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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case Nos. 2022AP2138

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW E. SULLIVAN,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
DENYING THE DEFENDANT'S ADJOURNMENT
REQUEST AND A FINDING THE DEFENDANT
IMPROPERLY REFUSED CHEMICAL TESTING IN
DODGE COUNTY, THE HONORABLE BRIAN
PFITZINGER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court properly deny the defendant's motion to adjourn the refusal hearing and correctly rule that the defendant improperly refused to submit to a chemical test of his blood?

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This Court can decide the issue based on well-settled law, the record in this case, and the briefs of the parties.

STATEMENT OF THE CASE

On October 18, 2022 Matthew Sullivan, the defendant-appellant, was issued a notice of revocation for improperly refusing to provide a sample of his blood consistent with Wis. Stats. §343.305(9). (R1) On October 25, 2022 the Mr. Sullivan promptly filed a written request for a refusal hearing. (R3)

On November 23, 2022, the Wednesday before Thanksgiving, Mr. Sullivan submitted a letter requesting an adjournment of the refusal hearing set for November 28, 2022, the following Monday. (R5) On November 28, 2022, Mr. Sullivan appeared in person and renewed his request for an adjournment. (R18. 3-8) The court denied his request and commenced the hearing. (R18. 8:11-15)

At the hearing Dodge County Sheriff Deputy Andrew Dean testified on behalf of the State of Wisconsin. (R18. 2) Mr. Sullivan elected to testify on his own-behalf. (R18. 2)

Regarding the Mr. Sullivan's refusal, Dep. Dean stated the Mr. Sullivan, "didn't specifically say no. I asked him four to six times if he would provide a blood test and all he kept telling me was I don't know. " (R18. 21:11-13) Dep. Dean then stated that he told Mr. Sullivan he needed to provide an answer, but Mr. Sullivan continued saying "I don't know." (R18. 14-18) Dep. Dean determined that Mr. Sullivan refused to submit to a chemical test of his blood.

Mr. Sullivan elected to testify and stated that "I have high blood sugar at the time; and that high and low, I get confused and can't think straight." (R18: 15-15-17) He

further stated, “I guess I refused the, from what I understand, I refused the blood.” (R18. 26:1-3)

STANDARD OF REVIEW

When reviewing the circuit court’s finding of a refusal, the appellate court will uphold the lower court’s finding of facts unless they are clearly erroneous, but independently reviews application of those facts to constitutional principles, as questions of law. See *State v. Blatterman*, 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26, *In re Smith*, 2008 WI 23, ¶16, 308 Wis.2d 65, 746 N.W.2d 243.

Whether to grant an adjournment of a proceeding lies within the discretion of the trial court. See *Phifer v. State*, 64 Wis.2d 24, 30, 218 N.W.2d 354 (1974). Reversal of the trial court’s decision is appropriate only upon a showing the trial court erred in the exercise of its discretion. *State v. O’Connell*, 179 Wis.2d 598, 616, 508 N.W.2d 23, 30 (Ct.App. 1993). In looking at whether the trial court properly exercised discretion, a reviewing court examines the record to “determine whether the Court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process” *State v. Bunch*, 191 Wis.2d 502, 506- 07, 529 N.W.2d 923 (Ct. App. 1995).

ARGUMENT

The circuit court’s denial of Mr. Sullivan’s request to adjourn the refusal hearing was proper

A. The defendant was not entitled to adequate representation

“In determining whether a court has abused its discretion by the denial of a continuance, a single inquiry is to be made. This inquiry requires the balancing of the defendant’s constitutional right to adequate representation by counsel

against the public interest in the prompt and efficient administration of justice. *State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225, 230 (1979). Given the Civil Nature of the refusal hearing, the defendant has “no constitutional right to effective assistance of counsel.” *State v. Krause*, 2006 WI App 43, ¶ 11, 289 Wis. 2d 573, 580, 712 N.W.2d 67. Therefore the court was required to deny the defendant’s request for a continuance due to the public interest in the prompt administration of justice which clearly outweighed the defendant’s lack of constitutional right to representation.

B. If the court finds the defendant was entitled to adequate representation the trial court still properly exercise discretion

Trial courts are given a large amount of discretion in ruling on a movant's continuance request because they are best suited to assess the specific circumstances presented. *United States v. Farr*, 297 F.3d 651, 655 (7th Cir.2002). Therefore, a trial court's discretionary decision must be upheld unless there is a showing “that the denial of the continuance was arbitrary, and that actual prejudice resulted.” *United States v. Withers*, 972 F.2d 837, 845 (7th Cir.1992). The mere denial of a continuance does not automatically give rise to a constitutional claim. *Wollman*, 86 Wis.2d at 469, 273 N.W.2d 225.

In *Wollman*, the Wisconsin Supreme Court applied a six-factor test that is helpful for determining if there has been a due process violation. *Wollman*, 86 Wis.2d at 470, 273 N.W.2d 225. These factors include: (1) the length of delay requested; (2) whether lead counsel has associates prepared to try the case in his or her absence; (3) whether other continuances had been requested and received by the defendant; (4) convenience or inconvenience to the parties, witnesses and the court; (5) whether the delay is for a

legitimate reason, or whether its purpose is dilatory; and (6) other relevant factors.

In reviewing the six-factor test it is clear the trial court properly exercised its discretion. The court's decision was based on the clear inconvenience to the state and to the court which would occur if an adjournment was granted. Far from arbitrary, the court had a compelling reason to deny the defendant's request. All parties were present and the motion hearing was ready to begin. Weighing the ability to proceed in timely manner against the lengthy delay sure to occur as the defendant had not yet hired an attorney, this court must defer to the trial courts discretionary decision.

The trial court properly determined that the defendant refused to comply with a chemical test

Section 343.305(1), Stats., provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct.App.1985). Any failure to submit to such a test, other than because of physical inability, is an improper refusal which invokes the penalties of the statute. *Id.* A verbal refusal is not required. The conduct of the accused may serve as the basis for a refusal. *Id.*

Additionally, under Wis. Stat. § 343.305(9)(a)5.c., a “person shall not be considered to have refused [a chemical] test if it is shown by a preponderance of evidence [at the refusal hearing] that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol....” See *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 191, 366 N.W.2d 506 (Ct.App.1985). The trial court's determination is a question of fact, which [the appellate court] will not disturb unless it is clearly erroneous. See WIS. STAT. § 805.17(2);

Noll v. Dimiceli's, Inc., 115 Wis.2d 641, 643, 340 N.W.2d 575 (Ct.App.1983).

According to Deputy Andrew Dean, the defendant “didn’t specifically say no. I asked him four to six time if he would provide a blood test and all he kept telling me was I don’t know. “ The defendant was then told that he needed to provide an answer, but then continued, “I don’t know.”

When he elected to testify, the defendant stated “I guess I refused the, from what I understand, I refused the blood.” He also offered a vague statement that, “I have high blood sugar at the time; and that high and low, I get confused and can’t think straight.”

The trial court heard both the testimony and had the opportunity to evaluate the credibility of both witnesses. Here there is a record which supports the trial court’s findings and is not clearly erroneous. Therefore, this court must accept the trial court’s findings and deny the defendant’s appeal.

Conclusion

This court should affirm the judgment of conviction.

Dated this 5th day of July 2023.

Respectfully submitted,
Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 1644 words.

Dated this 5th day of July 2023.

Electronically signed by:

Chad Wozniak
CHAD WOZNIAK

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of July 2023.

Electronically signed by:

Chad Wozniak
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