STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2017AP002266

City of Crandon

Plaintiff-Respondent,

v.

Lynda Morris

Defendant-Appellant.

On Appeal From An Order of the Circuit Court
For Forest County, Case No. 17-TR-85
Honorable Leon D. Stenz, Presiding

Brief of Appellant

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On Appeal From A Judgment of the Circuit Court

For Forest County, Case No. 17-CV-2

Honorable Leon D. Stenz, Presiding

Brief of Appellant

STATEMENT OF ISSUES PRESENTED

I. Is there a due process violation when a revocation order is entered prior to the expiration of the ten day period required by S.343.305(9)(a)4 and S.343.305(10)(a)?

Not answered by the Circuit Court.

II. If so, does the Circuit Court have the inherent power to vacate a void revocation order notwithstanding a failure to request a hearing within the ten days allowed by S.343.305(9)(a)4 and S.343.305(10)(a)?

Answered no by the Circuit Court.

III. If so, must the refusal be deemed reasonable based upon the suppression decision in the underlying prosecution?

Answered yes by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF APPEAL

This is an appeal from an order of the Circuit Court of Forest County, Hon. Leon D. Stenz presiding, which denied a defense motion to vacate a revocation order based upon refusal to take a chemical test. The defendant had been exonerated in the underlying prosecution on Fourth Amendment grounds. The Circuit Court denied the motion to vacate for the reason no hearing was in fact requested within ten days even if revocation was prematurely ordered.

Lynda Morris contends the error in revoking her driver's license within the ten day window is a due process violation for the reason revocation standards must be uniformly applied. If vacated and reopened it is stipulated the refusal was reasonable based upon the Fourth Amendment decision in case no. 17-CT-29.

THE REVOCATION

Lynda Morris was arrested for driving while intoxicated at 1:45 A.M. January 27, 2017 by the Crandon Police Department (1). She refused a test at 1:54 A.M. January 27, 2017. This was a third offense (1).

Cash bond was $850 which was posted January 31, 2017 (5-12). On January 30, 2017 the Notice of Interest to Revoke Operating Privilege was filed with the Clerk of Circuit Court (1).

The ten days to file a request for hearing with the Clerk of Court would begin the day after service, on January 28, 2017. The tenth day to file that request would be February 6, 2017.

On February 6, 2017 there is a CCAP description of a finding the refusal was not reasonable (5-6). This is a Clerk's entry and there was no actual court hearing. On February 6, 2017 the Conviction Status Report (3) was filed. This filing date of February 6, 2017 is cooborated by the pagination and CCAP entry (5-6).

Morris did not file a request for a hearing on or before the close of business February 6, 2017. The actual revocation order was made before the close of business on

February 6, 2017. The order (3) preceded the deadline to file the objection by a fraction of a day.

On April 18, 2017 the State filed OWI 3rd changes as case no. 17-CT-29 (5-12). A suppression hearing on July 6, 2017 resulted in a Fourth Amendment ruling in favor of Morris (5-11). The State later dismissed that case (5-11).

MOTION TO VACATE

The criminal charges were dismissed however the revocation is a separate file. As a result even though she prevailed on Fourth Amendment grounds her license was still revoked. It is undisputed that Fourth Amendment decision is equally applicable to the revocation proceedings (7) (16-6:20-22:1).

Morris computed the ten day window and alleged the revocation order was entered prior to the expiration of the tenth day. As a result, the driver's license was ordered revoked without strictly complying with the ten day interval (5-2).

Morris argued there is a due process violation when a driver's license is revoked due to unequal application of a mandatory standard (5-2). Since Morris was actually innocent, this due process violation was material and rendered the revocation void (5-1).

The hearing on Morris's motion to vacate (6) was held September 28, 2017 (16). The motion to vacate was denied for the basic reason no request for hearing was actually filed within ten days (16-5:17-24). All concerned agreed had there been a request filed within ten days, she would have prevailed on Fourth Amendment grounds (16-6:20-22).

This timely appeal (11) is from the order denying the motion (9).

ARGUMENT

I. ORDERING REVOCATION PRIOR TO EXPIRATION OF THE TEN DAY OBJECTION PERIOD REQUIRED BY S.343.305(9)a)4 AND S.343.305(10)(a) VIOLATED DUE PROCESS.

The motorist has ten days pursuant to S.343.305(9)(a)4 to request a refusal hearing. The first day for Morris commenced January 28, 2017; the day after service of the notice. S.990.001(4)(a). The tenth day was February 6, 2017. Since revocation was ordered during the final day to object, the response period was shortened by a fraction of a day.

Where, as here, strict compliance with a time limit applies; an error of law occurs even if the time limit is shortened only by hours. In re New River Dry Dock, 461 B.R. 642, 646 (USBC-SD-Fla 2011).

