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COURT OF APPEALS
DISTRICT III

10-11-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appellate Case No. 2017AP001079

In the matter of the refusal of Donald Lee McPhail:

COUNTY OF DOOR,

Plaintiff-Respondent,

-vs-

DONALD LEE 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 PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE AND THE FACTS.....	1-2
I. STANDARD OF REVIEW.....	2
II. THE CIRCUIT COURT PROPERLY DENIED THE DEFENDANT’S MOTION BECAUSE THE PURPOSE OF WISCONSIN STATUTE SECTION 343.305(9)(a) WAS FULFILLED NOTWITHSTANDING THE TRANSCRIPTION ERROR ON THE NOTICE FORM.....	3-5
CONCLUSION.....	4
CERTIFICATION.....	6
APPENDIX.....	100

TABLE OF AUTHORITIES

<i>STATE v. GAUTSCHI</i> , 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 22.....	1,2,3
<i>BURNETT v. HILL</i> , 207 Wis.2d 110, 121, 557 N.W. 2d 800 (1997).....	2
Black's Law Dictionary (10th ed. 2014).....	3,4

STATEMENT OF THE ISSUE

IS A TRANSCRIPTION ERROR IN THE NUMERICAL PORTION OF THE ADDRESS FOR THE DOOR COUNTY CIRCUIT COURT A FUNDAMENTAL ERROR UNDER *STATE v. GAUTSCHI*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 22.

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 due to the fact that the defendant never requested a hearing in this case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent, the State of Wisconsin (“State”) requests neither oral argument nor publication. This case can be resolved on the briefs by applying well-established legal principles to the facts presented.

STATEMENT OF THE CASE

On Tuesday, March 14th, 2017 Deputy Mike Reeths of the Door County Sheriff’s Department came across a semi stuck in the ditch off of Highway 42/57 in Door County, Wisconsin. R.17: App. 103-104. Deputy Reeths soon made contact with the driver whom he identified by North Carolina driver’s license as Donald Lee McPhail, the appellant. *Id.* During this initial contact the appellant noted that he had consumed “some beer” and admitted he should not have been driving. *Id.*

After his initial observations Deputy Reeths administered the Standardized Field Sobriety Tests to the appellant and the appellant did poorly on those tests. R.17:App. 104. Deputy Reeths first administered the Horizontal Gaze Nystagmus test and noted observing all six of the clues associated with that test. *Id.* Deputy Reeths then attempted to administer the other standardized field sobriety tests; however, the appellant refused to complete those tests. *Id.* Deputy Reeths then administered a preliminary breath test to the appellant, the results of which were .12. *Id.*

Given his observations to this point, Deputy Reeths attempted to obtain an evidentiary blood test from the appellant. After Deputy Reeths read the appellant the “Informing the Accused” form, the appellant replied with a definitive “no”. R.17: App 105.

Given this refusal Deputy Reeths completed and issued the appellant the form entitled "Intent to Revoke Operating Privilege". R.2: App. 112-113. In the bottom of the form Deputy Reeths noted an address of "1201 S Duluth Ave". *Id.* The address of the Door County Clerk of Circuit Court is 1205 S. Duluth Avenue.

This error was the subject of the Defendant's Notice of Motion and Emergency Motion to Vacate Judgment to Dismiss Refusal Charge. R.3 App. 114-119. The circuit court denied this motion, holding the error to be technical rather than fundamental. R.18: App. 129. In so holding the circuit court noted that the Door County Sheriff's Department and the Door County Clerk of Court occupy the same building, with the Sheriff's Department being located downstairs at 1201 S. Duluth and the Clerk being located upstairs at 1205 S. Duluth. R.18: App. 130. The Court went on to find that "if the defendant had sent the notice in, it would have been received downstairs and it would have been shipped upstairs." *Id.*

The circuit court went on to further hold that the appellant was not prejudiced by the error. The circuit court also held the defendant was not prejudiced. R.18: App. 10-11. In coming to this conclusion the court noted "the defense has not established and proven...that the defendant ever sent in a request for a refusal hearing, so how could he possibly be prejudiced by this technical deficiency." *Id.*

ARGUMENT

I. STANDARD OF REVIEW

The determination as to whether or not a defect is fundamental or technical is a question of law this Court reviews *de novo*. *In re Gautschi*, 2000 WI App 274, ¶ 9, 240 Wis. 2d 83, 90, 622 N.W.2d 24, 27 (citing *See Burnett v. Hill*, 207 Wis.2d 110, 121, 557 N.W.2d 800 (1997)).

II. THE CIRCUIT COURT PROPERLY DENIED THE DEFENDANT'S MOTION BECAUSE THE PURPOSE OF WISCONSIN STATUTE SECTION 343.305(9)(a) WAS FULFILLED NOTWITHSTANDING THE TRANSCRIPTION ERROR ON THE NOTICE FORM.

When an individual suspected of operating while intoxicated or a similar offense refuses to provide a sample as requested under Wisconsin Statute Section 343.305(3)(a) law enforcement officers provide the individual with a "Notice of Intent to Revoke Operating Privilege" form. The form instructs the individual, as is required under Wisconsin Statute Section 343.305(9)(a), that due to the refusal, the individual's operating privileges may be revoked. The form goes on to instruct individuals they "...have 10 days from the date of this notice to file a request for a hearing on the revocation with the court named below."

