STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2022AP496

v.

PETER JOHN LONG
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE CIRCUIT COURT FOR WINNEBAGO COUNT, THE HONORABLE DANIEL J. BISSETT, PRESDING

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Cases Cited

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I. Statement of Issues Presented for Review

1) Whether a circuit court can enter a default judgment by agreement of the parties in a refusal proceeding.

The circuit court properly entered a default in this refusal proceeding, as permitted by Wis. Stat. 806.02.

2) Whether the trial court abused its discretion in denying Mr. Long's motions to reopen traffic forfeiture.

The circuit court erred in denying Mr. Long's motion to reopen the refusal without a hearing. Mr. Long plead sufficient facts that he should have been given an evidentiary hearing.

3) Whether as a matter of law Mr. Long's trial counsel was not ineffective for failing to file an issue preclusion motion.

Because the issues in a preliminary hearing and a refusal hearing are different, there is no issue preclusion, and Mr. Long's trial counsel therefore could not have been ineffective in failing to file such a motion.

II. Statement on Oral Argument and Publication

The State is requesting neither publication nor oral argument, as this matter is a one judge decision - an appeal from a 343.05 proceeding. Wis. Stat. 752.31, 809.23(1)(b)4.

III. Statement of the Case

On August 20, 2020 Officer Jonathan Evers was on patrol in Fox Crossing, Winnebago County, Wisconsin when he observed a motorcycle hung up on a curb. R32:P23. Peter Long was found sleeping in a ditch about 300 yards from the motorcycle. R32:PP24-25. Officer Evers suspected Mr. Long was impaired by alcohol, and asked him to perform field sobriety tests, which Mr. Long did not perform. R32:PP26-27. Mr. Long was then arrested for OWI, and a blood sample obtained. R32:P27.

On August 21, 2020 the Fox Crossing Police Department filed a Notice of Intent to Revoke Operating Privilege with the Winnebago Circuit Court, pleading the defendant had refused a chemical test after being arrested for OWI10th. R1. On August 27, 2020 Mr. Long timely filed a request for a refusal hearing. R8.

Mr. Long was also criminally charged with OWI10 for the same incident. *Id.* On September 21, 2020 a preliminary hearing was held on the related case, and the Court Commissioner failed to find probable cause that a felony was committed, and did not bind the defendant over. R23, PP5-7. The court commissioner dismissed the criminal case, but sent the related refusal case (the subject of this appeal) to the circuit court. *Id.*

On February 19, 2021 the defendant, through his attorney, agreed to a default finding on the refusal. R49. On that same day the Court entered a Judgment of Conviction finding the defendant guilty of an unlawful refusal. R21.

On February 23, 2021 the DOT sent Mr. Long notice that pursuant to Wis. Stat 343.31(1m)(b) his driver's license would be revoked for life. R29:P12.

On January 24, 2022 the defendant filed a form motion to reopen the refusal, claiming his failure to appear was due to "incorrect advice and mistake by paid counsel." R26.

On January 25, 2022 the circuit court denied the defendant's motion, stating "there is no basis stated." R27.

On February 2, 2022 the defendant filed another motion to reopen the default judgment. R29. This motion alleged Mr. Long entered a default believing the only penalty for the default would be the loss of driver's license for three years. R29:P2. Mr. Long pled that the lifetime revocation "is far too severe a punishment not to litigate against since he was the victim of an unlawful arrest by the police. Once the case is reopened, Mr. Long will file a dispositive motion to the Circuit Court based on the doctrine of issue preclusion. Once the case is reopened, Mr. Long will file a dispositive motion to the Circuit Court based on the doctrine of issue preclusion. … The issue regarding whether Mr. Long drove or operated his motorcycle on August 20, 2020, which was found legally parked on his street south of his residence, has already been fully litigated and decided by the Court at his Preliminary Hearing on September 21, 2020, for Case No. 20CF540, the Honorable Bryan D. Keberlein presiding. The Court found that Mr.

Long was not driving or operating his motorcycle at the time of his unlawful arrest and dismissed the case." R29:P3.

On February 2, 2022 the circuit court denied Mr. Long's renewed motion. R30.

On March 2, 2022 Mr. Long filed a motion to modify his sentence based on a new factor. R37.

On March 15, 2022 Mr. Long filed a motion for the court to reconsider its denial of Mr. Long's previous motions to vacate the default and reopen the case. R38

On March 25, 2022 the Circuit Court denied Mr. Long's motion to reconsider, and motion to modify sentence. R43.

On March 28, 2022 Mr. Long filed Notice of Appeal. R44.

