STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

APPEAL NO.....2015 AP 2423

STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

MICHAEL R. HESS,

Defendant-Appellant,

APPELLANT'S REPLY BRIEF

CIRCUIT COURT CASE NO.. ..2003 TR 860

Michael R. Hess, Defendant-Appellant, Pro se
Gordon Correctional Center
10401 East County Road G
Gordon, WI 54833

REPLY BRIEF - TABLE OF AUTHORITIES

CASES CITED **PAGE**

The Respondent's argument in their Response Brief appears to be that:

Regardless of any case law, it has been 11 years and Hess should not be able to have a void default judgment vacated as the legal nullity it is. **They appear to be claiming some type of laches argument** to try to validate an invalid judgment and that there were now allegedly two notices of intent to revoke issued mailed to Hess.

The Respondent's response brief falls short of having a countervailing argument because:

The respondent claims it its argument that: "There is an absence of newly discovered evidence, therefore there is no legal basis for appeal".

The motion or appeal is not based on newly discovered evidence and I have not requested an appeal through newly discovered evidence. Newly discovered evidence is not required to challenge a void default judgment under Wis. Stat. § 806.07 (1) (d). The newly discovered evidence standard covers 806.07 (1) (a), (b) and (c) but does not include subsection "(d) the judgment is void", see *State ex rel M.L.B. v. D.G.H., 122 Wis. 2d 536; 363 N.W. 2d 419.*

I have appealed the denial of a Motion to Vacate a Void Default Judgment as Void. This is controlled by Wis. Stat. §806.07 (1) (d) the judgment is void, and is also under the authority of *Neylan v. Vorwald, 124 Wis. 2d 85; 368 N.W. 2d 648*, and the other cases listed throughout this brief on that subject.

My Motion to Vacate the Default Judgment was on the grounds that I was never served a Notice of Intent to Revoke and therefore the court lacked jurisdiction to enter the judgment and it is therefore void. Go ahead and count how many times the word "void" and "jurisdiction" is written throughout these briefs and motions.

The first line on my motion to vacate a revocation order states:

"Michael R Hess brings this motion pursuant to Wis. Stat. 806.07 on the grounds that the court imposed this revocation order without jurisdiction and violated the defendant's due process rights, thereby rendering the default judgment void"

The Circuit Court's decision on that motion I hereby appealed states only:

"The Motion you filed is denied, not timely, and no basis to grant, per Judge Constantine"

This decision was eventually signed on 12-30-2015 by another judge so I could appeal it.

In *Neylan v. Vorwald, 124 Wis. 2d 85; 368 N.W. 2d 648*, it says : In ***Halbach v. Halbach, 259 Wis.2d 329; 48 N.W. 2d 617 (1951)***, the void judgment was challenged ten years after entry. The court stated that laches did not apply even if the plaintiff had been dilatory or lackadaisical in his efforts to overturn the judgment. **'It is the duty if the Court to annul an invalid judgment'**.

The respondent is trying to apply some laches argument through presenting a scenario that all this is about some new evidence and that operates to validate an invalid judgment. That's not what this is about. This is about the default judgment being "void" because it was entered against me without me ever being served a notice of intent to revoke. The judgment is void for "lack of jurisdiction", and other constitutional protections, including due process, see *Polinski*.

The respondent asserts that the rules of civil procedure apply and cite §801.01 Stats. I agree because under § 801.11 which is the statute for personal jurisdiction, a person must be diligently served. There was no reason I could not have been personally served a Notice of Intent to Revoke. I was first under arrest and then I spent 16 days in jail and went to court. The respondent now claims without any proof that two notices were mailed to me. This is just not true, there were never even two notices issued, and none of them were ever mailed to me, EVER, and the date served section on the court's own records are blank, they never tried to explain that, and if the officer already issued one notice of intent to revoke, and served me, as the respondent claims without any proof, then why would he do this again?

This appeal is of a decision that states only **"The motion you filed is denied, not timely, and no basis to grant, per Judge Constantine".** There is no discretion here and does not say anything about it being denied based on newly discovered evidence. The transcripts in the respondent's brief are from a previous hearing before I received the **Police Record** printed on a copy of a citation that was stored inside Burlington Police Department where the public cannot rummage through any time they please, at least I don't think they can, at least not me being a felon and all.

