STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Appeal Case Nos. 2020AP1421 & 2020AP1422
Circuit Court Case Nos. 2018TR001179 & 2018TR001910

FOND DU LAC COUNTY,

Plaintiff-Appellant,

v.

JOHN A. HETTWER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER TO DISMISS WITH PREJUDICE ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE ROBERT J. WIRTZ, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

1) Did the County have a reasonable belief that blood work could be admitted at trial when the phlebotomist that drew the blood was not present?

2) If the County's belief was not reasonable, is the County's failure to have the phlebotomist present for trial amount to egregious or bad faith conduct?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County requests neither oral argument nor publication. The issues presented involve the application of well-settled legal principles to the facts.

STATEMENT OF THE CASE/FACTS

The procedural posture of this case is somewhat convoluted. This is an appeal to a motion to reconsider a motion to dismiss without prejudice which was made in response to an oral motion in limine.

John A. Hettwer was charged with Operating While Under the Influence and Operating With a Prohibited Alcohol Content (A. App. 1 & 2). On the morning of the Jury Trial on July 11, 2019, during a break in proceedings on the morning of trial, ADA Davis was informed that the phlebotomist, Brooke Dill, was unavailable to come to the trial due to her child being sick and not having a babysitter (A.App. 3, CR 29:8-13). The County requested for the phlebotomist to appear by phone, which defense objected to. (A.App. 3, CR 30:2). The Court specifically stated

> I don't think that this is the fault of the prosecution, nor do I think that it's -- nor do I think it's something that they have control over, which they could have done something about, you know, prior to getting here. It's not like they - - they did something wrong. I actually think that a sick child is a sufficient reason for a witness not to be present. I accept the State's representation that that's why Brooke Dill isn't here.

Defense also stated that they agreed that the County did not have any fault in this. (A.App. 3, CR 32:2-3).

The County again asked for phone testimony, but it was denied, and the court declared a mistrial indicating that the witness' reason for not being here was "fair and legitimate."(A.App. 3, CR 32:9-25). The case was then rescheduled for Jury Trial on January 23, 2020 (A.App 3, CR 33:20).

On the morning of the January 23, 2020 jury trial ADA Lindo received an email from support staff in the DA's Office that Ms. Dill was out of the country getting married,

and was again unavailable to testify (A.App. 4, CR:8:1-3). ADA Lindo indicated he found out about the witness availability that morning, but it was unclear when the unavailability was sent to the DA's Office. (A.App. 4, CR 13:5-16). Recognizing that there had been an issue with Ms. Dill's availability at the last trial, ADA Lindo indicated that he planned to proceed to trial without Ms. Dill and has done OWI trials without the phlebotomist before (A.App. 4, CR 8:3-11). Defense counsel indicated that they objected to an adjournment, and were ok with proceeding with the trial, but they did not think the prosecution could make their case without the phlebotomist (A.App. 4, CR 9:17-23). ADA Lindo indicated he preferred to proceed with the trial that morning, but asked for the court to make a determination regarding the blood results before the jury was impaneled (A.App. 4, CR 13:21-14:4). ADA Lindo argued that the blood result was admissible under Wis. Stat. 343.305(5), indicating that the statute simply requires the blood to be drawn by phlebotomist, or someone authorized to draw the blood and that the deputy witnessed this blood draw and could testify to it to lay foundation (A.App. 4, CR 14:19-15:3). ADA Lindo further argued that not having the phlebotomist would go towards weight of the evidence, not admissibility (A.App. 4, CR 15:3-7). Deputy District Attorney Edelstein argued that under Wis. Stat. 343.305(5) and 885.235 that the test results themselves are admissible, and that the issue is a chain of custody issue which is always considered to be weight of the evidence as opposed to admissibility (A.App 4, CR 19:6-18).

Defense counsel argued that the phlebotomist needed to be here to testify regarding her qualifications (A.App 4, CR 15:10-13).

The Court agreed with defense counsel that the State could not establish foundation for the blood results without the phlebotomist (A.App. 4, CR 16: 3-9). The Court further found Ms. Dill's nonappearance was without justification (A.App. 4, CR 16: 18-20).

