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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III**

Appellate Case No. 2017AP1079

COUNTY OF DOOR,

Plaintiff-Respondent,

-VS-

DONALD L. McPHAIL,

Defendant-Appellant.

**APPEAL FROM A FINAL ORDER ENTERED IN THE
CIRCUIT COURT FOR DOOR COUNTY, BRANCH I, THE
HONORABLE D. TODD EHLERS PRESIDING, CIRCUIT
COURT CASE NO. 17-TR-406**

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER UNDER *STATE v. GAUTSCHI*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24, IT WAS “FUNDAMENTAL ERROR” FOR THE NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE FORM ISSUED IN THIS CASE TO INACCURATELY SET FORTH THE ADDRESS AT WHICH A REQUEST FOR A REFUSAL HEARING MUST BE SENT, THEREBY COMPELLING DISMISSAL OF THE REFUSAL CHARGE?

Trial Court Answered: NO. The circuit court concluded that the erroneously transcribed address on the Notice of Intent to Revoke Operating Privilege form was “a technical error,” and the Defendant did not establish “prejudice[] by this technical deficiency.”

STATEMENT ON ORAL ARGUMENT

Mr. McPhail will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. McPhail believes publication of this Court’s decision is NOT WARRENTED as the common law authority which is on-point with the issue raised herein is straightforward and not in need of any further delineation, definition, or direction.

STATEMENT OF THE CASE AND THE FACTS

On March 14, 2017, the above-named Appellant, Donald McPhail, was detained by Deputy Mike Reeths of the Door County Sheriff’s Department for suspicion of Operating a Motor Vehicle While Intoxicated [hereinafter “OWI”] when Deputy Reeths came

upon Mr. McPhail's commercial motor vehicle stuck in a ditch along STH 42/57 in Door County. (R17 ¶ 1.)

As he engaged Mr. McPhail in conversation regarding what occurred which caused his semi-truck to enter the roadside culvert, Deputy Reeths ostensibly claimed that Mr. McPhail "slurred his words" and had some difficulty alighting from his vehicle. (R17 ¶¶ 3-4, 8.)

At this juncture, Deputy extended Mr. McPhail's detention in order to conduct field sobriety tests. (R17 ¶ 9.) After administering the horizontal gaze nystagmus field sobriety test, Mr. McPhail declined to continue with further testing, but agreed to submit to a preliminary breath test which yielded a result of .12. (R17 ¶ 10.) Thereupon, Deputy Reeths arrested Mr. McPhail for Operating a Motor Vehicle While Under the Influence of an Intoxicant-First Offense [hereinafter "OWI"], contrary to Wis. Stat. § 346.63(1)(a).¹ (R2.)

Subsequent to his arrest, Mr. McPhail was read the Informing the Accused form and was asked to submit to an evidentiary chemical test of his blood. (R1.) Mr. McPhail allegedly declined to submit to the requested test, and the arresting deputy prepared a Notice of Intent to Revoke Operating Privilege form. (R2; D-App 103.) In the course of so doing, however, the deputy erroneously wrote the address of the sheriff's office—**1201** S. Duluth Ave., Sturgeon Bay, WI 54235—in the box below the line marked "Address any hearing request to:" instead of the correct address for the court which was "**1205** South Duluth Avenue." (R2; D-App 103.) Mr. McPhail's operating privilege was subsequently revoked because the Clerk of Circuit Court never received a written request from Mr. McPhail asking the circuit court to grant him a hearing on license revocation. (R4; D-App 102.)

¹ All references herein to the Wisconsin Statutes are to the 2015-2016 version unless otherwise noted.

After retaining counsel, an Emergency Motion to Vacate Judgment and Dismiss Refusal Charge was filed on Mr. McPhail's behalf, petitioning the lower court to reopen the judgment in the refusal case and dismiss the charge on the grounds that: (1) Mr. McPhail was provided with an erroneous address at which to send a request for a refusal hearing through no mistake, neglect, or error on his part; and (2) the license revocation associated with the adverse refusal judgment would cause him to lose his job as a commercial motor vehicle operator without him ever having had the opportunity to be heard on the issue of whether he actually refused a test. (R3.)

A hearing on Mr. McPhail's motion was held on May 16, 2017. (R14.) At the hearing, the Door County Circuit Court, Branch I, the Honorable D. Todd Ehlers presiding, issued a decision from the bench denying Mr. McPhail's motion. (R14 at 10-11; D-App. 113-14.) Subsequently, Mr. McPhail filed a Motion for Reconsideration which was also denied. (R5.) Thereafter, Mr. McPhail initiated this appeal. (R12.)

ARGUMENT

I. THE FAILURE OF THE NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE FORM TO PROVIDE MR. McPHAIL WITH THE CORRECT ADDRESS AT WHICH TO REQUEST A REFUSAL HEARING CONSTITUTES FUNDAMENTAL ERROR REQUIRING DISMISSAL OF THE REFUSAL CHARGE.

A. Standard of Review on Appeal.

This appeal presents a question of law relating to whether an undisputed set of facts satisfies a particular legal standard. This Court reviews questions of this nature *de novo*. *State v. Ballos*, 230 Wis. 2d 495, 500, 602 N.W.2d 117 (Ct. App. 1999).