IV. Argument

1. The civil default statute, 806.02, applies to a refusal hearing.

The procedure for driver's license revocation due to an unlawful refusal is set forth in Wis. Stat. 343.05(9). Under the statute, a police officer serves a driver with an intent to revoke at the time of the refusal. Wis. Stat. 343.05(9)(a). The driver then has 10 days to file a request for a refusal hearing. Wis. Stat. 343.05(9)(a)4. If the driver fails to file a request for a hearing within 10 days, the refusal is found improper and DOT revokes the defendant's driving privilege. *Id.*

If a request for a hearing is filed, the matter proceeds to a hearing where three issues are considered: whether the officer had probable cause to believe the defendant was OWI, whether the informing the accused was read, and whether there was a refusal. Wis. Stat. 343.305(9)(a)(5).

If the Court finds an improper refusal, it revokes the driver's driving privilege accordingly. Wis. Stat. 343.305(10).

A refusal is a special proceeding as defined by Wis. Stat. ch. 801. State v. Schoepp, 204 Wis. 2d 266, 270, 554 N.W.2d 236, 238 (Ct. App. 1996). Wis. Stat. 801.01(2) provides that "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule." There is no default procedure in 343.305, but where there is no specific procedure prescribed by rule, the civil rules apply. *See* State v. Schoepp, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996). (No discovery provisions in 343.305 means the civil rules apply; note negative treatment of Shoepp, but only as it applies forfeitures due to a change in statute. *See* State v. Bausch, 104 WI App 12, 842 N.W.2d 654, 352 Wis.2d 500; and Wis. Stat. 354.20(1)(b) – a refusal is not a traffic regulation because there is no forfeiture component).

806.02 allows for default judgments in civil matters, and applies here. The parties' agreement to "ask that the Court default on the citation," R49:P2, is an agreement that no issue of law or fact has been joined on the claim asserted (unlawful refusal), and under Wis. Stat. 806.02(1) the default judgment was properly entered.

2. The Circuit Court erred in denying Mr. Long's motion to vacate his default without a hearing.

Mr. Long filed a form motion to reopen the refusal, claiming his "failure to appear was due to incorrect advice and mistake by paid counsel." R26. The Court denied the motion without a hearing, stating there was "no basis stated." R27.

Mr. Long then filed a more comprehensive motion, making a more specific claim that his attorney told him the "only" penalty from the refusal would be a three year revocation. R29:P2.

The Court denied this motion too. R30.

Two factors a court should consider in determining whether to grant a motion to vacate a judgment are "[w]hether the judgment was the result of the conscientious, deliberate, well-informed choice of the claimant;, and …[w]hether the claimant received the effective assistance of counsel." Allstate Ins. Co. v.

Brunswick Corp., 2007 WI App 221, ¶ 7, 305 Wis. 2d 400, 408, 740 N.W.2d 888, 891.

The State believes this record is insufficient to determine Mr. Long's claims of ineffective assistance of counsel, but that Mr. Long has plead facts, which if proved, would entitle him to vacate his default.

While there is no right to assistance of counsel in a refusal hearing, State v. Krause, 2006 WI App 43, 289 Wis. 2d 573, 712 N.W.2d 67, and the State believes the "lifetime revocation" under Wis. Stat. 343.31(1m)(b) is a collateral consequence[1] of a refusal finding, where a defendant is misadvised of even collateral consequences (as opposed to not advised of a collateral consequence), Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were

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[1] Direct consequences are those that have a definite, immediate, and largely automatic effect on the range of a defendant's punishment. Collateral consequences, on the other hand, are indirect and do not flow from the conviction; rather, they may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination or may rest[ ] not with the sentencing court, but instead with a different tribunal or government agency."

State v. LeMere, 2016 WI 41, ¶ 31, 368 Wis. 2d 624, 642, 879 N.W.2d 580, 589. In an analogous matter, a repeat drunk driving conviction which would subject the defendant to provisions of the "habitual traffic offender" law and an eventual five-year revocation of his driving license is only a collateral consequence of his plea to the charge. State v. Madison, 120 Wis.2d 150 159-61, 353 N.W.2d 835, 840-841 (Ct. App. 1984).

Under the lifetime revocation provision of Wis. Stat. 343.31(1m)(b), it is the DOT, not the sentencing Court, that revoked the defendant's license.

collateral. State v. Brown, 2004 WI App 179, ¶ 8, 276 Wis. 2d 559, 565, 687 N.W.2d 543, 546

While a chemical refusal case is not a criminal proceeding, case law directs that "effective assistance of counsel," and a defendant's "well informed choice" are relevant to whether Mr. Long's civil judgment should be vacated.

Even though this is a non-criminal proceeding, effective assistance of counsel is relevant to whether a judgment should stand. As regards being affirmatively misadvised of the consequence of the refusal, Mr. Long plead such facts which, if proved, should result in vacating the default, and that the trial court should have granted an evidentiary hearing on Mr. Long's motion to vacate the default.