Secondly on that subject the respondent alleges in it "issues presented" section "Is a copy of a citation that has been in existence for more than 11 years sufficient to form newly discovered evidence"

I'm not even arguing newly discovered evidence. That is a moot issue in this proceeding and something the respondent invented because they don't have any other argument. I'm arguing that this default judgment is void and I am entitled to have it removed from my record as a matter of right, however, the new information I received is not the citation itself as the respondent claims, that citation, # D339451-0 has nothing to do with this case 2003 TR 860, it is the **"Police Record"** that is printed on that same page, which was sent to me by the Burlington Police Department in December of 2014 that is the new info. This is where the officer states that he issued a notice of intent to revoke on 1-17-03. The respondent is now trying to represent this as a second notice. If this was true, and he served me a first notice, then why would he write another notice with the intent of mailing it to me? The respondent's claim does not make sense and there is nothing in any record that would suggest that there were two notices, or even 1 before 1-17-03

The respondent does not establish in any way that Hess was ever served a notice of intent to revoke to thereby argue jurisdiction. The respondent never argues a date on which Hess was served, they only falsely claim that the "Court Record" shows a notice of intent to revoke was mailed to the defendant. THE COURT RECORD DOES NOT SHOW THIS ANYWHERE! **It also certainly does not say anywhere that "a notice of intent to revoke was mailed to the defendant's last know mailing address".**

Wisconsin Statute § 809.15 Record on Appeal is what is expected to be filed for the case record. §809.15 (1) (a) 2 is "Proof of service of summons or other process". There is no proof of service in the record. As a matter of fact, THERE IS PROOF OF NO SERVICE. Documents 1-1 and 1-2 entered in the record on appeal conclusively show that no service was made, the date served section is blank and the respondent does not even attempt to put a date of service out there. There is no date anywhere in any record of service being made.

The Court Record does not have a date in that section. why? Why can't the district attorney put a date on the service they ALLEGE was done by mail? A person cannot look at the facts here and the record and say Hess was served and put a date of service on it because it never happened, Hess was never served.

The attached page 202, which is also page 109 of the appellant's brief, is the second part of P15 in the respondent's brief. In that document the officer stated that "All of this will be mailed to the defendant". Now if you look at page 109 or pg. 202, this is a report from the same day in which the officer states WHAT he gave another officer to mail to Hess. It states **"I then paper clipped a CITATION, A PHOTOCOPY CF THE BLOOD RESULTS and gave it to Admin. Asst. Hardesty to be mailed to the defendant's address"** Two things.

There is nothing mentioned about Officer Fisher giving a notice of intent to revoke to Admin. Asst. Hardesty to mail to the defendant, and secondly there is nothing to say he ever mailed the traffic citation and blood results either because the felony charges were already dismissed along with the charges in that citation the day before. On page 205 attached, the officer also specified what citations and paperwork he gave me, again no notice of intent to revoke mentioned.

Hess directly challenged the respondents to at least produce some kind of evidence that shows he was served a notice of intent to revoke, the respondent failed to do this because this cannot be done. You can't prove a person was served when they weren't and there cannot be evidence of some alleged event that never took place.

I believe that somewhere in the motion records from the first 2014 hearing I submitted a sworn statement that I was never served and in case you lost it here is another one: I hereby swear and affirm through my signature on this brief that I was never, ever served a notice of intent to revoke in this matter.

Document 1-1 is blank on the date served section, and is only more proof that Hess was never served to establish jurisdiction. This is the document that according to statute is what initiated the case. Wis. Statute § 809.15 (1) (a) 1 "The paper by which the action or proceeding was commenced" This lists Citation # C509994-2 as being the commencing paper which is a felony OWI citation, not a notice of intent to revoke, it even lists a court date of 01-27-2003 at 8:30 a.m. on 1-2 of this record. This criminal citation and charges were dismissed on 1-16-03 in case 2003 CF 002.

