

15AP2423

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No.....2015 AP 2423

STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

MICHAEL R. HESS,

Defendant-Appellant,

ON NOTICE OF APPEAL TO REVIEW A DEFAULT JUDGMENT
AND DENIAL OF A MOTION TO VACATE THE DEFAULT JUDGMENT
ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY,
CASE NO. 2003 TR 860, HONORABLE CHARLES CONSTANTINE PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Michael R. Hess
Defendant-Appellant, Pro-se
Gordon Correctional Center
10401 East County Road G
Gordon, WI 54838

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A DEFAULT JUDGMENT AND HESS WAS DENIED
DUE PROCESS OF LAW BECAUSE HE WAS NEVER
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STATE OF WISCONSIN
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STATE OF WISCONSIN,

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V.

Appeal No. 2015 AP 00 2423

MICHAEL R. HESS,

Defendant-Appellant

ON NOTICE OF APPEAL TO REVIEW A DEFAULT JUDGMENT AND
DENIAL OF A MOTION TO VACATE THAT DEFAULT JUDGMENT
ENTERED IN RACINE COUNTY CIRCUIT COURT, CASE NO 2003 TR 860
THE HONORABLE CHARLES CONSTANTINE PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

The court did not have jurisdiction to enter a default judgment because the defendant was never given notice and therefore service of process was never made as required for the court to inherit jurisdiction.

The defendant was denied due process of law because he was not served notice as required by statute which resulted in default judgment entered against him without ever being afforded an opportunity to be heard on the issue.

Should the court have vacated the default judgment as void and ordered it removed from the defendant's record, because the default judgment was entered without jurisdiction and the defendant was denied due process?

The circuit court answered: "The Motion you filed is denied, not timely, and no basis to grant, per Judge Constantine." (Pg. 110)

Pg. 111

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be necessary because the defendant is not an attorney and may have overlooked something that could be resolved through oral argument. Publication may be warranted because there is no precedent specifically addressing the procedures for challenging a void judgment under Wis. Stat. 343.305. There is also no case law addressing when and how service of process is made to satisfy due process and give the court jurisdiction under section 343.305 Stats.

I am also requesting publication because the two subsections listed below (in part) are ambiguous and give different start dates for a revocation when no hearing is requested:

s. 343.305 (9) (a) (4): If no request for a hearing is received within the 10-day period, *the revocation commences 30 days after the notice is issued.*

s. 343.305 (10): "After the person has been served" If no hearing was requested, *the revocation period shall begin 30 days after the date of the refusal.*

These subsections also conflict with when the person is served, and when the notice is issued.

The court could clarify this issue by mandating that the notice of intent to revoke be served upon the "arrested person" as is the language in *State v. Polinski*. 96 Wis.2d 43; 291 N.W. 2d 465. Appeals such as this could also be eliminated if it were mandated that the person be immediately served as the statute reads. It should also be mandated that the arrested person sign the notice of intent to revoke so when the Judge looks at it he will know when service was made, and that the court has the appropriate jurisdiction. If this would have been done in this case you would not be reading this appeal and have time to deal with other issues.

Copies of these notices should also be mandatorily saved because these are used as criminal offenses for life under s. 343.307 and s. 346.65 of the Wisconsin Statutes.

STATEMENT OF THE CASE AND FACTS

The defendant, Michael R. Hess, was arrested for OWI on January 1, 2003 by the Burlington Police Department. On January 1, 2003 he was issued 3 citations for OWI, OAR, and Criminal Damage to Property and then taken to Racine County Jail.

On January 2, 2003 a Criminal Complaint was issued by the Racine District Attorney also charging Hess with a P.A.C. charge, this is Case No. 2003 CF 2.

On January 16, 2003 all the Charges were dismissed on the Prosecutor's motion that case.

On January 9, 2003, in this case, 2003 TR 860, the court record (Pg. 107) shows a notice of intent to revoke was filed. The defendant was never served with a copy of this.

On January 17, 2003 the day after the court dismissed all the charges against Hess in case no. 2003 CF 2, and 17 days after the arrest, the arresting officer issued a citation for a P.A.C. although this had already cleared court the day before. He then wrote in his report (Pg. 108) that he also then issued a "notice of intent to revoke" which he then stated "all of this will be mailed to the defendant". This never happened. On that same date, January 17, 2003, the arresting officer also wrote in his supplement page to the incident report (Pg. 109) that "I then issued a citation for this citation D339451-0" and "I then paper clipped a *citation, a photocopy of the blood results* and gave it to Admin. Asst. Hardesty to be mailed to the defendant's address"

Hess never received a Notice of Intent to Revoke.