If Mr. Long proves that he was misadvised of the consequences of the judgment, the State agrees the judgment should be vacated. If he fails in such proof, the judgment should stand.

3. The non-bindover on the preliminary hearing is not dispositive to the refusal hearing.

Mr. Long claims that his attorney was ineffective for failing to file a motion that the refusal was precluded by the preliminary hearing outcome. Br. of Def-App, P7. Because the preliminary hearing outcome did not determine the refusal proceeding, Mr. Long's counsel was not ineffective for failing to bring such a motion.

Though the burden at both the preliminary hearing and a refusal is equally "probable cause," the issues to be proved are not identical. A preliminary hearing concerns whether there is probable cause to believe a felony has been committed by the defendant. Wis Stat. 970.03. A refusal hearing concerns whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, whether the informing the accused was read, and whether the driver refused. Wis. Stat. 343.05(9)(a)(5)(a).

> ¶ 19 Issue preclusion, formerly known as collateral estoppel, limits the relitigation of issues that have been actually decided in a previous case. The burden is on the party asserting issue preclusion to establish that it should be applied. An issue on which relitigation may be foreclosed may be one of evidentiary fact, of "ultimate fact," or of law. **If the issue in both actions is the same and has actually been litigated,** and the party against whom preclusion is asserted was a party, in privity with a party, or had sufficient identity of interest with a party in the previous litigation, then the trial court is to apply various factors to decide if the application of the doctrine is fundamentally fair.
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> ¶ 20 **A threshold question … is whether there is an identity of issues.** This requires a comparison of the issue or issues decided … and the issue or issues that [the defendant] seeks to preclude litigation on in this case. [I]t is not the similarity between the types of litigation or actions involved but between the factual [and legal] issues and their roles in the respective actions that is important to whether [issue preclusion] will apply."

State v. Miller, 2004 WI App 117, ¶¶ 19-20, 274 Wis. 2d 471, 485–86, 683 N.W.2d 485, 493.

In the preliminary hearing, the State presented evidence to establish probable cause to believe the defendant drove while intoxicated, with the requisite number of priors, and failed. As a matter of law this does not decide the refusal case.

A preliminary hearing bindover record would be satisfactory where the evidence consists of on no more than the officer observed the defendant driving, stopped her, arrested her for OWI, obtained blood which tested at above the legal limit, and has a felony qualifying number of priors. This record would be insufficient to prove probable cause for a blood draw. Similarly the State could present evidence proving an OWI beyond a reasonable doubt at the preliminary hearing and forget or fail on its proof of qualifying priors, resulting in non bind over, but sufficient evidence to proceed on a refusal.

Finally a non bindover on a preliminary hearing is not a matter that is "actually decided." "The purpose of a preliminary hearing is to determine whether there is probable cause to believe that a felony has been committed by the defendant. *See* § 970.03(1), stats. It is not a full evidentiary hearing but rather is intended to be a summary hearing where the magistrate considers if the State has presented sufficient evidence establishing a reasonable probability that the defendant committed the felony. The preliminary hearing acts as a screening device, protecting defendants from groundless or malicious prosecutions, and thus also conserving our judicial resources. … After a complaint is dismissed at a preliminary hearing, a second complaint can be filed against the defendant if additional evidence exists or is discovered. *See* § 970.04, stats. Reissuance of the complaint is permitted because **the dismissal after the preliminary hearing does not have the same effect as an acquittal after a trial on the merits**. More specifically, a complaint may be reissued against a defendant when "new or unused evidence" would support a finding of

probable cause." State v. Johnson, 231 Wis. 2d 58, 64-65, 604 N.W.2d 902, 905–06 (Ct. App. 1999). Emphasis added.

Mr. Long claims that the preliminary court "found that Mr. Long's arrest was unlawful due to lack of probable cause[.]" Br. of Def. App. 5. The State disagrees. The hearing commissioner ruled: "Given what I have before the Court, the Court will dismiss the count, not finding there is probable cause basis to proceed with a felony." R32:P45. The Commissioner's ruling was simply that the record did not support probable cause to proceed with a felony; there was no finding lack of probable cause to arrest, or that the arrest was unlawful.

Because the issues are different between the preliminary hearing and the refusal finding, issue preclusion does not apply, and Mr. Long's trial counsel was not ineffective in failing to file motions on the issue.

V. Conclusion

The trial court correctly entered judgment. The trial court erred in denying Mr. Long's motion to vacate the judgment without a hearing. Mr. Long's trial counsel was not ineffective as a matter of law for failing to litigate issue preclusion.

This matter should be returned to the trial court for an evidentiary hearing on Mr. Long's motion to vacate the judgment.

Dated this December 19, 2022

Electronically signed By:

Adam J Levin 12/19/22

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2506 words.

Dated at Oshkosh, Wisconsin this December 19, 2022

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