

RECEIVED  
09-08-2020  
CLERK OF WISCONSIN  
COURT OF APPEALS

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

---

Appeal No. 2020 AP 31  
Circuit Court Case No. 2019 TR 5045

---

VILLAGE OF LOMIRA,  
Plaintiff-Respondent,

v.

PHILLIP N. BENNINGHOFF,  
Defendant-Appellant.

---

BRIEF OF PLAINTIFF-RESPONDENT

---

ON APPEAL FROM THE CIRCUIT COURT  
FOR DODGE COUNTY, BRANCH 1,  
THE HONORABLE BRIAN A. PFITZINGER PRESIDING

---

Respectfully submitted,

Elbert & Wolter, Ltd.  
Jacquelyn L. Wolter, SBN: 1052322

Attorney for PLAINTIFF-RESPONDENT,  
Village of Lomira

210 E. Center Street  
P.O. Box 203  
Juneau, WI 53039-0203  
(920) 386-2505

TABLE OF CONTENTS

Table of Authorities . . . . . 2

Statement of the Issues: . . . . . 3

    I.    WHETHER THE CIRCUIT COURT ERRED WHEN IT  
          DENIED THE DEFENDANT’S MOTION FOR RELIEF FROM  
          JUDGMENT AND SUBSEQUENT MOTION TO RECONSIDER.  
          . . . . . 3, 7

    II.   WHETHER WIS. STAT. §343.305 VIOLATES THE  
          FOURTH AMENDMENT OR FOURTEENTH AMENDMENT. . .  
          . . . . . 3, 9

Statement on Oral Argument . . . . . 4

Statement on Publication . . . . . 4

Statement of the Case . . . . . 5

Statement of the Facts . . . . . 6

Standard of Review . . . . . 7

Argument . . . . . 7-12

Conclusion . . . . . 12

Certification of Brief . . . . . 13

Certification of Electronic Filing . . . . . 14

Appendix Table of Contents . . . . . A-Ap. 101

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Mitchell v. Wisconsin, \_\_\_ U.S. \_\_\_, 139 S.Ct. 2525, 204 L.

Ed. 2d. 1040. . . . . 9

Wisconsin Supreme Court Cases

State v. Anagnos (In re Anagnos), 341 Wis.2d 576, 815 N.W.2d 675, 2012 WI 64 (Wis. 2012). . . . . 11, 12

State v. Nordness, 128 Wis.2d 15, 381 N.W.2d 300 (Wis. 1986). . . . .7, 10, 11

Village of Elm Grove v. Brefka, 2013 WI 54, 348 Wis.2d 282, 832 N.W.2d 121 (Wis. 2013). . . . . 7, 8, 9

Statutes

Wis. Stat. § 343.305 (2015-2016) . . . . 3, 7, 8, 9, 10, 11

Wis. Stat. § 346.63 (1)(a) and (b) (2015-2016) . . . . . 8

STATEMENT OF ISSUES

- I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT AND SUBSEQUENT MOTION TO RECONSIDER.

Answer: NO.

- II. WHETHER WIS. STAT. §343.305 VIOLATES THE FOURTH AMENDMENT OR FOURTEENTH AMENDMENT.

Answer: NO.

STATEMENT ON ORAL ARGUMENT

The plaintiff-respondent does not request oral argument of the issues presented in this case, but stands ready to do so provided this Court believes that oral argument would be useful in the exposition of the legal arguments presented.

STATEMENT ON PUBLICATION

The plaintiff-respondent does not request the decision of this Court be published.

STATEMENT OF CASE

On August 31, 2019, the defendant had contact with an officer from the Village of Lomira. Said contact resulted in the defendant receiving a Notice of Intent to Revoke Operating Privilege. (R. 1) (A-Ap 102).

After the required ten-day time limit, on September 30, 2019, the defendant requested a refusal hearing. (R. 7) (A-Ap 103). On October 22, 2019, the defendant filed a Motion for Relief from Judgment. (R. 9) (A-Ap 104-106). The circuit court denied the motion on October 24, 2019. (R. 11) (A-Ap 107).

On November 12, 2019, the defendant filed a Motion to Reconsider. (R. 12) (A-Ap 108-114). The circuit court heard oral arguments on January 3, 2020. On January 21, 2020, the court issued a written decision denying the defendant's motion. (R. 23) (A-Ap 115-116).