Then on January 31, 2003, the court issued a default judgment (Pg. 110) revoking Hess's driver's license because the defendant "Failed to request a hearing" within 10 days of the date on the Notice of Intent to Revoke that Hess never received.

On August 6, 2014 Hess filed a motion to vacate the revocation order, based on jurisdictional issues and the fact that he never received a "Notice of Intent to Revoke" as required by Wis. Stat. 343.305(9) (a). The court scheduled a hearing for October 20, 2014 on Hess's motion only.

In September of 2014, before the hearing, Hess sent an open records request to the Burlington P.D. for copies of all the records from the arrest on January 1, 2003.

Hess then received copies of the citations issued on January 1, 2003, a copy of Incident Report 132019, and the supplemented pages. There was nothing mentioned about a notice of intent to revoke ever being issued in any of this paperwork.

A hearing was then held on Hess's motion to vacate the revocation order on October 20, 2014, and the Court refused to reopen Case no. 2003 TR 860.

After the hearing and on December 7, 2014, Hess decided to write Sgt. David Krupp at the Burlington P.D. and requested any information on Citation D339451-0, if there was any available.

On January 10, 2015, Hess received a copy of Citation D339451-0 in the mail from Sgt. David Krupp, (Pg. 108). On this copy was a copy of the Police Record for that day, January 17, 2003. This Police Record contains the information that Hess was missing to prove he was never served a Notice of Intent to Revoke. As stated above, it reads:

On 1-17-03, I OFC Fisher received the blood work from the State Crime Lab. This was a forced Blood draw with the refusal of the informing the accused (see IR).

The results of this test was a .29 BAC. I then issued this Citation along with additional paperwork, including a Notice of Intent to Revoke.

All of this will be mailed to the defendant.

Based on this new information, that proves Hess was never served with the required paperwork to inform him that he has 10 days to request a hearing, and to invoke the court's jurisdiction, Hess then filed another motion to vacate the revocation order titled "Amended Motion to Vacate the Revocation Order" in September of 2015 (Pgs. 102-105). Hess titled this as "amended" to let the court know that this isn't the same motion previously filed and is based on the new evidence received from the Burlington Police Dept, it was denied (Pg. 110) and is the subject of this appeal. Hess is also not an attorney and whether the court sees this as a re-filed motion or new one shouldn't matter, the court knows or should know what I was trying to accomplish.

ARGUMENT

**THE COURT NEVER HAD ANY JURISDICTION TO ENTER
A DEFAULT JUDGMENT AND HESS WAS DENIED
DUE PROCESS OF LAW BECAUSE HE WAS NEVER
SERVED WITH A NOTICE OF INTENT TO REVOKE
OR GIVEN AN OPPORTUNITY TO BE HEARD BEFORE
THE COURT REVOKED HIS DRIVER'S LICENSE**

Wisconsin Statute s. 343.305 (9) (b) requires the use of the notice under par. (a) or (am) to give the court jurisdiction over the person:

(2003 Stats.) 343.305 (9) (b) The use of the notice under par. (a) or (am) by a law enforcement officer in connection with the enforcement of this section is adequate process to give the appropriate court jurisdiction over the person.

343.305

(9) REFUSALS; NOTICE AND COURT HEARING

(a) If a person refuses to take a test under sub. (3) (a), the law enforcement officer shall immediately take possession of the persons license and prepare a notice of intent to revoke, by court order under sub. (10), the persons operating privilege. If the person was driving or operating a commercial motor vehicle, the officer shall issue an out-of-service order to the person for the 24 hours after the refusal and notify the department in the manner prescribed by the department. The officer shall issue a copy of the notice of intent to revoke the privilege to the person and submit or mail a copy with the persons license to the circuit court for the county in which the arrest under sub. (3) (a) was made. The officer shall also mail a copy of the notice of intent to revoke to the district attorney for that county and the department. The notice of intent to revoke the persons operating privilege shall contain substantially all of the following information:

1. That prior to a request under sub. (3) (a), the officer had placed the person under arrest for a violation of s. 346.63 (1), (2m) or (5) or local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25
2. That the officer complied with sub. (4)
3. That the person refused a request under sub. (3) (a)
4. That the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.