Hess never waived any jurisdictional challenge. There are no missing records here either. Something can't be missing if it was never there to begin with. The court substituted a felony traffic citation for a notice of intent to revoke and that citation is fundamentally defective for that purpose because it does not show anything about a revocation or that a person must request a hearing within 10 day nor does it list where to request this hearing. This is why there is a notice of intent to revoke form, MV 3396, to be used in these situations.

On page 11 of the respondent's brief they are trying to allege that I am arguing that I was not personally served. I never said this either. I said NEVER SERVED, not personally, there is a difference there and they are trying to put words in my mouth.

Then on page 12 of the respondent's brief the respondent alleges that "a notice of intent to revoke was sent to the defendant at his last know address". IT DOES NOT SAY THIS ANYWHERE, WHERE IS THE RESPONDENT READING THIS STUFF? This is all being made up by the respondent in an attempt to get my appeal dismissed because that is their job, but making things up and lying in their briefs should have some consequences. The respondent is trying to twist a new story that never happened.

IF the tables were turned, and for some reason Hess needed to prove he was served, he also would not be able to do this from the evidence presented and the records. This is because it is a fact that Hess was not served and the court was without jurisdiction to render the default judgment.

In addition, the officers police record statement states that he did issue a notice of intent to revoke on January 17, 2003 and IF this would have somehow been served to Hess, the court was still not authorized by statute to then revoke Hess's license until 30 days from the date of service or issuance, and therefore the default judgment is also statutorily unauthorized and void.

Hess was never served for the court to acquire jurisdiction and the respondent's brief and all the records do not prove otherwise. Hess has established the judgment as being void. This is not a newly discovered evidence scenario as the respondent is trying to turn this into because they cannot prove there ever was a notice of intent to revoke either filed with the court or mailed to Hess. The record on appeal establishes that Citation C509994-2 was filed in case, 2003 TR 860, see 1-1 and 1-2, not a notice of intent to revoke, there is no copy of a notice of intent to revoke in the record on appeal or anywhere else.

Per the rules of appellate procedure § 809.15(1)(a)1. these document, 1-1 and 1-2, are what initiated the case and there is no service date there. This is not something Hess could manipulate because these are court controlled records that indicate Hess was never served, exactly as he claims. This backs up everything Hess says about not being served and Hess did not even have this evidence when he brought this appeal, this is just icing on the cake.

The respondent is trying to create an alternative theory of a first and second notice of intent to revoke as being issued and mailed to Hess. As I said in my addendum to the brief I've recently seen a copy of a notice of intent to revoke, form MV 3396. These forms are color coordinated carbon copies that are to be mailed to all parties so if in fact there was a second notice of intent to revoke issued and filed that should be in the court record too. There is no notice of intent to revoke listed in the court record after January 17, 2003. the date the officer wrote in his report that he "issued" this notice. One of these colored copies is supposed to be mailed to the district attorney too, so they should have multiple copies if this were true. The respondent is making up stories with no evidence to back it up.

Why did the court not get a copy of this and file it in the record as the respondent claims? IF there were two notices issued, as the respondent is trying to invent, then there should be <u>two entries</u> in the court record, but there is not. The DMV is also supposed to get a copy of this notice of intent to revoke and they also have <u>no record</u> of this notice, see §343.305(9) Stats.

In *Neylan v. Vorwald, 124 Wis. 2d 85; 368 N.W. 2d 648,* @ Footnote 14 it recites that **"A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, but he must establish that the judgment is void"**. *Footnote 14 contains several other case laws that are relevant to this situation.*

Here, Hess has established that "the judgment is void" in several different scenarios:

A. The Court never acquired personal jurisdiction through Wis. Stat. §343.305(9)(b) because Hess was never served or given in any way a "Notice of Intent to Revoke", ever, (see 1-1), and the default judgment is **void** in that aspect. The officer did not even attempt to exercise reasonable diligence to serve Hess a notice of intent to revoke, see *Emery v. Emery, 124 Wis. 2d 613, 622; 369 N.W. 2d 728, 732-33 (1985).*

B. **This default judgment was entered contrary to due process** and it is **void** in that way too, because it was entered without ever informing Hess or giving him a opportunity to request a hearing before the default judgment was entered. again because he was never given the "Notice of Intent to Revoke" as statutorily required. That information is to be provided in the notice along with the name and address of the court, this never happened!