ADA Lindo indicated that if the Court planned to dismiss the case with prejudice he would proceed on the OWI by itself, however if the Court planned to dismiss without prejudice that the prosecution would refile the case (A.App. 4, CR 17:14-20). The Court dismissed the case without prejudice and assessed the prosecution with jury fees (A.App. 4, CR 22:18-23:7).

On January 23, 2020, defense counsel filed a motion to reconsider dismissing the citations without prejudice and to dismiss the citations with prejudice (A.App. 5). ADA Lindo filed a response to this motion on March 5, 2020 (A.App 6). Arguments were made at a motion hearing on July 10, 2020 (A. App. 7). Defense counsel argued that the State was negligent in not procuring the phlebotomist, and that this negligence amounted to failure to prosecute (A. App. 7, CR: 4:23-5:9). Further defense counsel changed its position

regarding the 2019 Jury trial, indicating that the prosecution was unprepared due to the phlebotomist not being present (after previously agreeing that this was not the fault of the prosecution) (A.App. 7, CR 5:5). The State argued that the State was prepared to go to trial without the phlebotomist, because compliance with Wis. Stat. 343 is not the only way to admit blood test results (A.App. 7, CR 24:1-7, 27:15-24). The State argued that this belief was based on the language of the statute and persuasive case law, and therefore the State's belief that it could go to trial was justified. The Court granted defense counsel's motion to reconsider and dismissed the citations with prejudice (A.App 7, CR 29:11-15; A.App. 8).

The ruling against the admissibility of the blood test evidence on the morning of the trial was unexpected, and constitutes a clear and justifiable excuse for not prosecuting. Further, if the Court planned to dismiss the case with prejudice, Attorney Lindo was prepared to proceed on just the OWI charge. Attorney Lindo did not proceed on just the OWI charge, after relying on the Court's ruling that the case could be dismissed with prejudice.

STANDARD OF REVIEW

Dismissal for failure to prosecute is largely within the circuit court's discretion. *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis.2d 381, 392, 497 N.W.2d 756, 760 (Ct. App. 1993). The standard of review is therefore deferential. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 41, 299 Wis.2d 81, 726 N.W.2d 898. Nonetheless, " '[e]xercise of discretion'... is not license for mere 'unfettered decision making,' " but requires "application of correct legal principles to the facts of record." *Hlavinka*, 174 Wis.2d 381, 392.

Although dismissing an action with prejudice is within a circuit court's discretion, it is a particularly harsh sanction. It is therefore appropriate only in limited circumstances. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 41, 299 Wis.2d 81, 726 N.W.2d 898; *see also Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995). Wis. Stat. § 805.03 limits the sanctions that circuit courts may impose for failure to prosecute to those that are "just." Wisconsin courts have interpreted this limitation to mean that dismissal requires that the non-complying party has acted egregiously or in bad faith. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 41; *Trispel v. Haefer*, 89 Wis.2d 725, 732, 279 N.W.2d 242 (1979); *Furrenes v. Ford Motor Co.*, 79 Wis.2d 260, 267–69, 255 N.W.2d 511 (1977).

When a judge orders a case dismissed for failure to prosecute under Wis. Stat. § 805.03, it is presumed that the dismissal is with prejudice. *Marshall–Wisconsin Co. v.*

Juneau Square Corp., 139 Wis. 2d 112, 128, 406 N.W.2d 764 (1987). The State must show "good cause" for the delay in prosecution. *Id.*

ARGUMENT

The court erred in granting Hettwer's motion to reconsider the court's dismissal without prejudice. The court's initial dismissal without prejudice was correct.

In this case, the State had a clear and justifiable excuse for the delay because the State had reason to believe that the trial did not require the phlebotomist. Because this belief was supported by persuasive case law and legislative intent, the State's conduct was neither egregious nor in bad faith.

I. The State had good reason to believe that the trial did not require a phlebotomist

The State was prepared to go forward at trial. The only reason the State requested a dismissal without prejudice is because the Court unexpectedly granted Hettwer's motion in limine to prevent the blood test results from being admitted.

