

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2888

Cir. Ct. No. 2011CV2837

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VILLAGE OF ELM GROVE,

PLAINTIFF-RESPONDENT,

v.

RICHARD K. BREFKA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
MARK D. GUNDRUM, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Richard K. Brefka appeals the circuit court order denying his request for a refusal hearing. The circuit court determined that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

because Brefka did not file a request for a refusal hearing within the ten-day statutory time limit prescribed in WIS. STAT. § 343.305(9)(a)4., the court lacked competence to hear his motion. As such, the circuit court dismissed Brefka's appeal and remanded the case back to the municipal court for disposition. Brefka contends that the circuit court erred in concluding that it lacked competence to extend the ten-day time limit under WIS. STAT. §§ 800.115(1) and 806.07, and *State v. Schoepp*, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996). The Village of Elm Grove counters that § 343.305(9)(a)4. and (10)(a), as well as an unpublished Wisconsin Court of Appeals decision, *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60 (unpublished), clearly state that the circuit court is without competence to extend the ten-day time limit within which a refusal hearing must be requested. We agree with the municipal and circuit courts, and affirm.

BACKGROUND

¶2 Following a December 12, 2010 traffic stop, during which Brefka apparently refused the police officer's request that Brefka submit to a chemical blood alcohol test, Brefka was issued a "Notice Of Intent To Revoke Operating Privilege."² (Some capitalization omitted.) See WIS. STAT. § 343.305(9)(a). The Notice was dated December 12, 2010. Brefka does not challenge the giving of the Notice or its contents. The Notice properly informed Brefka that he had ten days

² The Notice states that during the December 12, 2010 traffic stop Brefka was arrested for operating a motor vehicle while intoxicated ("OWI"), in violation of WIS. STAT. § 346.63(1)(a). The Village asserts that the OWI charge is being tried separately from these refusal proceedings, and Brefka does not disagree.

to request a refusal hearing, and that if he did not, “the court must revoke your operating privileges 30 days from the date of this notice.” Brefka requested a refusal hearing on December 28, 2010, more than ten days beyond the notice date. These facts are not in dispute.

¶3 Brefka filed a “Motion To Extend Time Limit On Request For Hearing On Refusal To Submit To Test” in the Village of Elm Grove municipal court. (Some capitalization omitted.) His motion was signed July 14, 2011.³ Brefka based his motion on excusable neglect, namely, his own and that of his former attorney. As grounds, Brefka’s motion states that he spoke to his former attorney on December 27, 2010, about requesting a refusal hearing, but that Brefka did not pay the attorney until December 28, 2010. In his motion, Brefka asserts that the deadline for the hearing request was December 27, 2010. The Village disagrees that December 27, 2010, was the deadline date, but whatever the deadline, both parties agree that Brefka’s request for a refusal hearing was untimely.

¶4 The Village of Elm Grove municipal court scheduled a hearing on Brefka’s motion and the Village attorney moved to strike the defendant’s refusal hearing request as untimely. The municipal court determined that the request was untimely, that it lacked competence to proceed and dismissed the request for a refusal hearing. Brefka appealed to the circuit court, which affirmed the municipal

³ The record on appeal does not reveal when this motion was filed in the municipal court but the filing date is not germane to this appeal.

court and remanded the case back to the municipal court for further proceedings. Brefka appeals the circuit court's ruling.⁴

DISCUSSION

¶5 Brefka argues that the circuit court erred in ruling that it lacked competence to extend his deadline for requesting a refusal hearing under WIS. STAT. § 343.305(9)(a)4. Brefka contends that the circuit court has competence to extend the deadline for excusable neglect under WIS. STAT. §§ 800.115(1) and 806.07. Whether the circuit court has competence to hold a refusal hearing when it is undisputed that the defendant has failed to meet the ten-day deadline of § 343.305(9)(a)4. is a question of statutory construction which we review independently of the circuit court. *See Nelson v. McLaughlin*, 211 Wis. 2d 487, 495, 565 N.W.2d 123 (1997) (“Interpretation and application of a statute to undisputed facts is a question of law, reviewable *de novo*.”). We construe statutes by discerning the plain meaning of the words of the statute to discover the legislature's intent. *See McEvoy v. Group Health Coop. of Eau Claire*, 213 Wis. 2d 507, 528, 570 N.W.2d 397 (1997).

¶6 WISCONSIN STAT. § 343.305(9)(a)4. provides in pertinent part:

If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.... The notice of intent to

⁴ We include some procedural facts in our opinion that appear in the Village's brief, but which are apparently not in the record as they are not cited by the Village. *See* WIS. STAT. § 809.19(1)(d) & (3)(a)2. Because Brefka did not file a reply brief and therefore does not argue that the procedural facts stated by the Village are untrue, we deem them admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

revoke the person's operating privilege shall contain substantially all of the following information:

....

