RECEIVED
09-24-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP475

In the Matter of the Refusal of Jack Ray Zimmerman, Jr.:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JACK RAY ZIMMERMAN, JR.,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING, TRIAL COURT CASE NO. 19-TR-2191

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS AUTHORITY PURSUANT TO WIS. STAT. § 809.83(2) AND SUMMARILY REVERSE THE DECISION OF THE LOWER COURT FOR THE STATE'S FAILURE TO TIMELY FILE ITS BRIEF AS ORDERED.

A. Procedural History of The Instant Matter.

The Defendant-Appellant in the instant case, Mr. Zimmerman, timely filed his initial brief on June 2, 2020. Based upon this filing date, the Plaintiff-Respondent, the State of Wisconsin, had thirty days within which to file its brief. Wis. Stat. § 809.19(3)(a)1. (2019-20). The State failed to meet its obligation in this regard, and by Order dated July 15, 2020, this Court directed the State to file its brief no later than July 22, 2020.

Despite being ordered to do so, the State *again* failed to file a brief. This Court then issued a second Order dated August 4, 2020, requiring the State to file its brief no later than September 8, 2020. This Order indicated that the Court would decide the issue raised by Mr. Zimmerman without consideration of the State's argument if its brief was not timely filed by the new date ordered.

Remarkably, the State *yet again* failed to comply with the Court's Order, filing its brief two days late on September 10, 2020. Throughout the pendency of this matter, the State submitted no motion for enlargement of the time within which to file its brief nor did it offer any explanation whatsoever for its failure to comply with multiple orders by this Court. Thus, there is no apparent "reasonable explanation" which can be attributed to the State's disregard for its statutory obligation to file its brief within thirty days, nor is there any explanation for its more egregious indifference to this Court's multiple orders.

B. Statement of the Law.

Wisconsin Statute § 809.83(2) provides in relevant part that the "[f]ailure of a person to comply with a court order or a requirement of these rules . . . is grounds for . . . summary reversal . . . ." Wis. Stat. § 809.83(2) (2019-20).

In cases where a respondent fails to file a brief, this court has the authority to issue an order of summary reversal. *See State ex re. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 259-60, 500 N.W.2d 339 (Ct. App. 1993) (summary reversal is an appropriate sanction for a respondent's violation of briefing requirements). Whether to grant summary reversal as a sanction against a party who fails to file a brief is a decision left to this Court's discretion. *See Raz v. Brown*, 2003 WI 29, ¶ 14, 260 Wis. 2d 614, 660 N.W.2d 647.

In *State v. Smythe (In re Smythe)*, 225 Wis. 2d 456, 592 N.W.2d 628 (1999), the Wisconsin Supreme Court set forth the standard by which summary reversal is appropriately imposed.[1] *Smythe* involved a circumstance in which an attorney with a reputation for filing motions requesting an enlargement of time to file his briefs, and for filing briefs beyond their time limit, had requested an extension over the Christmas holiday for filing his brief because the attorney assigned responsibility for Smythe's appeal was on vacation. *Id.* at 458-60. The court of appeals, based at least in part upon the attorney's past history with the court, denied his request both initially and upon a motion for reconsideration. *Id.* at 460-62.

The *Smythe* court remanded the case to the court of appeals for several reasons. Chief among these reasons was that the *Smythe* court could not impute any bad faith or complicity on Smythe's part in the attorney's prior conduct. *Id.* at 470-71. In reaching its decision, the *Smythe* court stated that the abrupt termination of a case—either by summary reversal or dismissal—is appropriately imposed when "'bad faith or egregious conduct can be shown on the part of the non-complying party.'" *Id.* at 469, quoting *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W.2d 859 (1991), citing *Trispel v. Haefer*, 89 Wis. 2d 725, 279 N.W.2d 242 (1979).

For the reasons set forth below, Mr. Zimmerman proffers that the State's actions in this case merit summary reversal because they are manifestly demonstrative of bad faith and/or egregious conduct.

---

[1]While the *Smythe* court specifically addressed the standard to be applied for imposing "dismissal" of an appeal, the *Raz* court extended the same logic to the imposition of summary reversal as a sanction.

C. The State's Conduct Was "Egregious."

To be clear, this case is distinguishable from *Smythe* in one very important way: the delinquent attorney in *Smythe* at least filed a request for an enlargement of the time within which he could file his brief, and whether appropriate or not, he provided *reasons* for his request. This case is not one in which any fathomable reason has been provided by the State for its (1) disregard of a statutorily-imposed deadline, (2) ignoring an initial order of this Court to file its brief by a date certain, and (3) unabashed contempt for a second deadline by which to file its brief.