C. **The Court was not statutorily authorized** to revoke Hess's license on the date that it did, and because the default judgment is not statutorily authorized, it is also **void** in that way. Exhibit-3, page 108 of the appellant's brief provides that the officer, in his own written words, **"issued"** a notice of intent to revoke on **1-17-2003** and he then had INTENDED TO SEND HESS A COPY, but never did. He gave papers to Admin. Asst. Hardesty to be mailed to Hess but the notice of intent is not one of those papers. These are his own words, see appellant's brief page 109. Ex-2 attached as page 202.

Wis. Statute §343.305(9)(a)4 states in part that: If no request for a hearing is received within the 10-day period, the revocation commences 30 days after the notice is issued.

Likewise Wis. Statute §343.305(10) states in part: **"after the person has been served"** if no hearing was requested, the revocation period shall begin 30 days after the date of the refusal.

Here, the **"effective date"** printed on the revocation order, or default judgment is shown as effective on **01-31-2003**, ***14 days after it was allegedly issued,*** not 30 days.

Hess was never served to satisfy 343.305(10) and the only place where a notice of intent to revoke is mentioned clearly states that one was "issued" on **1-17-2003**, and therefore this is not ***30 days after the notice was issued***, assuming he did actually write or issue one which there is no proof of that either, that does not satisfy the requirements of 343.305(9)(a)4.

A trial court properly exercises it's discretion when it examines the relevant facts, applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach, *Gerth v. American Star Ins. Co., 166 Wis. 2d 1000, 1006-07; 480 N.W. 2d 836, 839 (Ct. App 1992).* As you see below, there are many judges that conclude there is no time limit to vacate a "void" default judgment, and here the judge specifically wrote "not timely filed", so what I conclude is that many other reasonable judges reached a different decision. Here the trial court erroneously exercised its discretion because it did not use any discretion at all, or at least did not explain the rationale behind the single sentence written decision.

If the trial court would have looked into it. the court would have known a "void" default judgment being challenged for lack of jurisdiction can be vacated at any time and one can also challenge a "void judgment" at any time and there are many case laws on this, here are a few: *Baxter v. Armon, 143 Wis. 2d 891; 421 N.W. 2d 117; Benitez v. Fasick, 220 Wis. 2d 358; 582 N.W. 2d 505; Pacurar v. Hernly, 611 F. 2d 179, 181; Taft v. Donellan Jerome, Inc., 407 F. 2d 807, 808 (7th Cir. 1969); Federal Land Bank v. Olson, 239 Wis. 448, 454, 1 N.W. 2d 752(1943); West v. West, 82 Wis. 2d 158, 165-166; 262 N.W. 2d 87(1978); Kohler Co. v. DILHR, 81 Wis. 2d 11, 25; 259 N.W. 2d 695(1977).*

If the respondent were to have it their way, a person could never use any new information or evidence they later come upon to have a basis to challenge a void judgment. I understand that the respondent has filed their brief and is just trying to do their job but making things up such as multiple notices and mailings that never happened is getting a little out of line.

There was a previous hearing on 10-20-2014 in which I brought up the same issue about jurisdiction and the judgment being void. The transcripts in the respondent's brief are from that hearing. This appeal is not from that hearing or oral decision.

I claimed beforehand that I was never served and when the circuit court filed the record on appeal you see the date served box is empty, fully supporting my previous claims of never being served. Now IF there had been a date served in there then the state would have an argument but they just don't.