B. The Statutory Requirement of Notice.

Wisconsin Statute § 343.305(9)(a) provides that “[i]f a person refuses to take a[n implied consent test] . . . , the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person’s operating privilege.” Subparagraph (a) further informs the suspect “[t]hat 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.**” Wis. Stat. § 343.305(9)(a)4. (emphasis added).

The foregoing statutory provisions guarantee accused citizens a measure of due process by ensuring that suspects are made aware of: (1) the allegations they face; (2) their right to contest those allegations; and (3) what issues are to be addressed at any hearing they may request. This entire legislatively-created schema acts as what the courts have characterized as a “fairness guarantee” by ensuring that the accused “has a meaningful opportunity to present a complete defense.” *Accord, California v. Trombetta*, 467 U.S. 479, 485 (1984); *State v. Leudtke*, 2015 WI 42, ¶ 58, 362 Wis. 2d 1, 863 N.W.2d 592.

When anything interferes with an accused’s statutory right to be heard and have a meaningful opportunity to present a defense, significant sanctions, including dismissal of the pending charges, are often levied against the State given the paramount importance of the rights being protected. *Accord, State v. Walstad*, 119 Wis. 2d 483, 351 N.W. 2d 469 (1984). In this case, however, the lower court failed to recognize the due process protections inherent in § 343.305(9)(a), and in so failing, concluded that Mr. McPhail needed to prove some kind of actual harm before any sanction would lie. Harm or actual prejudice is precisely what an aggrieved defendant does *not* need to prove when it comes to a violation of his or her due process rights. This very issue was addressed in *State v. Gautschi*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24.

C. When an Accused Is Not Provided With Proper Notice Under the Statute as Required, the Remedy Is Dismissal of the Refusal Charge.

Grounds for relieving Mr. McPhail from the operation of the refusal judgment in this case exist under *State v. Gautschi*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24. In *Gautschi*, the defendant challenged whether the circuit court had *in personam* jurisdiction over him because the Notice of Intent to Revoke form he was given failed to advise him of “substantially all” of the information he was required to receive pursuant to § 343.305(9)(a). *Id.* ¶¶ 6-7. The court of appeals agreed with *Gautschi* that the form was, in fact, defective. *Id.* ¶ 7. The court declined, however, to hold that the circuit court was without personal jurisdiction over *Gautschi*. *Id.*

In finding that the defect did not deprive the circuit court of jurisdiction, the *Gautschi* court examined whether the error on the Notice of Intent to Revoke was a mere “technical error” or was a more disconcerting “fundamental error.” *Id.* ¶ 9. The *Gautschi* court admonished that fundamental errors are of a nature which compel relief, whereas technical errors only require relief if the defendant can establish prejudice. *Id.* Ultimately, the *Gautschi* court concluded that the error he alleged was merely technical, and in no way prejudiced him. *Id.* ¶ 15.

In reaching this conclusion, the *Gautschi* court observed that *Gautschi* had not been deprived of an opportunity to be heard, and that § 343.305(9)(a) was specifically designed to ensure that procedural due process was satisfied by affording a citizen “notice.” *Id.* ¶ 13. As part and parcel of the procedural due process “notice” component satisfied by § 343.305(9)(a), the *Gautschi* court found that the defect in his Notice of Intent to Revoke form did not deprive him of “an opportunity *to be heard* at a meaningful time and in a meaningful manner.” *Id.* (emphasis added).

Unlike *Gautschi*, Mr. McPhail *was* deprived of an opportunity to be heard because the Notice of Intent to Revoke form in this case misdirected him as to where an application for a hearing ought to be made. Thus, not only was the underlying purpose of § 343.305(9)(a) thwarted, but notions of procedural due process were undermined as well because there was no meaningful opportunity for Mr. McPhail to have been heard given that the request for a hearing on the reasonableness of his alleged refusal would have gone to the wrong address.

The County will likely protest that the erroneous addressee-recipient was one which would have known to forward Mr. McPhail's request for a hearing to the clerk of court's office because it was the sheriff's address in the same general building. This argument must fail because it diminishes the sanctity of the due process right being protected by requiring this Court to "nitpick through the minutia of the error" rather than by protecting the right *carte blanche*. That is, if the address in Mr. McPhail's case being off by one digit passes muster under *Gautschi*, then the next time this Court will have to examine whether it's being off by two digits is still "okay." Three digits? Perhaps the next case will involve an erroneous addressee who lives across the street from the courthouse, and then this Court can determine whether that passes muster as well.

The point is this: the County would be *guessing* that Mr. McPhail's request would have ended up getting to the right destination. There is no proof of that in the record. What there is proof of, however, is that the **wrong address** was on the Notice of Intent to Revoke form so one thing—and *one thing only*—can be said with certainty, namely: the request would initially have gone to the **wrong recipient**. That is the point at which this Court's inquiry should end. Any diversions the County would suggest beyond that are excursions into the realm of speculation.

CONCLUSION

Based upon the foregoing authorities and arguments, Mr. McPhail respectfully requests that this Court find that a “fundamental error” occurred in his case when the arresting officer provided him with an erroneous address at which to request a hearing on the reasonableness of his alleged refusal to submit to an implied consent test.

Dated this _____ day of September, 2017.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By: _____
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 1,857 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains (1) a Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 7, 2017. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of September, 2017.

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APPENDIX

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