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 plain language of the statute is abundantly clear. Section 343.305(9)(a)4. specifically mandates that if the request for a hearing is not *received* within the ten-day period, *revocation commences* thirty days after the date of the notice of intent to revoke. Here, there is no dispute that the notice date was December 12, 2010, and no request was received within ten days. The statute contains no provision for an extension of the ten-day deadline.

¶7 Additionally, WIS. STAT. § 343.305(10)(a) *requires* the circuit court to proceed with revocation if no request for a hearing is timely received:

If the court determines under sub. (9)(d) that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, *the court shall proceed under this subsection.*

(Emphasis added.) "Shall" is a word with no ambiguity. *See State v. Sprosty*, 227 Wis. 2d 316, 324, 595 N.W.2d 692 (1999) ("the word 'shall' is presumed mandatory when it appears in a statute") (citation omitted). "If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Because it is undisputed that no request for a refusal hearing

was filed within ten days of the Notice, the circuit court here had no discretion under the statute and was required to proceed with revocation.

¶8 Despite the clarity of the statutory language, Brefka argues that WIS. STAT. §§ 800.115(1) and 806.07(1)(a) permit the circuit court to extend the ten-day deadline due to excusable neglect. Section 800.115(1) permits a defendant in a *municipal court* case to move for relief due to excusable neglect within six months after judgment. Section 806.07(1)(a) gives a *circuit court* discretion to relieve a party from a judgment or order for excusable neglect. Brefka argues that we held in *Schoepp* that a refusal case is a special proceeding under WIS. STAT. § 801.01 and that the civil rules of discovery apply in refusal cases. *See Schoepp*, 204 Wis. 2d at 270. From that he argues that therefore the civil statutes permitting relief from an order for excusable neglect apply here to permit extension of the ten-day deadline.

¶9 Brefka correctly states that we held in *Schoepp* that the civil rules of discovery applied in that refusal case, *see id.*, but we reached that holding only after concluding that the refusal statute did not prescribe a different discovery procedure: “The plain language of [WIS. STAT.] § 801.01(2) ... provides that Chapter 804 ... governs practice in circuit courts in all special proceedings ‘*except where different procedure is prescribed by statute or rule.*’” *See Schoepp*, 204 Wis. 2d at 272 (emphasis added).

¶10 Here, unlike in *Schoepp*, both WIS. STAT. § 343.305(9)(a)4. and (10)(a) *do* provide for a different procedure, namely, both provisions of the refusal statutes impose a mandatory obligation on the circuit court to revoke a person’s operating privilege if he or she does not file a request for a refusal hearing within ten days of the notice of intent to revoke. Brefka simply ignores the clear

exception language of WIS. STAT. § 801.01(2) and the second part of our holding in *Schoepp*. We do not.

¶11 Finally, Brefka takes issue with the circuit court's reliance on *Fricano*.⁵ In finding that it lacked competence to extend the deadline, the circuit court based its decision on the language of the statutes and also the holding in *Fricano*. Brefka argues that *Fricano* lacks even persuasive value on the competence issue, attempting to distinguish it from his case based on procedural differences.

¶12 In *Fricano*, Fricano failed to file a request for a refusal hearing within ten days, just as Brefka did. *See id.*, 326 Wis. 2d 267, ¶2. After he received notice from the Wisconsin Department of Motor Vehicles that his driver's license was revoked due to his failure to request a refusal hearing within ten days, Fricano brought a motion to reopen the refusal, calling it a judgment. *Id.*, ¶3. In contrast, Brefka argues that his motion was to extend the deadline for requesting a hearing, not a motion to reopen judgment and thus *Fricano* has no applicability to his appeal.

¶13 Brefka is incorrect. The cases are identical on their undisputed facts. We held that the circuit court lost competency to proceed with the case when Fricano failed to request a hearing within the ten-day time limit set by statute,

⁵ The Village relied on *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60 (unpublished), before the municipal court, before the circuit court, and before this court, clearly identifying it as an unpublished decision, including a copy of the opinion in the appendix and citing it for its persuasive value. *See* WIS. STAT. § 809.23(3). The circuit court explicitly found the case persuasive, as do we.

citing *Green County DHS v. H.N.*, 162 Wis. 2d 635, 656, 469 N.W.2d 845 (1991), where we stated that failure to observe statutory time limits deprives a court of competency. See *Fricano*, 326 Wis. 2d 267, ¶9. Thus, *Fricano* adds persuasive heft to our interpretation of WIS. STAT. § 343.305(9)(a)4. and (10)(a). We conclude that the municipal and circuit courts correctly found that they lacked competence to extend the ten-day deadline for requesting a refusal hearing.

By the Court.—Order Affirmed.

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

