COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0259

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE REFUSAL OF JAMES M. STRATTON:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. STRATTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] James Stratton appeals the circuit court's order denying his motion to vacate the February 10, 1997 order suspending his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

operating privilege. He contends the court erroneously exercised its discretion in denying the motion. We disagree and affirm.

¶2 On January 7, 1997, Stratton was issued a citation for operating a motor vehicle while under the influence of an intoxicant (OMVWI), fifth offense, contrary to WIS. STAT. § 346.63(1)(a) (1997-98). On the same date, he was given a copy of a "Notice of Intent to Revoke Operating Privilege" by a law enforcement officer. That document recited that the officer had arrested Stratton for OMVWI and requested that he submit to a test of his blood for alcohol as provided by WIS. STAT. § 343.305(3) (1997-98) (the implied consent statute), and Stratton had refused the request. The document informed Stratton that he could request a hearing on his operating privilege by mailing or delivering a written request within ten days of the date of the notice to the specified address; if a hearing were not requested by that date, his operating privilege would be revoked or suspended for a specified period beginning thirty days from the notice date. The document also stated that the issues at the hearing were limited to whether the officer was entitled to request that Stratton submit to the test, whether the proper notice was given to Stratton, whether Stratton refused to submit to the test, and whether Stratton had a physical disability or disease unrelated to the use of alcohol that was the basis for his refusal.

¶3 Stratton did not request a hearing within ten days, or at any time thereafter. The prosecutor moved for a dismissal of the charge on the ground that the State did not feel it could meet its burden of proving that Stratton was the driver of the vehicle, and the court approved the dismissal on February 10, 1997. Also on that same date, the court entered an order suspending Stratton's operating privilege for one year for his refusal to submit to a test for intoxication. The order

stated that the OMVWI charge was dismissed and noted that Stratton had failed to request a hearing.

¶4 Subsequently Stratton was convicted of OMVWI, fifth offense, on August 31, 1999, and OMVWI, sixth, seventh, and eighth offenses, on March 10, 2000. With respect to each of these convictions, the February 10, 1997 suspension order was counted as an alcohol-related offense for purposes of applying enhanced penalties. WIS. STAT. §§ 343.307(1)(f) and 343.305(10).

¶5 On October 23, 2000, Stratton filed a "Motion to Reopen Default Judgment" under WIS. STAT. § 806.07(1)(h).[2] Stratton's counsel's affidavit

[2] WISCONSIN STAT. § 806.07(1) provides:

> **Relief from judgment or order. (1)** On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

accompanied the motion and averred the following (in addition to the background we have already related) based on what Stratton had told him: At the time the 1997 charge was dismissed, Stratton was in jail, to the best of his knowledge, and his attorney at the time informed him of the dismissal. Stratton was released from jail and believed that all matters regarding the case had been dismissed. He did not know that the "refusal portion of the case went forward and to default [j]udgment on February 10, 1997." Prior to the plea and sentencing for the August 31, 1999 conviction, Stratton told his attorney in that case that he had been convicted only three times previously, not four; but this was never straightened out. Stratton told present counsel, who had been appointed for postconviction purposes with regard to the March 10, 2000 convictions, of his concern that his prior convictions had not been properly counted. Present counsel then investigated and brought the motion. Stratton informed present counsel that he had not been driving on January 7, 1997.

¶6 At the hearing on the motion, Stratton's counsel's argument followed the assertions in the affidavit. The prosecutor, in response, argued that the suspension of Stratton's operating privilege was proper whether or not the State could meet its burden in proving Stratton was the driver, since Stratton had not requested a hearing within ten days; the order entered was not a default judgment but was the result of Stratton not having requested a hearing. The prosecutor also argued that there was no evidence before the court indicating any likelihood that Stratton would prevail on the merits at a refusal hearing, even if the standards for re-opening a default judgment were applicable. Stratton's counsel replied that Stratton's misunderstanding of the effect of the dismissal of the OMVWI charge on the refusal proceeding was understandable and that the

prospect of prevailing at a refusal hearing would be "pretty good," since the State acknowledged it could not prove Stratton was the driver.

¶7 The trial court denied the motion. Referring to the reason for the dismissal of the citation and the relation of that to the prospect of prevailing at a refusal hearing, the court observed that the State's burden of proof was "beyond a reasonable doubt." It then noted that the reason for the suspension order was the failure to request a hearing within the specified time period; that proceeding was an entirely separate matter from the OMVWI; and under the law, an acquittal on the OMVWI charge is not a basis to vacate the revocation or suspension order for a refusal. The court concluded that the suspension order was proper and no basis for relief from that order had been demonstrated.

