordered revocation and assessment was entered on April 10, 2017. As noted by the court in *Brefka* there is no statutory mechanism to “reclaim the time lost to litigation.” *Brefka*, 348 Wis. 2d 282, ¶28.

This case demonstrates the potential harm to the precise legislative penalty structure at the core of Wisconsin’s implied consent law. A person who fails to request a refusal hearing within ten days can potentially avoid or diminish the refusal penalty by extending the litigation into the one-year revocation period. This may result in a person who fails to request a refusal hearing receiving a lesser penalty than a person who makes a timely request. As noted in *Brefka*, this outcome undermines the purposes of the implied consent statute by diminishing “any incentive to immediately consent to a chemical test.” *Brefka*, 348 Wis. 2d 282, ¶32.

CONCLUSION

Ortiz Martinez was issued a valid Notice of Intent to Revoke Operating Privilege and failed to request a refusal hearing within ten days. Under well-established case law, the circuit court lacks competency to hear the defendant’s request for a refusal hearing. Permitting extended litigation despite the failure to request a timely hearing would run contrary to the legislative purposes behind the implied consent law. For that reason, the State of Wisconsin respectfully requests that the Court of Appeals affirm the order of the circuit court.

Dated this _____ day of November, 2017.

Respectfully submitted,

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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 word count of this brief is 1,584.

Date

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the 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.

Date

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