Hettwer asserts that the State was not ready for trial because the phlebotomist was not available to testify. Hettwer argues that blood test results are only admissible if the State proves compliance with Wis. Stat. § 343.305. However, the State's position is that the trial could proceed without the phlebotomist because of the language of the statute, persuasive case law, and policy reasoning.

Plain language of the statute

Hettwer asserts that the requirements of Wis. Stat. § 343.305(5) must be met in order for blood test results to be admissible. During the hearing on Hettwer's motion to reconsider, both Hettwer and the Court assert that without this reading, the statute would be meaningless. This is incorrect.

The plain language of Wis. Stat. § 343.305(6)(a) states that the requirements only apply under "this section," meaning section 343.305. By stating "to be considered valid under this section" a chemical analysis must have been conducted in accordance with Wis. Stat. § 343.305(7), the legislature simply provided the standards required to uphold an administrative suspension under Wis. Stat. § 343.305(7). If the testing was not done in accordance with the standards of § 343.305, it is insufficient to sustain an administrative suspension. Besides administrative suspension, Wis. Stat. § 343.305(5)(d) also mandates the admissibility of blood tests, and mandates that they be given *prima facie* effect. None

of this is relevant to Hettwer's case, because his case is neither an administrative suspension, nor was the State attempting to admit the blood test under Wis. Stat. § 343.305(5)(d). However, it does disprove the assertion that the statute is meaningless if there are other ways to admit a blood test. Wis. Stat. § 343.305(5)(d) does not have language to make any blood test not administered in compliance with this section inadmissible. The statute is meant to reduce drunk driving by providing an additional tool for the State to prosecute more drunk driving offenses; it was not meant to introduce additional hurdles for all prosecutions using chemical tests.

Persuasive Case Law

The State was prepared to go to trial under a theory that is supported by supportive case law from the Wisconsin Court of Appeals.

The most analogous case is *County of Fond du Lac v. Bethke*, 2014 WI App 63, 354 Wis.2d 326, 847 N.W.2d 427. In *Bethke*, the defendant objected to the use of blood test results because the phlebotomist who drew the blood was not available to testify. The court held that the deputy's testimony was sufficient to satisfy the burden of admissibility for the test results. *Id*. The Wisconsin Court of Appeals agreed, and the conviction was affirmed.

State v. Wiedmeyer, 2016 WI App 46, 370 Wis.2d 187, 881 N.W.2d 805 held that blood test results can be admitted without adherence to Wis. Stat. § 343.305. Specifically, the State in *Wiedmeyer* made use of expert opinion under Wis. Stat. § 907.02. *Id*.

Based on *Bethke* and *Wiedmeyer*, the State in this case had good reason to believe that a trial could proceed without the phlebotomist.

Policy Reasoning

The Court's interpretation of Wis. Stat. § 343.305(6)(a), in which no blood test result is admissible without the blood drawer's testimony, would be contrary to the public policy behind Wisconsin's laws prohibiting operating under the influence of an intoxicant. The Court refers to the State's interpretation of Wis. Stat. § 343.305 to be "blood draw light," and implies that the State's interpretation would make the statute "toothless." The Court's position goes against public policy.

Wis. Stat. § 967.055 states that "the legislature encourages the vigorous prosecution of offenses involving the operation of a motor vehicle by one under the influence of controlled substances." The Wisconsin Legislature enacted the implied consent statute to

combat drunk driving. *State v. Reitter*, 227 Wis. 2d at 223–25 (1999) (citation omitted). The law was not created to enhance the rights of drunk drivers, but "to facilitate the collection of evidence." *Reitter*, 227 Wis. 2d at 224 (citation omitted; *State v. Neitzel*, 95 Wis. 2d 191, 203–04, 289 N.W.2d 828 (1980)). The purpose of the law "is to obtain the blood alcohol content in order to obtain evidence to prosecute drunk drivers." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986) (citing *Brooks*, 113 Wis. 2d at 355 (additional citation omitted)). Courts construe the implied consent law liberally in order to effectuate the legislative purpose behind the statute. *Reitter*, 227 Wis. 2d at 224–25 (citation omitted).