The form puts the notice requirements of 343.305(9)(a) into effect, which require law enforcement officers to provide individuals with, along with the other information required by the statute, substantially all of the information that would allow the individual to request a hearing on the revocation by mailing or delivering a written request to the court whose address is specified in the notice. Wisconsin Statute Section 343.305(9)(a); Wisconsin Statute Section 343.305(9)(a)4. This ensures the accused is provided constitutionally sufficient notice and guarantees the individual the protections of due process. *See In re Gautschi*, 2000 WI App 274, ¶ 13, 240 Wis. 2d 83, 92, 622 N.W.2d 24, 28.

However, there have been situations where Courts have held the notice form did not provide the individual with substantially all of the necessary information. *See Gautschi*, 2000 WI App at ¶ 7, 240 Wis. 2d 89, 622 N.W.2d 27. In such cases courts look to determine whether the purpose of the statute was fulfilled. *See Gautschi*, 2000 WI App at ¶ 11, 240 Wis. 2d at 90–91, 622 N.W.2d at 27. If the purpose of the statute was fulfilled notwithstanding the error, the error is then technical. *See Gautschi*, 2000 WI App at ¶ 11, 240 Wis. 2d at 91, 622 N.W.2d at 27. If the error prevented the purpose of the statute from being fulfilled, the error is then fundamental. *Id.* Fundamental errors demand relief, while technical errors require a defendant to establish prejudice to find relief. *See Gautschi*, 2000 WI App at ¶ 11-12, 240 Wis. 2d at 91–92, 622 N.W.2d at 27–28.

The purpose of Wisconsin Statute Section 343.305(9)(a) is to give notice of what is going to be happening and where it is going to be happening. *See Gautschi*, 2000 WI App at ¶ 13, 240 Wis. 2d at 92, 622 N.W.2d at 28. In the case at hand, that purpose was undoubtedly fulfilled. While the numerical address listed on the form was incorrect, the listed address would end in the notice being sent to the correct building. As the circuit court noted, had the defendant sent the notice “it would have been received downstairs and it would have been shipped upstairs,” thus ensuring the defendant would have been provided with a notice to be heard whether the defendant mailed or personally delivered the notice.

Such a minor error also seems to have been contemplated and allowed by the statute. The statute requires the notice to contain substantially all of the information that would allow the individual to request a hearing on the revocation by mailing or delivering a written request to the court whose address is specified in the notice. Wisconsin Statute Section 343.305(9)(a); Wisconsin Statute Section 343.305(9)(a)4. Black’s Law dictionary defines the term “substantial” as follows:

[S]ubstantial *adj.* **1.** Of, relating to, or involving substance; material... **2.** Real and not imaginary; having actual, not fictitious, existence ... **3.** *Important, essential, and material; of real worth and importance* ... **4.** Strong, solid, and firm ... **5.** At least moderately wealthy; possessed of sufficient financial means ... **6.** Considerable in amount or value; large in volume or number ... **7.** Having permanence or near-permanence; long-lasting ... **8.** *Containing the essence of a thing; conveying the right idea even if not the exact details* ... **9.** Nourishing; affording sufficient nutriment ...

Black's Law Dictionary (10th ed. 2014)(emphasis added)

While not all of the details of the address were correct, the information provided to the defendant substantially informed him of where he needed to request a hearing, had he chosen to do so, and thus the purpose of the statute was fulfilled and this Court should hold that the error on the form was a technical one, thus requiring the defendant to be prejudiced to be entitled to relief.

The defense's "slippery-slope" argument must fail as it does not properly address the unique facts of this case. While it is true that someday a situation may arise where the information provided to the defendant is so erroneous that his right to due process has been compromised, this is surely not that case. Here, the circuit court correctly noted that had any notice been sent it undoubtedly would have been forwarded to the clerk and thus this argument must fail.

Given the technical the error in question, we move now to the issue of prejudice. On this issue the only logical conclusion can be that the defendant was not prejudiced as he never sent the notice to request a hearing. As the circuit court noted, given the defendant's failure to request a hearing, it would have been impossible for him to have been prejudiced by this error. R.18 App. 129-130. The defendant has presented nothing to the contrary; thus, the State argues this Court should deny the defendant's motion.

CONCLUSION

Based upon the foregoing authorities and arguments, the State respectfully requests that this Court uphold the ruling of the circuit court and hold that the error on the notice form was technical. The purpose of the statute was undoubtedly fulfilled as the form substantially informed the defendant of where he could request a hearing and the defendant never requested such a hearing.

Respectfully submitted this 9th day of October, 2017.

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Plaintiff-Respondent

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 1638 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 and 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 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 October 9th, 2017. I further certify that the brief and appendix was correctly addressed and postage was prepaid.

Respectfully submitted this 9th day of October, 2017.

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APPENDIX

In the matter of the application for Search Warrant for the person of Donald Lee
McPhail Transcript of Proceedings.....101-111

Notice of Intent to Revoke Operating Privilege.....112-113

Notice of Motion and Emergency Motion to Vacate Judgment and Dismiss
Refusal Charge in Door County Case Number 17-TR-406..... 114-119

County of Door vs. Donald Lee McPhail Motion Hearing Transcript.....120-133