When revocation was ordered during February 6, 2017 that order could not have been based upon S.343.305(10)(a) since ten days had not yet expired. By definition, this revocation order was based upon an unascertainable, unwritten standard and violated due process. Best v. State, 99 Wis. 2d 495, 503-504, 299 NW2d 604 (Ct. App. 1980). When an order is entered contrary to due process, that order is void. Wengerd v. Rinehart, 114 Wis. 2d 575, 587, 338 NW2d 861 (Ct. App. 1983).

The revocation order in this case is void; however the motorist did not request a hearing within ten days. Morris must establish the Circuit Court had the competence to consider a post judgment motion in the absence of a timely request for hearing.

II. THE INHERENT JUDICIAL POWER TO CORRECT ERRORS IS NOT RESTRICTED BY S.343.305(10)(a).

The Circuit Court's position the mandatory revocation in the absence of a timely hearing request deprives the Circuit Court of the ability to reopen a default revocation order is substantially correct. State v. Bentdahl, 351 Wis. 2d 739, 754, 840 NW 2d 704, 2013 WI 106 ¢33. In Bentdahl, the Supreme Court interpreted the mandatory revocation order based upon a defaulted appearance by the motorist as depriving the motorist of the

ability to set aside the default order, unless there was a plea to the underlying charge. Id at ¶35.

The Supreme Court deferred for later decision the applicability of unusual circumstances. Id at ¶34 n.10 second paragraph. Bentdahl, did not address the situation at bar where the due process violation occurs prior to the default by the motorist.

The applicability of the implied consent law to the competency of a Circuit Court to subsequently correct a due process violation represents a question of law. State v. Bentdahl, 351 Wis. 2d 739, 747, 840 NW 2d 704, 2013 WI 106 ¶17. There is a conflict between the implied consent law and the inherent power of the courts when there is a proposed limit to the exercise of that implied power to a specific frame. There is no time limit on the inherent power of the court to attack a void order. Neylan v. Vorwald, 124 Wis. 2d 85, 98, 368 NW2d 648 (1985).

Time limits in traffic court imposed by the legislature do not apply in the context of inherent power of the court to vacate a void order. City of Kenosha v. Jensen, 184 Wis. 2d 91, 98, 516 NW2d 4 (Ct. App. 1994).

The Circuit Court's position inherent authority was lacking to address a motion attacking a void order was incorrect. Normally the Circuit Court would be sustained for the reason reopening and vacating a void order would require a rehearing with no defense on the merits of record. Judicial economy will sustain refusal to reopen a default judgment, which after further proceedings, would have to be re-entered. Johns v. County of Oneida, 201 Wis. 2d 600, 606, 549 NW2d 269 (Ct. App. 1996).

Morris must establish maintaining the revocation order is the result of an erroneous exercise of discretion, Johnson v. Cintos Corp. No. 2, 339 Wis. 2d 493, 505, 811 NW2d 756, 2012 WI 31¶22 (2012).

III. REVOKING MORRIS'S DRIVER'S LICENSE VIOLATES THE FOURTH AMENDMENT.

One complete defense to a revocation notice is if the underlying arrest violates the Fourth Amendment. State v. Anagnos, 341 Wis. 2d 576, 595, 815 NW2d 675 2012 WI 64 ¶43. It is undisputed Morris was arrested in violation of her Fourth Amendment rights. Failure to vacate the default revocation order was an erroneous exercise of discretion.

The Department of Transportation cannot revoke a driver's license when a motorist refused a chemical test after being illegally arrested. Id at ¶43.

Morris is entitled to use of the suppression decision in case no. 17-CT-29 of July 6, 2017 with full force and effect in this case. Crowall v. Heritage Mut. Ins. Co., 118 Wis. 2d 120, 128, 346 NW2d 327 (Ct. App. 1984).

Conducting a contested hearing after remand would serve no purpose based upon the state of the record. Normally the remedy for correcting a void order is to vacate the order and remand for further proceedings. City of Kenosha v. Jensen, 184 Wis. 2d 91, 98, 516 NW2d 4 (Ct. App. 1994). Here, further fact finding is unnecessary and Morris is entitled to an order pursuant to S.343.305(9)(a)5.a. and S.343.305(9)(d) denying further revocation.

CONCLUSION

Lynda Morris respectfully requests the revocation order of February 6, 2017 be vacated and remanded with directions to deny further revocation pursuant to S.343.305(9)(a)5a and S.343.305(9)(d).

Respectfully submitted this 26th day of February, 2018.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is eight (8) pages.
Dated: February 26, 2018

Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of §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: February 26, 2018

Kennedy Law Office

Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF MAILING

I certify that this brief together with a separate appendix, was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 26th of February, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

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