STATEMENT OF THE FACTS

The record does not contain any testimony related to the incident. While the defendant, in his motions and his brief, continues to assert his "side of the story", no testimony was given by the defendant thereby subjecting him to cross-examination. Further, the circuit court did not hear any testimony from the officer due to the defendant's default. Therefore, the only uncontested facts in the record are those of the procedure cited previously.

### STANDARD OF REVIEW

Whether the circuit court has competency to hold a refusal hearing, when it is undisputed that the defendant has failed to meet the ten-day deadline of §343.305(9)(a)4, is a question that this Court reviews independent of the circuit court. Village of Elm Grove v. Brefka, 2013 WI 54, ¶13, 348 Wis.2d 282, 290, 832 N.W.2d 121, (Wis. 2013). Further, the questions related to the interpretation, application, and construction of Wis. Stat. §343.305 are questions of law that this Court decides independently. Id. ¶14; State v. Nordness, 128 Wis.2d 15, 24, 381 N.W.2d 300 (Wis. 1986).

### ARGUMENT

- I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT AND SUBSEQUENT MOTION TO RECONSIDER.

"Section 343.305, Stats., known as the implied consent law, states that any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given his consent for chemical testing when requested to do so by a law enforcement officer." Nordness, 128 Wis.2d at 24.

Wisconsin Statutes §343.305 states in relevant part:



(3) (a) "Upon arrest of a person for violation of s. 346.63(1)...a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine..."

(9) (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 notice of intent to revoke the persons operating privilege shall contain...that the person may request a hearing on the revocation within 10 days..."

(9) (a) (5) "That the issues of the hearing are limited to: a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol...and whether the person was lawfully placed under arrest for violation of s. 346.63 (1)..."

(10) (a) "If the court determines under sub. (9) (d) that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court shall proceed under this subsection."

The defendant does not dispute that he failed to request a refusal hearing in the required ten-day time period. The same facts were present in Brefka; the defendant failed to observe the statutory time limits for requesting a refusal hearing. Brefka, 2013 WI 54 at ¶1. In Brefka, the Wisconsin Supreme Court concluded that because Brefka did not file a request for a refusal hearing within the required ten-day time

limit, the circuit court lacked competency to hear his request to extend the time limit. "The ten-day time limit is a mandatory requirement that may not be extended due to excusable neglect." Id. ¶44.

II. WHETHER WIS. STAT. §343.305 VIOLATES THE FOURTH AMENDMENT OR FOURTEENTH AMENDMENT.

The defendant, in his brief, argues that "Wis. Stat. §343.305 violates the Fourth Amendment with respect to warrantless invasive blood testing" and judicial review thereof. In making his argument, the defendant relies on Mitchell v. Wisconsin, \_\_\_ U.S. \_\_\_, 139 S.Ct. 2525, 204 L.Ed.2d 1040. The defendant's argument is displaced. A warrantless blood draw was not taken because the defendant refused. Further, Mitchell does not apply. Specifically, the Mitchell Court wrote, "Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test." Id. at 2531. In the instant case, the defendant was not unconscious, but rather was awake and refused the request for a blood test.

Then, the defendant argues that he was denied a due process hearing regarding the lack of subject matter jurisdiction as it relates to whether or not the defendant

operated on a highway. Due process requires that a person have notice of the offense and the opportunity to be heard at a meaningful time and in a meaningful manner. Nordness, 128 Wis.2d at 34.

In the instant case, the defendant argues that he was not driving on a highway. This is the same type of argument alleged in Nordness. Both Nordness and the defendant allege an element of the underlying Operating under the Influence offense is lacking. Just as in Nordness, the defendant was afforded a hearing. However, here the defendant failed to take advantage of the hearing.

The facts in Nordness are strikingly similar to the facts in the instant case. In Nordness, Nordness argued he was denied the opportunity to present evidence that he was not the actual operator of the motor vehicle, and therefore, he was denied due process of law because he effectively would be denied a forum in which to defend himself. The court disagreed and determined that the issues as listed within Wis. Stat. §343.305(3)(b)5, do not infringe upon a defendant's due process rights. Nordness, 128 Wis.2d at 29. The Court went on to say,

"It is no defense for Nordness to show in a revocation hearing that he was not the actual driver of the stopped car. Simply because the legislature has denied him this defense by

limiting the issues at a revocation hearing does not deny him his due process rights. Nordness still has that defense available to him in the underlying prosecution for his driving while under the influence of an intoxicant. Should the legislature desire to broaden the scope of a revocation hearing, it certainly has that ability." Id. at 34.