In enacting an implied consent law, the legislature obviously did not intend to make it more difficult to prosecute OWI-related offenses. Instead, the legislature has encouraged drivers to comply with the implied consent law, and has provided that if a person does comply, and if a test result shows a prohibited alcohol concentration or a detectable presence of illegal drugs, the person's operating privilege will be administratively suspended, and the test result is automatically admissible at trial. But if the testing is not in accordance with Wis. Stat. § 343.305(6), the person will prevail at an administrative suspension hearing (if he or she timely requests a hearing), and the test results are not automatically admissible at trial.

The Court's interpretation of Wis. Stat. § 343.305(6)(a) is contrary to the policy behind Wisconsin's *per se* drug law, Wis. Stat. § 346.63(1)(am), which prohibits operating a motor vehicle with a detectable presence of a restricted controlled substance. The legislature enacted the law, in 2003 Wis. Act. 97, because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance." Legislative Council Act Memo for 2003 Wis. Act. 97 (Dec. 16, 2003). The statute provides that "if one has a detectable amount of a restricted controlled substance in his or her bloodstream while operating a vehicle or going armed with a firearm there is no requirement that the person was 'under the influence' of that restricted controlled substance. Evidence of a detectable amount is sufficient." *Id.*

II. Because the State had good reason to believe that the phlebotomist was not needed for trial, the State's failure to procure the phlebotomist was neither egregious nor in bad faith.

The State concedes that the State expected the phlebotomist to testify at trial. However, the fact that she was not available does not constitute negligence. If the State had believed that the phlebotomist's testimony was essential to the case, it would have taken more stringent steps to secure the witness, either by a served subpoena or a motion to

reschedule. For the reasons stated above, the State had good reason to believe that the phlebotomist's testimony would be nice to have, but not necessary to the case. Thus, the State mailed the phlebotomist a subpoena without proper service.

The State's case would have been weakened without the phlebotomist. Hettwer would have been free to argue against the probative value of the blood test results. The phlebotomist's absence would go to the weight of the evidence, rather than the admissibility of the test results. Hettwer would have been free to present his arguments concerning the accuracy of the tests in front of the jury without a phlebotomist there to refute them. It is in the State's interest to present the strongest case possible, but it is not egregious or bad faith conduct when the State does not secure ancillary evidence when said evidence is not essential to the case.

The State had good reason to believe that the trial could proceed without the phlebotomist, and articulated these reasons in the hearing on Hettwer's motion to reconsider. These reasons offer a clear and justified excuse for the State's motion to dismiss without prejudice. It certainly does not constitute negligence on the scale of "failure to prosecute."

CONCLUSION

The State was ready to go to trial before the circuit court incorrectly granted Hettwer's motion in limine. The circuit court also incorrectly granted Hettwer's motion to reconsider, which resulted in a dismissal with prejudice. The State showed a clear and justifiable excuse for its belief that it could prosecute the case without a phlebotomist. This belief was based on the plain language of Wis. Stat. § 343, persuasive case law, and policy reasoning. The belief, even if mistaken, certainly does not rise to the level of egregious or bad faith. The Court should reverse the circuit court's ruling on the motion to reconsider so that Hettwer's case is dismissed without prejudice.

For the reasons above, the judgement of the trial court should be reversed.

Dated this 17th day of December 2020.

The body of this brief was written by law student, Nate Hoagland, and edited and reviewed by Assistant District Attorney Tessa Button.

Electronically Signed by: TESSA BUTTON
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CERTIFICATION OF WORD COUNT

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the body of this brief is 2,883 words.

Dated this 17th day of December, 2020.

Electronically Signed by: TESSA BUTTON
Assistant District Attorney

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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APPENDIX CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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CERTIFICATION OF MAILING

I hereby certify, pursuant to Wis. Stat. § 809.19(8)(a)(2), that on the date below, I mailed 3 copies of this brief to the Respondent at:

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by depositing the same in a mailbox designed for deposit by the United States Postal Service, contained in packaging with the proper amount of prepaid postage thereon.

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