COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2627-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD D. HUBATCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed.*

MYSE, J. Richard D. Hubatch appeals a judgment[1] convicting him of wrongfully refusing to submit to chemical testing, § 343.305, STATS. Hubatch argues that his conviction should be overturned because the action was prosecuted by the city attorney instead of by the district attorney. Because this

[1] This is an expedited appeal under RULE 809.17, STATS.

court concludes that the city and state willfully have been engaged in a long-standing practice of avoiding the requirement that refusal actions be prosecuted by the state, the judgment is reversed.

Hubatch was charged with operating while intoxicated, and refused to submit to a chemical test to determine the presence of alcohol in his blood. He requested a hearing to determine whether his refusal was lawful. The City of Shawano began to prosecute the refusal, subpoenaing prosecution witnesses and responding to Hubatch's discovery demands. The city removed itself from the case only after Hubatch moved to dismiss based on the city's lack of authority to prosecute such actions.

The assistant district attorney appeared with the city at the hearing on Hubatch's dismissal motion and declared its readiness to prosecute the action. The trial court refused Hubatch's dismissal motion, concluding that any dismissal would be without prejudice and therefore would accomplish little beyond creating an unnecessary delay. Because all those necessary to properly prosecute were already present, the hearing proceeded with the assistant district attorney conducting the examination of the witnesses arranged for by the city attorney. The trial court ultimately concluded that Hubatch's refusal was wrongful, and revoked his driving privileges for a year. Hubatch appeals.

Hubatch asserts that the trial judge erred by failing to dismiss the case for wrongful prosecution. Hubatch correctly notes that the law has been clear for almost twenty years that the state must prosecute refusal actions. In ***City of Madison v. Bardwell***, 83 Wis.2d 891, 903, 266 N.W.2d 618, 624 (1978), the court held that in such proceedings "the state is the interested party, and the district

attorney should [prosecute] the case." The state does not contest that ***Bardwell*** unambiguously requires it to prosecute refusal actions.

Hubatch contends that the City of Shawano and the district attorney wrongfully have avoided the requirement of ***Bardwell*** by reaching an understanding that allows the city attorney to prosecute these actions. Under this implicit agreement, the city begins the prosecution and carries it out until the defendant objects to the wrongful prosecution. If the defendant fails to object at or before the trial, the objection is waived and the city's prosecution will stand. *See* ***id.*** (failing to object to the city prosecuting the action is waived if not objected to). On the other hand, if the defendant does object, the city will make arrangements for the district attorney to take over the case.

The existence of such a long-standing agreement in violation of the Supreme Court's holding in ***Bardwell*** is not disputed. At the motion hearing, the circuit judge noted that the city had been prosecuting refusals for twenty years. (27:4). The city attorney admitted to trying these cases for the nineteen years he had been involved with the city attorney's office (27:6). Finally, in its brief, the state recognizes the "19 year old practice of the city attorney's office to prosecute refusal hearings unless the defense objects." Accordingly, this court does not hesitate to conclude that ***Bardwell*** was not complied with.

The state next argues that any violation of ***Bardwell*** resulting from its illegal agreement with the city was harmless error. Considering the conscious disregard of the law which has existed for nineteen years, this court cannot agree. While Hubatch himself may not have suffered any specific prejudice, the broader social harm caused by a disregard for the legal requirements by those charged with the responsibility to enforce the law is sufficient to demonstrate prejudice. The

community is entitled to have refusal hearings prosecuted in accordance with the requirements of the law. Ignoring such requirements prejudices the community because the process required has not been followed. Such a practice can no longer continue. The judgment is therefore reversed. For the same reasons, this court declines to accept the state's request for dismissal without prejudice.

By the Court—Judgment reversed.

This opinion will not be published. RULE 809.17(2)(b)4, STATS.