Further, "Nordness was extended a prerevocation hearing and was extended the general opportunity to present evidence and cross-examine the arresting officer. Restricting the scope of a revocation hearing to the issues listed in section 343.305(3)(b)5 does not deprive him of due process." Id. at 34.

In the instant case, the defendant was afforded a hearing. A hearing at which he could have argued the officer did not have probable cause to arrest him. He failed to do so.

Going one step further, the Village asserts, that had the defendant requested a refusal hearing, he would have been able to assert his claim, of not operating on a highway, under the purview of the probable cause to arrest analysis afforded at a refusal hearing. The Supreme Court has held that Wis. Stat. §343.305(9)(a)5 a does not limit the defendant to contesting whether the officer had probable cause to believe the defendant was operating while under the influence of an intoxicant. State v. Anagnos (In re

Anagnos), 2012 WI 64 ¶42, 341 Wis.2d 576, 815 N.W.2d 675 (Wis. 2012). "The language of the statute provides that a defendant may also contest whether he was lawfully placed under arrest." Id. As part of this inquiry, the circuit court may entertain an argument that the arrest was unlawful because the traffic stop that preceded it was not justified by either probable cause or reasonable suspicion." Id.

#### CONCLUSION

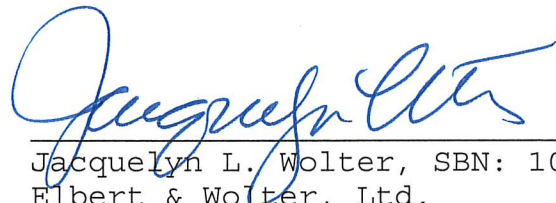
For the reasons stated herein, the Village asserts the circuit court's ruling should be upheld.

Dated this 10<sup>th</sup> day of August, 2020.

Signed,

**ELBERT & WOLTER, LTD.**

By:



Jacquelyn L. Wolter, SBN: 1052322  
Elbert & Wolter, Ltd.  
Attorney for Plaintiff-Respondent,  
Village of Lomira  
210 E. Center Street  
P.O. Box 203  
Juneau, WI 53039-0203  
(920) 386-2505

CERTIFICATION

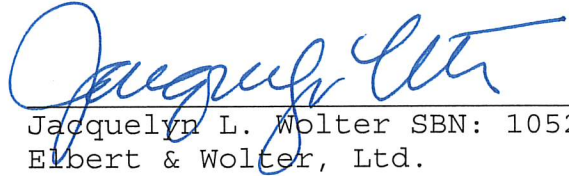
I certify that this brief meets the form and length requirements of Wis. Stat. §809.19(8)(b) & (c) (2016-2017) in that it is Desktop Publishing or Other Means (monospaced font, 10 characters per inch, double spaced, a 1.5 inch left margin, and all other margins 1 inch). The length of the brief is 12 pages.

Dated this 10th day of August, 2020.

Signed,

**ELBERT & WOLTER, LTD.**

By:



Jacquelyn L. Wolter SBN: 1052322  
Elbert & Wolter, Ltd.  
Attorney for Plaintiff-Respondent,  
Village of Lomira  
210 E. Center Street  
P.O. Box 203  
Juneau, WI 53039-0203  
(920) 386-2505

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.19(12)(f) -

ELECTRONIC BRIEF CERTIFICATION.

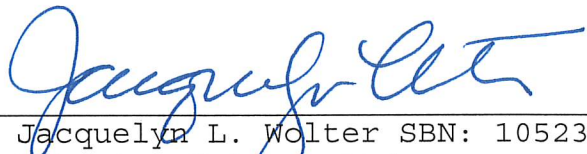
I hereby certify that I have submitted an electronic copy of the Plaintiff-Respondent's Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12)(f). I further certified the Defendant-Appellant was served with an electronic copy of this Brief via the Wisconsin Appellate Electronic filing system.

Dated this 10<sup>th</sup> day of August, 2020.

Signed,

ELBERT & WOLTER, LTD.

By:



Jacquelyn L. Wolter SBN: 1052322  
Elbert & Wolter, Ltd.  
Attorney for Plaintiff-Respondent,  
Village of Lomira  
210 E. Center Street  
P.O. Box 203  
Juneau, WI 53039-0203  
(920) 386-2505