COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2015

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. 2015AP172

Cir. Ct. No. 2014TR3860

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE REFUSAL OF MICHAEL T. SHEEDY:

OZAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. SHEEDY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Michael T. Sheedy appeals from an order denying his request to reopen proceedings on the revocation of his driving privileges and hold a hearing on his refusal to submit to an implied consent blood alcohol test. *See* WIS. STAT. § 343.305(2). Sheedy asserts that he did not refuse the blood test and that he requested a hearing within the ten-day period. Sheedy provides nothing to support his assertion that he mailed the request for the hearing within the ten-day period. We affirm the circuit court's denial of Sheedy's motion to reopen.

¶2 Sheedy was arrested on September 20, 2014, for operating a motor vehicle while intoxicated (OWI). Sheedy refused to submit to a blood test. He was given a copy of the notice of intent to revoke operating privilege, which included a notice that Sheedy had ten days in which to request a hearing. The court found that he did not request a hearing within ten days, and a default judgment was entered on October 6, 2014. Sheedy's failure to request a hearing was deemed a no contest plea. On October 28, 2014, Sheedy wrote the court and asked to reopen his case, though he did not assert that he was not in default. The court denied his request as untimely.

¶3 Sheedy maintains that he did not refuse the test and that he requested a hearing on September 29, 2014, within the ten-day period. Even construing Sheedy's October 28, 2014 letter liberally as a motion to reopen his case, Sheedy did not assert that he was not in default, much less set forth any explanation or include any supporting documents to show that he was not in default. On appeal,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

as well as below, Sheedy does not provide any proof that he mailed the request for a hearing. There is simply nothing in the record to support Sheedy's assertion that he mailed a request for a hearing within ten days of his arrest.[2]

¶4 Under WIS. STAT. § 343.305, the implied consent law, any person who drives a motor vehicle on public highways is deemed "to have given consent to one or more tests of his or her breath, blood or urine ... when requested to do so by a law enforcement officer" following an arrest for OWI. Sec. 343.305(2), (3)(a). If a driver refuses to submit to such a test, he or she is issued a "notice of intent to revoke" operating privilege. Sec. 343.305(9). This notice must advise "[t]hat the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court.... If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued." Sec. 343.305(9)(a)4.

¶5 Sheedy's failure to timely request a hearing within ten days caused the court to lose competence to hear the matter. *See* ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶4, 348 Wis. 2d 282, 832 N.W.2d 121. Whether a court has lost competence to proceed is a question of law that we review de novo. ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. A

[2] Sheedy also does not include in his appellate appendix any proof that he mailed the request at all, much less in a timely fashion. We note that Sheedy includes several documents in his appellate appendix that are not in the appellate record. If Sheedy wanted to rely on the documents in his appendix, it was his responsibility to ensure that they were included in the record on appeal. *See* ***Mercury Records Prods., Inc. v. Economic Consultants, Inc.***, 91 Wis. 2d 482, 506, 283 N.W.2d 613 (Ct. App. 1979). An appellate court cannot consider material attached to a brief that is outside the record. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984).

court's competence refers to the ability of a court to adjudicate the case before it. ***Id.***, ¶9. A "court's loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived." ***Green Cnty. DHS v. H.N.***, 162 Wis. 2d 635, 657, 469 N.W.2d 845 (1991). Under WIS. STAT. § 343.305, failure to bring the matter before the circuit court within the ten-day period results in a loss of competence, preventing the court from even addressing the case. *See* ***Brefka***, 348 Wis. 2d 282, ¶4. And, even construing Sheedy's letter to the court liberally as a motion to reopen, Sheedy did not assert that he was not in default.

¶6 Because his failure to timely request a hearing resulted in the loss of the court's competence to act further in the matter, we need not address Sheedy's other arguments.

By the Court.—Order affirmed.

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