

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0692

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF ROBERT P.
EGGIMANN:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT P. EGGIMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Reversed and cause remanded.*

¶1 LUNDSTEN, J.¹ Robert P. Eggimann appeals from an order of the circuit court denying his motion to vacate a refusal order. He argues that the circuit court erroneously held that the notice of intent to revoke his operating privileges adequately contained information required by WIS. STAT. § 343.305(9)(a) (1997-98). Based on new precedent, it is now clear that the notice was defective. Accordingly, the decision of the circuit court was erroneous, and the issue of prejudice must be addressed by the circuit court. We therefore reverse the circuit court's order.

FACTS

¶2 Eggimann was arrested on February 10, 1999, and charged with operating a motor vehicle while intoxicated, operating with a prohibited alcohol concentration, and operating after revocation or suspension. After the arresting officer read Eggimann the statutorily required "Informing the Accused" form, Eggimann refused to submit to a blood test. Eggimann was subsequently issued a document entitled "Notice of Intent to Revoke Operating Privilege," which informed him of his right to request a hearing within ten days of the date of the notice. The notice stated:

The issues to be decided at the hearing are limited to whether I was entitled to request that you submit to the test, whether proper notice was given, whether you refused to submit and whether you have a physical disability or disease unrelated to the use of alcohol or controlled substance which was the basis for your refusal.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 On March 16, 1999, a refusal order was issued by the court effectively revoking Eggimann's license. On May 3, 1999, Eggimann made an untimely demand for a hearing on the refusal and filed a motion to vacate the refusal order, challenging the content of the notice of intent to revoke. On September 10, 1999, the circuit court orally denied Eggimann's motion to vacate the order revoking his license, and on January 22, 2000, a written order was entered.

DISCUSSION

¶4 Eggimann first contends that the "Notice of Intent to Revoke Operating Privilege" he received failed to satisfy the requirements of WIS. STAT. § 343.305(9)(a) (1997-98). Specifically, he says the notice failed to inform him that the issues at a refusal hearing could include whether the officer had probable cause to believe Eggimann was operating while under the influence of alcohol and whether Eggimann was lawfully placed under arrest. He says this omission rendered the notice defective and deprived the court of personal jurisdiction. This very issue has now been resolved in *State v. Gautschi*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24.

¶5 In *Gautschi*, this court explained that a deficient notice of intent to revoke can, in some situations, deprive the court of personal jurisdiction. *Id.* at ¶¶9-12. The particular deficiency at issue in this case is a "technical" defect. *Id.* at ¶14. A technical defect does not thwart personal jurisdiction unless the defect causes prejudice. *Id.* at ¶9.

¶6 In this case, the circuit court did not address the question of prejudice because it found that the notice was not defective. Because of *Gautschi*,

the circuit court's decision finding that the notice was not defective must be reversed.

¶7 On the question of prejudice, Eggimann claims the record shows that the State failed to demonstrate that he was not prejudiced by the defective notice. Indeed, Eggimann claims that the record affirmatively shows prejudice because the situation here is the one envisioned in the following language from a footnote in *Gautschi*:

We do not conclude that the State could always demonstrate the lack of prejudice stemming from a notice worded as was *Gautschi*'s. For example, the recipient of a similarly worded notice, who believes that the officer lacked grounds to stop and arrest him or her for OMVWI, may suffer prejudice if the person fails to file a timely request for a hearing because he or she did not understand that the issue could be raised at a refusal hearing.

Id. at ¶15 n.4.

¶8 However, this footnote does not mean that a defendant who fails to request a hearing always demonstrates prejudice. To the contrary, the footnote suggests that a prejudice determination entails an analysis of whether the defendant has a basis for challenging a stop and whether the defendant actually failed to request a hearing *because* he or she did not understand that the issue could be raised at such a hearing. The record in this case is silent on these topics. Eggimann argues generally that no one could make an informed decision to forgo a refusal hearing in light of the defective notice; but that is not necessarily true, particularly in situations like this where it is a defendant's fourth operating while intoxicated arrest.

¶9 We conclude that the record in this case does not show prejudice.

¶10 The State argues that the record affirmatively shows a lack of prejudice. The State points to a stipulation entered into by Eggimann regarding his OMVWI charge. In this regard, Eggimann correctly argues that the stipulation can only be used for the purpose of deciding a legal issue relating to a suppression motion filed by Eggimann. The stipulation expressly limits its use “[f]or the sole and limited purpose of providing a factual predicate upon which the [circuit] Court may decide the motions to suppress pending before it.” The suppression motions below were distinct from Eggimann’s challenge to the notice of intent to revoke. The State gives no reason as to why this court may ignore the limitation agreed upon by the parties.

¶11 Accordingly, we reverse the decision of the circuit court and hold that the notice of intent to revoke contained a technical defect of the specific type described in *Gautschi*. However, we do not grant the relief sought by Eggimann. The revocation order is not vacated. Instead, the matter is remanded to the circuit court so that it can address the topic of prejudice. When the circuit court addresses prejudice, it may, if it chooses, consider whether granting Eggimann’s previous request for a refusal hearing will avoid prejudice under the circumstances of this case.

By the Court.—Order reversed and cause remanded.

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

