COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1382 **Cir. Ct. No. 02TR001876**

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

IN THE MATTER OF THE REFUSAL OF SANDY J. CLAUDE:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDY J. CLAUDE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] The effective use of Wisconsin's scarce judicial resources compels a party seeking relief to identify and coherently argue all issues.

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(g) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

In the trial court, the party is required to prominently flag each issue requiring the trial court's attention. In the appellate court, the party is required to adequately develop argument on why the trial court erred. We affirm the trial court's conclusion that Sandy J. Claude refused to submit to a chemical test of her blood alcohol content because she did not adhere to these elementary rules.

¶2 After her arrest for operating a motor vehicle while intoxicated, Claude sought a hearing on her refusal to submit to a chemical test under the implied consent law. In a Motion to Dismiss Refusal Proceedings, Claude contended that her consent to the chemical test was coerced because the implied consent law threatens consequences if she refuses.[2] She filed a second brief, entitled Estoppel Brief, in which she stated the facts were not in dispute and there was only one issue:

> Is the State estopped from pursuing refusal penalties because the arresting officer, prior to informing the Respondent by the reading of the "Informing the Accused" form and requesting she submit to a blood test, had decided, based on the policy of his department which so dictated, that he would require the Respondent to submit to a blood test whether or not she "refused" under the "implied consent" statute and the officer did not inform the Respondent of that fact before requiring her to decide whether to submit or to "refuse."

[2] Claude's assertion that language of the implied consent law contains a threatened sanction of a loss of driving privileges and this threat constitutes a coercive measure invalidating her consent for Fourth Amendment purposes was rejected in two opinions released after she filed her Motion to Dismiss Refusal Proceedings on March 6, 2002. ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, *review denied*, 2003 WI 16, 259 Wis. 2d 104, 657 N.W.2d 708 (Wis. Jan. 14, 2003) (No. 02-0965-CR); ***Village of Little Chute v. Walitalo***, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891, *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 892 (Wis. Sept. 26, 2002) (No. 01-3060).

¶3 The undisputed facts establish that after being read the Informing the Accused form, Claude refused to submit to a chemical test of her blood. The arresting officer then informed her, pursuant to his department's policy, that he would have hospital personnel perform a blood draw. Claude passively submitted to the blood draw.

¶4 During a hearing on Claude's motion, the following exchange took place between the trial court and Claude's counsel:

> THE COURT: Mr. Kalal, was the issue ever briefed that this is, in effect, not a refusal, because ultimately a blood test was taken?
>
> MR. KALAL: That was not concentrically briefed. It is an element that the court is, I believe, obliged to address.
>
> THE COURT: All right. Well, if that issue had been briefed, the court would have to take a hard look as to whether or not there is indeed a refusal in this case, because I think that is an interesting issue. Now, there's a difference between when—situations we've had when officers have to physically hold someone down and a situation where, in effect, the blood is obtained. This court has had a question as to whether or not that truly constitutes a refusal. And although I say a question, I haven't made a decision, if those facts come before me, which way I would rule. What I would want—and I think that's the more legitimate issue in some of these cases as opposed to what's argued here, but that's the type of issue that I would want both sides to fully brief before I would go out on a limb and make a decision on that.
>
> What this court will find is that issue has been waived and, as such, is not before this court.
>
> The court will find that there is a refusal in this case ….

¶5 Claude appeals from this finding. She challenges the trial court's conclusion that the issue of whether there was a refusal under the undisputed facts of this case was waived.

> Though the trial court viewed this argument as waived, it was not. The defendant-appellant specifically asserted that the issue was one that the trial court was obliged to address. It is, in fact, an issue essential to the State's proof under Wis. Stat. § 343.305(8). Even if it could be said that the briefs concentrated on the Due Process issue, the discussion in those briefs clearly encompassed the statutory issue, an issue necessarily preliminary to the Constitutional issue. Moreover, in a circuit court, there is no rule requiring a party to brief every issue to preserve that issue.

¶6 Contrary to Claude's assertion that she can preserve an issue in the trial court without briefing it, the elementary rule in Wisconsin is that in order to avoid waiver, an issue must be sufficiently flagged for the trial court to be made aware that the party requests a ruling on the issue. ***Beacon Bowl, Inc. v. Wis. Elec. Power Co.***, 176 Wis. 2d 740, 790, 501 N.W.2d 788 (1993).

¶7 Claude is correct that whether she refused is an issue at a refusal hearing. The issues at a refusal hearing are whether: (1) the officer had probable cause to believe that the person was driving while under the influence of alcohol; (2) the officer complied with the informational provisions of the implied consent statute; (3) the person refused to permit a blood, breath or urine test; and (4) the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol. ***State v. Nordness***, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986).

¶8 However, Claude fails to acknowledge that the State had put together a prima facie case for refusal to submit to a chemical test, and in order to overcome the State's case Claude had to present a coherent case—evidence and/or legal argument—that after saying no to the request to submit to a chemical test her passive cooperation erased her refusal. "The trial court is not an advocate; it is not up to the court to provide the evidence. Rather, it is the court's responsibility to decide on the basis of the evidence" and legal argument. ***Fowler v. Fowler***, 158

Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990). "Trial courts need not divine issues on a party's behalf. It is therefore unfair and certainly illogical to expect trial courts to discern and resolve every 'argument' that could have been but was not raised in resolving an issue." ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476, *review denied*, 2003 WI 91, 262 Wis. 2d 502, 665 N.W.2d 376 (Wis. May 5, 2003) (No. 02-1413).

¶9 It is just as unfair and illogical for an appellant to place the burden on this court. The court of appeals "will not entertain claims which were not pleaded or pursued below and which were not even remotely considered by the trial court." ***Martin v. Liberty Mut. Fire Ins. Co.***, 97 Wis. 2d 127, 135, 293 N.W.2d 168 (1980). Claude does not develop her argument on this issue in her brief to this court. In her initial brief, six paragraphs are found in the section she labels "There Was No Refusal," three paragraphs are devoted to the waiver issue and lack citation to any legal authority, one paragraph is argument that a driver's obligation is to submit to a test, one paragraph asserts an arresting officer may provide supplemental information, and one paragraph contends that no decision of an appellate court has exactly defined what constitutes a "refusal." She fails to present any argument why, under the facts of this case, her refusal is erased by her passive submission to the blood draw ordered by the arresting officer.

¶10 An appellate court does not decide issues that are not adequately developed by the parties in their briefs. ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997). The lack of substance to Claude's argument before this court would require us to analyze the issues, develop the issues, and then decide them. ***State v. Marshall***, 2002 WI App 73, ¶24, 251 Wis. 2d 408, 642 N.W.2d 571, *review denied*, 2002 WI 109, 254 Wis. 2d 262, 648 N.W.2d 477 (Wis. May 21, 2002) (No. 01-1403-CR). We are a high-volume,

error-correcting court and in order to maintain our efficient operation, we cannot serve as both advocate and court. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶11 Finally, we may, in our discretion, choose to address an issue despite waiver if it is in the interests of justice that we do so. ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996). We decline to address the issue Claude raises because her failure to adequately brief the issue in the trial court deprived the State and the trial court the opportunity to carefully consider the issue and deprived this court of the thoughtful analysis of the trial court. Her failure to adequately brief the issue in this court deprived this court of the cogent and logical legal reasoning—from both Claude and the State—that we need to resolve the issue.

By the Court.—Order affirmed.

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