¶8 Since the trial court's decision whether to vacate the suspension order is committed to its discretion, we affirm if the court properly exercised its discretion. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W. 2d 419 (1985). A trial court properly exercises its discretion when it applies the correct legal standard to the facts of record and reaches a reasonable result through a rational process. ***Id.*** at 542. Relief under WIS. STAT. § 806.07(1)(h) is appropriate when the moving party has grounds that are included in subsection (a), (b), or (c) but the motion is brought outside the one-year time period applicable to those subsections under § 806.07(2) and there are extraordinary circumstances justifying relief in the interest of justice. ***Id.*** at 553. In exercising its discretion, the court is to consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following:

> [W]hether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which

> there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Id. at 552-53.

¶9 Stratton argues that the trial court erroneously exercised its discretion because it did not consider any of the above factors and instead based its decision on a flawed view of the law. According to Stratton, the trial court's statement that the refusal proceeding and the OMVWI charge are separate shows that it erred in not recognizing that they are related in two ways significant in this case: the reason for dismissal of the OMVWI charge relates to one of the issues at a refusal hearing—whether there was probable cause to arrest—and the suspension order affected the future penalties for OMVWI offenses.

¶10 We disagree with Stratton's analysis of the trial court's decision for several reasons. First, we do not agree that the trial court is obligated to consider factors for vacating the suspension order for which Stratton did not argue or present evidence. Stratton's counsel did not argue or present evidence that Stratton did not have effective assistance of counsel. Therefore, the court did not err in not considering the second factor.

¶11 Second, we do not agree that the court did not consider the other three factors relevant in this case—the first, third, and fourth.[3] Although the court's comments are not lengthy, they do respond to the arguments Stratton's

[3] The fifth factor relates to reasons against vacating the order and we do not understand Stratton to be arguing that the court should have considered this.

counsel made and do explain the court's reasons for rejecting them. The court need not specifically mention in its decision each argument or piece of evidence it has heard because we assume that it considered the evidence and argument presented to it. *See* ***Nelsen v. Candee***, 205 Wis. 2d 632, 644, 556 N.W.2d 784 (Ct. App. 1996).

¶12 The court heard Stratton's counsel's explanation for the reason Stratton had taken no action with respect to the refusal proceeding after the dismissal of the OMVWI charge—this goes to the first factor. However, the court pointed out that the suspension order was entered because no hearing was requested as prescribed by statute. Under the statute and the notice Stratton was given that repeats the statutory requirements, the hearing had to be requested within ten days of January 7, 1997. That date had passed well before the State moved to dismiss the charge on February 10, 1997. We understand the court to be saying that counsel's explanation for Stratton not taking any action after dismissal of the OMVWI charge does not explain Stratton's reasons for not having requested a hearing within the required time period: the suspension order was entered not because of the OMVWI dismissal on February 10, but because Stratton had not requested a hearing within the prescribed time period.

¶13 With respect to the third and fourth factors, since there was no refusal hearing, both factors involve an assessment of Stratton's chance of prevailing at a refusal hearing. The only ground for a hearing counsel mentioned was to challenge probable cause. The court heard counsel's view that the State's assessment that it could not prove that Stratton had been driving together with Stratton's assertion that he had not been driving indicated Stratton had a "pretty good" chance of showing there was no probable cause; the court also heard the prosecutor's opposing argument. The court indicated its disagreement with

Stratton's counsel, pointing out that on the OMVWI charge, the State had to meet a burden of "beyond a reasonable doubt." Stratton's counsel did not offer any argument directed to the probable cause standard or the information the officer had at the time of arrest.[4] The court could therefore reasonably conclude that Stratton had not shown he had any likelihood of prevailing, and, thus, there was no reason to allow a hearing at this point in time.

¶14 Third, we do not agree that the court did not understand that the refusal hearing and the OMVWI charge were related in the ways Stratton argues. Rather, the court did not agree with Stratton that the reason for the dismissal of the OMVWI charge meant there was no probable cause to arrest, and, as we have already indicated, that is a reasonable conclusion in view of what was presented to the court. And we have no question that the court did understand the effect of the suspension order on later penalties—that was explained by Stratton's counsel, not disputed by the prosecutor, and is the required outcome under the relevant statute.

¶15 We are satisfied that the court did apply the appropriate factors to the evidence before it in a rational process, and its decision that relief was not warranted was a reasonable decision.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE § 809.23(1)(b)4.

[4] At a refusal hearing, the State need not prove that Stratton was the actual driver of the car, only that the officer had probable cause to believe he was operating the vehicle; moreover the trial court does not weigh the State's and the defendant's evidence to decide probable cause, but only ascertains the plausibility of the officer's account. ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986).