COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP668 **Cir. Ct. No. 2016TR21383**

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

IN THE MATTER OF THE REFUSAL OF HECTOR MIGUEL ORTIZ MARTINEZ:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HECTOR MIGUEL ORTIZ MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN M. KIES, Judge. *Affirmed.*

¶1 BRENNAN, P.J.[1] Hector Miguel Ortiz Martinez appeals from an order revoking his driver's license pursuant to WIS. STAT. § 343.305(9), for refusing to provide a requested breath sample following his arrest for operating while intoxicated. Ortiz Martinez received no hearing on the refusal because he had failed to request a hearing within the ten-day period prescribed in WIS. STAT. § 343.305(10)(a). He sought an opportunity to present evidence and argue to the court that under the circumstances, he was entitled to such a hearing despite a belatedly filed request. He asserted that a language barrier and incomplete information he had received from police meant that the written notice he received was legally insufficient to constitute "notice of intent to revoke" his operating privileges as § 343.305(10)(a) requires. Under the statute, the ten-day clock on filing a request for a hearing starts at the time such notice is served.

¶2 The circuit court held that the lack of a timely request for a hearing deprived the court of competency to hear Ortiz Martinez's arguments. Ortiz Martinez renews his arguments on appeal. We affirm.

BACKGROUND

¶3 Ortiz Martinez, a native Spanish speaker, was arrested on September 6, 2016, for operating while intoxicated. Upon his arrest, he was asked to submit to a chemical test of his breath and refused to do so. As a result, the arresting officer issued Ortiz Martinez a Notice of Intent to Revoke Operating Privilege (Notice). The Notice stated that he had "10 days from the date of this notice to file a request for a hearing on the revocation." It is undisputed that Ortiz

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Martinez did not file a request for a hearing by September 20, 2016, which was ten days after he received the Notice on September 6, 2016.[2] The first document filed by Ortiz Martinez with regard to the refusal hearing was filed with the court on September 30, 2016. Upon his release from custody on the OWI arrest, Ortiz Martinez inquired about when he needed to come to court; he says he was told that he had a mandatory court date on October 6, 2016. Later, he called back to the police station to confirm that he was valid to drive. The refusal charge and the related deadline were not mentioned during these conversations.

¶4 Ortiz Martinez left the state for work reasons on September 8, 2016. While out of state, he contacted a Wisconsin attorney, who told him about the deadline for requesting a refusal hearing. Ortiz Martinez arranged to have two written requests for a refusal hearing hand-delivered to the circuit court. CCAP records[3] show that a letter from the defendant was filed on September 30, 2016.[4]

¶5 Ortiz Martinez filed a motion requesting that the circuit court grant a hearing "on the reasonableness of his refusal to submit to a chemical test pursuant to [WIS. STAT. §] 343.305(10)(a)." He asserted that his September 30, 2016 request for a refusal hearing "would be timely if measured from the date the

[2] Appellate counsel asserts in a footnote in his brief that the Notice filing requirement is really fourteen, not ten, days per WIS. STAT. § 801.15(1), but then concedes in the same footnote that appellant's deadline was September 20, 2016.

[3] The filing of a letter from the defendant is shown on Wisconsin's CCAP (Consolidated Court Automation Programs), an online website that reflects information entered by court staff, of which this court may take judicial notice. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5, n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

[4] No letter in the record reflects a date-stamp of September 30, 2016; for reasons that are not clear, one of the letters is date-stamped October 3, 2016, even though there is no corresponding CCAP entry on that date.

defendant actually had notice" of what he needed to do to challenge the refusal charge. The circuit court concluded that it was without competency to hear Ortiz Martinez's motion because of the "statutory requirement that a hearing on the revocation be requested within ten days." Accordingly, a revocation of Ortiz Martinez's operating privileges was entered effective for one year from the date of the refusal. This appeal follows.

DISCUSSION

Standard of review and relevant law.

¶6 The issues we address in this case—a circuit court's competency and the interpretation of a statute—are issues of law reviewed *de novo*. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190, ***State v. Leitner***, 2002 WI 77, ¶16, 253 Wis. 2d 449, 646 N.W.2d 341.

¶7 Where a refusal has occurred, there will be a revocation of operating privileges in two circumstances: (1) "[i]f a court determines under sub. (9)(d) that a person improperly refused to take a test" or (2) "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[.]" WIS. STAT. § 343.305(10)(a). "If no hearing was requested, the revocation period shall begin 30 days after the date of the refusal." ***Id.***

¶8 A hearing is limited to the following issues:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol ….
>
> b. Whether the officer complied with [§ 343.305] sub. (4) [requiring the officer to read specified information to the person from whom the test specimen is requested]

> c. Whether the person refused to permit the test.

WIS. STAT. § 343.305(9)(a)5.