During that hearing the judge just refused to reopen the case. That was not a motion to reopen the case. This new motion also was not a motion to reopen the case. It was a motion to vacate a default judgment in which Hess specifically challenged and questioned the court's jurisdiction which would then render the judgment void because he was never served. There are also case laws on this which I've read and this could also be an erroneous exercise of discretion, or abuse of discretion before the terminology was changed, depending on the date of the case law, the term was changed in 1992, see *Hefty v. Hefty, 172 Wis. 2d 124, 128 n.1; 493 N.W. 2d 33 (1992).*

It appears that the clerk of court, has mistakenly substituted the felony criminal citation C509994-2, from felony case 2003 CF 002, for a notice of intent to revoke in the record in this civil case, 2003 TR 860, and because it is apparently being used as the notice of intent to revoke pursuant to §343.305(9)(a), it is **FUNDAMENTALLY DEFECTIVE** in that aspect because §343.305(9)(a) requires the notice to: inform the person that he has 10 days to request a hearing for the revocation to the court whose address is listed on the notice. There is nothing on this citation that even remotely suggests that this is a civil revocation proceeding and the person must request a hearing. This was a felony OWI citation and mentions nothing about any revocation proceeding at all and does not even list the correct statute, it is an OWI citation per §346.63(1)(a) Stats., not an implied consent notice

A notice of intent to revoke is intended to be "immediately" issued, see *State v. Rydeski, 214 Wis. 2d 101; 571 N.W. 2d 417(1997)* though in *State v. Moline, 170 Wis. 2d 531; 489 N.W. 2d 667*, which is an earlier case, the court implies that the "shall immediately be served" is directory not mandatory. Either way though, **service to the person is required to adhere to due process**, this is explained in *State v. Polinski, 96 Wis. 2d 43; 291 N.W. 2d 465.*

The respondent brought up the *Moline* case in their brief suggesting that immediate service is not required. Here Hess was NEVER SERVED, either immediately or any time since.

SERVICE IN ITSELF IS MANDATORY FOR JURISDICTION

Because service was never made and because the Racine Circuit Court has substituted a felony criminal citation that is fundamentally defective to be used as a notice of intent to revoke, this absolutely violates Hess's due process rights, without a doubt. There may also be some other misconduct there in falsifying the court records. I'll leave that issue alone for now but I do want the issue in the record through this brief in case of any further proceedings.

The main issue is whether or not this default judgment is void, this is the issue, and as Hess has proved throughout his briefs and attachments, using the police and court records as proof, the default judgment is just that, VOID, a legal nullity. Vacating a void judgment is mandatory and it is not a discretionary ordeal, if it is void it must be vacated, see *Halbach v. Halbach, 259 Wis. 329; 48 N.W. 2d 617, (1951).*

This default judgment should be voided just because of the fact that this case was initiated through the use of Criminal Citation #C50999-2 being substituted as a notice of intent to revoke, and plated with a different statute in the record. **This case and information was never properly filed**, and these reasons too would infringe on Hess's due process rights. These records are falsified in that respect, regardless of whether it was intentional or not.

And although it's too late and really not relevant to this appeal, if I would have been given a hearing, **there was no refusal**, and I could have proven that back then before my license was ever revoked. Now the revocation has been served and I can never get that back, but I do want this void default judgment removed from all my records and that is the point of this appeal, to clear my record of this.

Statement on publication

I believe that publication is necessary because civil default judgments such as this are being counted as criminal offenses under the penalty phase for OVI offenders and there must be accurate records kept if the State uses these default judgments to put people in prison, and there should be some definitive avenue for challenging these civil "criminal offenses".

Publication is also needed to establish a date on which these type of revocations are to begin, 343.305 has two different start dates as previously explained in the brief in chief.

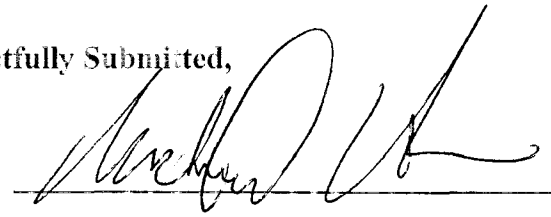
Publication should also mandate if possible, a proof of service for a notice of intent to revoke and a date of that proof of service so the court knows exactly when the person was given notice.

FINAL CONCLUSION

For these reasons and those brought forth in my Brief and Addendum to the Brief I am respectfully requesting that the Court order that the "void default judgment" be adjudged as such and ordered to be removed from all Court Records and my Driving Record with the Department of Transportation.

Dated this 27TH day of May, 2016

Respectfully Submitted,



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

REPLY BRIEF APPENDIX

EXHIBITS **PAGE**