Even if the State failed to file a motion for an extension of time to file its brief, one would think that when it did finally submit a brief, it would have submitted the same with a cover letter which, at minimum, should have contained an apology to this Court and the Appellant, if not at least some semblance of an explanation or excuse for its (mis)conduct.

Mr. Zimmerman proffers that such appalling deportment demonstrates nothing but an unqualified contempt for the authority of this Court and the rules of appellate procedure. For its conduct to have gone so far afield of the rules *without explanation* is patently demonstrative of "egregious conduct"—if not bad faith—as delineated by the *Smythe* court. If this conduct is not demonstrably "egregious," then Mr. Zimmerman must ask how far a party would need to go to demonstrate egregious conduct? Would four orders need to be disregarded? Five? Would the offending party have to expressly "sling mud" at the authority of this Court in its brief? Mr. Zimmerman posits that it is absurd to think things would need to get that far out of hand because the bar has already been set at a reasonable and rational level by the misconduct of the State in this case. Ignoring a statute, two orders of this Court, and delaying the appeal by a full **sixty-eight (68) days** beyond the day its brief was due, *without explanation or motion*, is sufficient proof of egregiousness.

D. The State's Conduct Has Prejudiced Mr. Zimmerman.

Apart from the foregoing, Mr. Zimmerman also urges this Court to consider the additional factor that he has been prejudiced by the inexplicable delay caused by the State.

Substantial injury to Mr. Zimmerman has already occurred in the form of financial, employment, and reputational costs, not to mention the anxiety associated with the unnecessary delay caused by the State in this matter. For

example, Mr. Zimmerman's self-employment as an airline consultant is entirely dependent upon his reputation. Business is never as robust for those individuals who have potential clients who first research the reputation of their prospective consultants and discover that they have pending, unresolved legal matters. This will only change, if at all, at such time as this Court can render a decision, which decision has been unreasonably delayed by the State.

Additionally, Mr. Zimmerman's ability to defend his case has been affected by the delay. While he awaits a determination by this Court regarding whether the judgment on the refusal charge will be sustained or reversed, the companion charge of operating a motor vehicle while intoxicated "hangs in limbo" because this Court's judgment will affect whether the refusal will be able to be used against him at trial on the OWI as proof of consciousness of guilt. This delay will only cause his witnesses' memory to fade over time. The more temporally removed from the events of this case his witnesses become, the less likely they are to remember the important details of the evening. This is prejudicial and comes about solely as a result of the State's conduct.

Likewise, delay has only served to increase Mr. Zimmerman's anxiety as he continues to seek justice in an unknown future delayed not by his conduct, but rather, by a government which is ostensibly established to secure and protect the rights of the individual. His faith that "the system" serves the ends of justice is deeply shaken by the incomprehensible and baffling conduct of the State.

While not a formal part of the *Smythe* test, Mr. Zimmerman believes some degree of consideration ought to be given to how the State's unconscionable delay in prosecuting this appeal has prejudiced him for all of the foregoing reasons.

II. CONVICTIONS FOR VIOLATIONS OF WIS. STAT. §§ 940.09(1) & 940.25(1) WHICH OCCURRED PRIOR TO JANUARY 1, 1989 WERE NOT INTENDED TO BE COUNTED AS PENALTY ENHANCERS IN OPERATING WHILE INTOXICATED RELATED CASES.

The State argues that changes to Wisconsin's prior offense counting provisions made by 1999 Wis. Act 109 evidence an intent on the part of the legislature to separate the counting of convictions for violations of Wis. Stat.

§§ 940.09(1) & 940.25(1) from the manner in which all other prior alcohol-related violations are counted. State's Brief at pp. 5-7.

The foregoing argument must fail, however, because it ignores the principle set forth in *State ex rel. Sauk Cty. Dist. Attorney v. Gollmar*, 32 Wis. 2d 406, 145 N.W.2d 670 (1966), and its predecessor cases which hold that repeals of law by implication ***are not favored***. *Id.* at 412, citing *Pattermann v. Whitewater*, 32 Wis. 2d 350, 350, 145 N.W.2d 705 (1966).