¶9 In two recent cases, our supreme court has interpreted the refusal statute. In one, the court held that "[t]he ten-day time limit is a mandatory requirement that may not be extended due to [the defendant's] excusable neglect." ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶4, 348 Wis. 2d 282, 832 N.W.2d 121. It held that "the circuit court is without competency to hear [a] request to extend the ten-day time limit" set forth in the statutes. ***Id.***

¶10 The same year, it held in a separate case that "a circuit court has no discretionary authority to dismiss a refusal charge when a defendant fails to request a refusal hearing within the statutory ten-day time period." ***State v. Bentdahl***, 2013 WI 106, ¶8, 351 Wis. 2d 739, 840 N.W.2d 704. It noted that "the language of the implied consent statute governing court-ordered penalties for refusal does not grant discretionary authority to circuit courts." ***Id.***, ¶32. "Per the statutory language, if no hearing is requested within the ten-day time period, then revocation is mandatory." ***Id.*** The decision also contains a footnote that includes the following language:

> We do recognize, however, that factual circumstances distinct from those at issue today may arise, which make a request for a refusal hearing within the ten-day time limit or entry of a plea of guilty impossible. We do not decide what the discretionary authority of the circuit court would be under such circumstances.

Id., ¶34, n.10.

¶11 In ***Bentdahl***, the issue of adequate notice was not presented to the supreme court; it specifically noted that it was not "review[ing] the court of

appeals' decision that notice was proper in this case, since that issue [was] not before [the court]."[5] ***Id.***, ¶6.

DISCUSSION

¶12 Ortiz Martinez argues that ***Brefka*** and ***Bentdahl***, both of which are refusal cases, do not govern the question presented here because neither addresses the issue of the sufficiency of notice. He instead relies on language from two non-refusal cases, and he argues that on that basis he is entitled to an evidentiary hearing on the question of "whether, under the peculiar circumstances of this case, the officer reasonably complied with the dictates of the implied consent law."

¶13 The first case on which he relies involved a deaf defendant who was charged with OWI and sought to suppress evidence of his blood-alcohol-level test results on the grounds that without a sign language interpreter, he had been unable, at the time of the traffic stop, to "fully understand … the trooper's instructions for the sobriety test and the Informing the Accused Form." ***State v. Piddington***, 2001 WI 24, ¶8, 241 Wis. 2d 754, 623 N.W.2d 528. On appeal, our supreme court held that "the attempts of law enforcement to communicate with the defendant were reasonable under all the circumstances" and concluded that suppression of the evidence was not warranted. ***Id.***, ¶1. In its discussion of WIS. STAT. 343.305(4), the supreme court said the statute "requires the arresting officer … to utilize those methods which are reasonable, and would reasonably convey the implied consent warnings." ***Id.***

[5] The court further noted that ***Bentdahl*** "did not ask this court to review the portion of the court of appeals' decision that found proper notice[,]" and that "neither party sets forth any argument regarding notice in the briefing to this court." ***State v. Bentdahl***, 2013 WI 106, ¶6, 351 Wis. 2d 739, 840 N.W.2d 704.

¶14 Ortiz Martinez reads ***Piddington*** as creating an evidentiary burden on the state as to the sufficiency of the notice given. But under the statute and the case law interpreting it, there is no evidentiary burden on the state in a refusal case where no timely request has been made for a hearing. ***Piddington*** concerned an evidentiary hearing that is thus not available without a timely request to a defendant facing a refusal charge.[6] The evidentiary hearing the defendant received in that case was a suppression hearing held on the defendant's motion in an OWI case. ***Id.***. For a refusal charge, as ***Brefka*** and ***Bentdahl*** directly state, to have a hearing where the sufficiency of the notice can be challenged, a defendant must strictly comply with the statute's deadline. Nothing in ***Piddington*** erases this requirement, and accordingly, this case is not relevant to Ortiz Martinez.

¶15 Ortiz Martinez also relies on ***State v. Begicevic***, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293, another case that is not a refusal case. He argues that this case is relevant because it concerns a challenge to the reasonableness of the arresting officer's means of conveying the implied consent warnings to the defendant, specifically where there was a language barrier involved. ***Id.***, ¶¶11-25. However, this case is as irrelevant as ***Piddington*** because it does not create any exception to the refusal hearing-request rule. Cases involving charges for which a defendant is entitled to a suppression hearing are not relevant to a case where a defendant is entitled to an evidentiary hearing only if he timely requests one.

¶16 Finally, he relies on the ***Bentdahl*** footnote, quoted above, in which our supreme court explicitly stated that it was leaving for another day a decision

[6] Ortiz Martinez makes no constitutional arguments.

about the discretionary authority of the circuit court under circumstances where compliance with the statute was "impossible." Ortiz Martinez argues that this is evidence that "[t]he Wisconsin supreme court has not foreclosed the type of inquiry Ortiz sought in this case." Notwithstanding this language, there is nothing in ***Bentdahl*** that authorizes circuit courts to do anything other than follow the statute strictly. In the alternative, we hold that even if this language means that a circuit court may have the authority to hold a hearing in contravention of the statute where "a request for a refusal hearing within the ten-day time limit [was] … impossible," this case is not such a situation. The facts are that Ortiz Martinez had ten days from the time of receiving the Notice to request a hearing. He presented no evidence of any impossibility during that time. We cannot say it was "impossible" for him to obtain the necessary assistance to understand the written form he had been given. As he concedes in his brief, "[i]t is undisputed that Ortiz was given a copy of the [Notice] applicable to his refusal case, containing all of this important and applicable information[,]" and "[i]t is true the officer issued the [Notice] to Ortiz, and that this is what the statute commands him to do."

¶17 The order revoking Ortiz Martinez's driver's license for refusing to provide a requested breath sample pursuant to WIS. STAT. § 343.305(9) is accordingly affirmed.

By the Court.-Order affirmed.

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