The court did not have jurisdiction under 343.305 (9) (b) because Hess was never served with a notice of intent to revoke under sub. (9) (a), either immediately or ever. The police record typed on January 17, 2003, 17 days after the arrest by the arresting officer states that on this day:

"On 1-17-03, I Ofc Fisher received the blood work from the state crime lab. This was a forced blood draw with refusal of the informing the accused (see IR).

The results of this test was a .29 BAC. I then issued this citation along with additional paperwork including a notice of intent to revoke

All of this will be mailed to the defendant"

(Pg. 108 above and 109 below)

And on this same day on page 7 of Incident Report 132019 he states that:

"On 1-17-03, I Officer Fisher upon returning to work received the blood alcohol concentration results from the legal blood draw on Michael Hess from 1-1-03. See IR 13209 for full details.

Upon opening the sealed envelope from the state crime lab the results were .298. I then issued a citation for this citation D339451-0. I filled out additional paperwork. I then paper clipped a citation, a photocopy of the blood results and gave it to Admin. Asst. Hardesty to be mailed to the defendant's address.

On the ticket there is no date or time. This is a felony traffic citation. We have already had the preliminary hearing on this."

It is clear from reading these two police reports together that on 1-17-13 Officer Fisher issued the notice of intent to revoke. Officer Fisher **did not** give the notice to Admin Asst. Hardesty to mail to the defendant. Regardless of that, Even if he would have, it would still not constitute service of process because it has to be served to the person. There is also no reason it could not have been served to Hess, he was in Racine County Jail from the arrest on January 1, 2003 until January 16, 2003 when all charges were dismissed, they knew where he was at.

I Michael R. Hess, the defendant, also remember that I was never served any Notice of Intent to Revoke. I am using the police reports and record to prove this. I don't know how the court record shows a notice of intent to revoke on 1-9-03 if he never issued it until 1-17-03 as the arresting officer states in his own reports. **This information/notice was not properly filed.**

The State has nothing to argue here, I know that I was never served or given a notice of intent to revoke, show me some document that proves I was served. If the State could provide something that shows I was served a notice of intent to revoke then they'd have an argument, I know they cannot do this. It's obvious that the officer made some mistakes and didn't handle things properly

The bottom line here is that Hess was not served with a Notice of Intent to Revoke as required by Wis. Stat. s. 343.305(9) (a), and the law enforcement officer did not "use this notice" to give the appropriate court jurisdiction as required by Wis. Stat. s. 343.305(9) (b).

Because the court did not have any jurisdiction, the judgment or revocation order in this case is void, see *Wengerd v. Rinehard*, 114 Wis. 2d 575 578-79; *United States v. McDonald*, 86 F.R.D. 204, 208 (N.D. Ill. 1980). **There is no time limit for Hess to challenge this "Void Judgment" as a motion on a void judgment is not subject to the time requirements of Wis. Stat. s. 806.07(2), see *Neylan v. Vorwald*, 124 Wis. 2d 85; 368 N.W. 2d 648 (1985).** Because there is no time limit to challenge a "void judgment" under 806.07(d), the court erred in denying Hess's motion as "not timely filed".

Wis. Stat. 806.07(d) is akin to Rule 60(b)(4) of the Federal Rules of Civil Procedure and because void judgments are legal nullities, they can be vacated at any time, *Pacurar v. Hernly*, 61 F. 2d 179 (1979); *Wisconsin Public Service Corp. v. Krist*, 104 Wis. 2d 381, 311 N.W. 2d 624. It may also be an abuse of discretion in denying Hess motion to vacate the void default judgment, see *United States v. Indoor Cultivation Equip. from High Tech Indoor*, 55 F. 3d 1311.

As for court's assumption that there was "no basis to grant" Hess's motion, this **void revocation order** is currently being used against Hess as a criminal offense and penalty enhancer under Wis. Stats. 346.65, and 343.307, and is being disguised as an administrative and civil forfeiture. These default judgments are offenses as counted per 343.307 Stats. These "offenses" are being used for lifetime because the penalty enhancers of 346.65 Stats. Count back for life. Because of this, Hess may literally end up serving more time in prison in addition to his license already being revoked. Hess is currently serving a Class G felony sentence due to this "void default judgment", when it should be a Class H, four years difference in the penalty. This is a very good "basis to grant his motion". This is no harmless error. If the respondent argues harmless error, then it shouldn't be a problem to harmlessly remove it from Hess's record.

Hess was denied due process of law as guaranteed by the 14th Amendment to the United States Constitution because he was never given this notice of intent to revoke. Wis. Stat. s 343.305 requires giving notice to the arrested person to satisfy due process, *State v. Polinski*, 96 Wis. 2d 43; 291 N.W. 2d 465.