Quoting *Kienbaum v. Haberny*, 273 Wis. 413, 78 N.W.2d 888 (1956), the *Gollmar* court stated that "'[t]he doctrine of implied repeal is not favored, and an earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together.'" *Gollmar*, 32 Wis 2d at 413, quoting *Kienbaum*, 273 Wis. at 420. The requirement that the party moving to disregard a portion of a prior enactment establish *manifest inconsistency* ***and*** *repugnance* to the later act is indeed a very high burden and evidence of the strength of the *presumption* that the doctrine of implied repeal *is not favored.*

The *Kienbaum* court observed that when two acts of the legislature can stand together, they are not manifestly repugnant to one another. *Kienbaum*, 273 Wis. at 421. Such is the case between § 9348(2f) of 1997 Wis. Act 237—the provision of the law which excludes the counting of offenses which occurred prior to January 1, 1989—and the later Act 109 which created the "lifetime" counting of prior violations of §§ 940.09(1) & 940.25(1) in that Mr. Zimmerman has offered this Court an analysis of the law which does harm to neither Act.

As Mr. Zimmerman proffered in his initial brief, Act 109 *never expressly changed* the rule regarding counting of convictions for violations which occurred prior to January 1, 1989. The absence of any express change to the "starting date" for the counting of prior convictions makes perfect sense if one considers that violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule expressed in § 346.65(2)(am)2.,[2]

[2]This penalty provision provides that if an individual has one prior violation which would be counted under § 343.307(1), and that violation occurred more than ten years prior to the violation for which the individual is currently being prosecuted, it may not be counted as a penalty enhancer.

but rather, were to be counted for the person's lifetime *beginning with the date of January 1, 1989*.

Because the foregoing interpretation does no harm to any provision of either Act 237 or Act 109, and furthermore, because the State has failed to demonstrate any manifest inconsistency and repugnance by interpreting the law in this fashion, its argument must fail and this Court should conclude that Mr. Zimmerman's interpretation of the law is the correct one.

III. THE STATE APPLIES THE WRONG TEST TO THE ISSUE OF WHETHER MR. ZIMMERMAN WAS PREJUDICED BY DEPUTY CONERY'S INFORMING HIM THAT HE WAS A "THIRD OFFENDER."

The State expends significant energy in its brief attempting to convince this Court that the appropriate analysis for determining whether the misinformation provided to Mr. Zimmerman regarding the number of offense with which he was going to be charged ought to be analyzed under the rubric of the three-pronged test first set forth in *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995). State's Brief at pp. 7-10. This argument is a red-herring diversion from the correct analysis which should be applied in this case. Because the misinformation supplied to Mr. Zimmerman related specifically to the *penalties* which he was facing, the appropriate analysis is one which is conducted under *State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989).

Wilke involved a case in which the defendant was not provided with correct information regarding the *penalties* which could be imposed against her. Even though there was no apparent link between the misinformation and Wilke's election to refuse chemical testing, the court nevertheless declined to permit the state to revoke her operating privilege for the alleged refusal. *Id.* at 652. Similarly, in *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997), *overruled on other grounds, Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, the court of appeals found that a circuit court's requirement that the defendant demonstrate prejudice with respect to how a misstatement of applicable penalties affected his decision to submit to an implied consent test was error. *Schirmang*, 210 Wis. 2d at 331. Because Mr. Zimmerman was not provided with accurate information regarding the offense for which he was being detained and arrested, the *Quelle* test, as the State avers, is not applicable to the facts of this case. This Court should,

therefore, find that the misstatement made by Deputy Conery regarding the number of offense Mr. Zimmerman was facing precludes the State from revoking Mr. Zimmerman's license for his allegedly improper refusal.

CONCLUSION

Based upon the reasons set forth herein, Mr. Zimmerman requests that this Court summarily reverse the decision of the circuit court as a sanction for the State's manifestly egregious conduct in failing to timely file its brief in this matter. Alternatively, Mr. Zimmerman respectfully requests that this Court remand this matter to the circuit court with directions to strike his convictions for violations which occurred prior to January 1, 1989 as penalty enhancers and enter an order finding that he did not improperly refuse to submit to an implied consent test, and further order that his operating privilege be reinstated.

Dated this 21st day of September, 2020.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By: _____

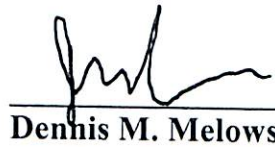
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

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 2,477 words. I hereby certify that I have submitted an electronic copy of this brief 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 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 22, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 22nd day of September, 2020.

MELOWSKI & ASSOCIATES, LLC



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