Polinski uses the term "arrested person" and would indicate that the notice is thereby intended to be immediately served. Wis. Stat. s. 343.305(9) (a) states in part "the law enforcement officer **shall immediately take possession of the persons license and prepare a notice of intent to revoke**" Hess was never served or given notice, immediately or any time thereafter.

This goes along with 343.305(9) (a) (4) that states "the revocation period commences 30 days after the notice is issued" and 343.305(10) (a) "after the person has been served"

Hess was never served a notice of intent to revoke, EVER. The officer allegedly issued one 17 days after the arrest and *intended to send Hess a copy, which he never did.* Hess had already been released from jail by then anyway, charges dismissed. Hess was no longer an "arrested person", as in *Polinski*. If immediate service were mandated, this would never be an issue.

The court was also not authorized by statute to commence the revocation of Hess's license on January 31, 2003 because the arresting officer wrote in his report that he did not "ISSUE" a notice of intent to revoke until January 17, 2003. Using s. 343.305 (9) (a) (4), Hess's license could not have been statutorily revoked until February 16, 2003. And because Hess was never served or given a copy of this notice of intent to revoke, stating the court's address which is supposed to be "specified in the notice". Hess could never have requested a hearing because he was never given this information, thereby denying him a due process right to a hearing. And because Hess was never served, the court did not have jurisdiction to revoke Hess's license at all.

THE STATE HAS NOTHING TO PROVE HESS WAS EVER SERVED A NOTICE OF INTENT TO REVOKE, WHEREAS HESS IS USING THE STATES OWN POLICE REPORTS AND COURT RECORDS AS PROOF THAT HE WAS NOT SERVED. I, HESS, AM CHALLENGING THEM TO PROVIDE SOMETHING THAT SHOWS I WAS SERVED, AND INVOKED THE COURT'S JURISDICTION, AND GAVE ME A CHANCE TO BE HEARD BEFORE THE DEFAULT JUDGMENT WAS ENTERED.

THEY CANNOT.

All the Respondent's attorney can try to do is say that Hess, who is not an attorney, somehow made a procedural error in challenging this void judgment. Is this really the way to treat the residents of Wisconsin, by sticking it to them any way possible and filling up the prisons, when they know the default judgment is void?

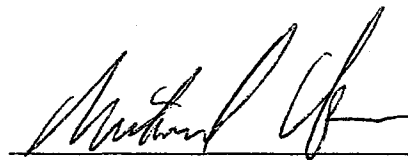
CONCLUSION

As demonstrated above, the court never had the appropriate jurisdiction and Hess was denied a due process right to a hearing because he was never given a "Notice of Intent to Revoke" as required by state statute. Because the court was without jurisdiction to render the judgment, the judgment is void *ab initio* and it's the court's duty to vacate it, *Halbach v. Halbach*, 259 Wis. 2d 329; 48 N.W. 2d 329 (1951), vacating a void judgment is mandatory not discretionary. The court was also not statutorily authorized to revoke Hess's driver's license on the date when it ordered the revocation to commence.

Because the judgment is void, Hess is requesting that the court vacate it as such, and order it removed from Hess's driving record with the Wisconsin Department of Transportation and all court records.

Dated this 13th day of ~~November~~, 2015.

January, 2016



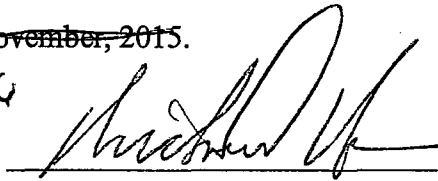
Michael R. Hess, Defendant-Appellant, Pro se

CERTIFICATION

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is 3,653 words, (cover thru index to appendix).

Dated this 13th day of ~~November~~, 2015.

January, 2016



Michael R. Hess, Defendant-Appellant, Pro se

CERTIFICATION OF APPENDIX

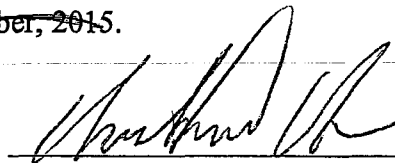
I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

- (1) A table of contents;
- (2) Relevant trial court record entries;
- (3) The findings or opinion of the trial court; and
- (4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically juveniles and parents of juveniles, with notations that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of ~~November~~, 2015.

January, 2016



Michael R. Hess, Defendant-Appellant, Pro-se

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