COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2006

Cornelia G. Clark
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. 2006AP6 **Cir. Ct. No. 2005TR7766**

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

IN THE MATTER OF THE REFUSAL OF CHRISTOPHER L. AMBORT:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. AMBORT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Christopher Ambort, pro se, appeals an order revoking his motor vehicle operating privilege for refusing to submit to chemical

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-2004). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

testing of his blood as required under WIS. STAT. § 343.305 (2003-04). His sole claim of error is that he was denied due process, specifically, notice and a meaningful opportunity to be heard, because (1) the arresting officer did not issue a Notice of Intent to Revoke immediately after he refused to submit to a blood test, and (2) he was not provided with copies of police reports until the refusal hearing.

¶2 We conclude Ambort's due process right to notice was not violated because the record establishes that he was given sufficient notice of the refusal hearing to allow him to prepare for it. We also conclude the circuit court provided Ambort the right to be heard in a meaningful manner by withholding a final decision on the refusal issue until Ambort had the opportunity to review police reports and make additional argument based on them. Because the refusal proceedings in the circuit court did not violate Ambort's constitutional right to due process, we affirm the order revoking his driving privilege.

BACKGROUND

¶3 According to testimony at the refusal hearing, at approximately 2:38 a.m. on September 17, 2005, a police officer observed a silver Taurus in the City of Lancaster squeal its tires and veer suddenly. The driver regained control of the vehicle and continued driving. The officer stopped the vehicle and spoke with the driver, Christopher Ambort. During their conversation, the officer detected the odor of intoxicants coming from the vehicle. Also, Ambort's eyes were bloodshot and glassy and his speech was slow and slurred. After Ambort acknowledged that he had consumed beer, the officer directed him to perform several field sobriety tests. Based on Ambort's performance on the field sobriety tests, the officer arrested him for operating a motor vehicle while under the influence of an intoxicant (OMVWI).

¶4 No qualified operator was available at the time of Ambort's arrest to administer an Intoximeter test of his breath. The officer therefore transported Ambort to a nearby hospital to obtain a sample of his blood for chemical testing. At the hospital, the officer read Ambort the Informing the Accused form and asked him if he would submit to a chemical test of his blood. Ambort refused. Later, when a certified Intoximeter operator came on duty, Ambort agreed to submit to a breath test, which produced an alcohol concentration of 0.06, a level within the legal limit.

¶5 Based on the breath test result, the OMVI citation was dismissed. On September 23, 2005, however, the arresting officer issued Ambort a Notice of Intent to Revoke Operating Privilege for his refusal to submit to a blood test when requested to do so. The Notice advised Ambort that his operating privilege would be revoked in thirty days and that he could request a refusal hearing, which he did.

¶6 At the conclusion of the refusal hearing on November 16, 2005, the circuit court said it would render a final decision after Ambort had the opportunity to review the applicable police reports and to make additional arguments on the basis of the reports.[2] Two days later, the court issued a decision in which it concluded that "the law and facts in this case require that I affirm the officer's determination that the defendant refused to take the primary test requested by law enforcement." The court did not enter a revocation order at that time, however. The clerk's minutes for the next scheduled court appearance on November 29 reflect that Ambort did not appear and that the circuit court "confirms his previous

[2] The circuit court directed that the police reports be provided to Ambort, adding, "and as far as the refusal goes, I want him to have a chance to look at those reports and get back to me on anything he thinks I should know about."

decision & will dismiss the other Lancaster citations." The clerk entered the two-year revocation order the same day.

¶7 Ambort then filed a "motion to vacate," which the circuit court treated as a motion for reconsideration of its refusal/revocation decision. In a written decision denying the motion, the court noted that it had not entered a revocation order until after the November 29 court date "in order to give the defendant an opportunity to be heard on the refusal after he had reviewed the police reports." The court stated that, because Ambort did not appear on November 29, the court assumed he had elected to accept the City's offer to dismiss the remaining traffic citations if a license revocation was ordered for the refusal. Ambort appeals the order revoking his driving privilege for two years and the denial of his motion for reconsideration.

ANALYSIS

¶8 Ambort frames the issue on appeal as follows: "[T]he state didn't provide notice [as required under WIS. STAT. §] 343.305(9)(a) before Chris Ambort[']s revocation went into effect. The court affirmed its decision two days after Ambort was to get the police reports and papers." As near as we can discern from his appellate briefs, Ambort claims that his right to due process was violated during the refusal/revocation proceedings in one or both of the two following ways: (1) the arresting officer did not confiscate his drivers license and issue a Notice of Intent to Revoke immediately after his purported refusal, issuing the notice almost a week later; and (2) Ambort was not provided with copies of the police reports relating to his arrest and refusal until the day of the refusal hearing, thus impairing his ability to prepare a defense.

¶9 This appeal thus requires us to interpret the statutory requirements for notice of refusal proceedings under WIS. STAT. § 343.305(9)(a) and to decide whether Ambort's constitutional right to due process was violated. Both are questions of law that we decide de novo. *See* ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997) (statutory interpretation); ***State v. Martwick,*** 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552 (constitutional violation).

¶10 The statute at issue provides in pertinent part:

> If a person refuses to take a test under sub. (3)(a), the law enforcement *officer shall immediately* take possession of the person's license and *prepare a notice of intent to revoke … the person's operating privilege*.… The officer *shall issue a copy of the notice of intent to revoke the privilege to the person* and submit or mail a copy with the person's license to the circuit court for the county in which the arrest … was made or to the municipal court in the municipality in which the arrest was made….

WIS. STAT. § 343.305(9)(a) (emphasis added). In support of his claim that his due process rights were violated because the arresting officer did not immediately prepare and issue a Notice of Intent to Revoke, Ambort cites ***State v. Gautschi***, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24. He argues that ***Gautschi*** explains that one of the purposes of § 343.305(9)(a) is to provide "notice of what is going to be happening to that driver as a result of the refusal and a[n] opportunity to be heard before it happens." He asserts that the delay in his receiving the Notice deprived him of the timely receipt of critical information he needed to prepare for the refusal hearing.

¶11 We addressed in ***Gautschi*** whether the contents of the Notice of Intent to Revoke Operating Privilege given to the defendant in that case satisfied the requirement of WIS. STAT. § 343.305(9)(a)5. that the notice inform a defendant

of the issues that may be addressed at a refusal hearing. *See* ***Gautschi*****,** 240 Wis. 2d 83, ¶¶4-6. Ambort's claim of error is different, however—he does not allege a deficiency in the contents of the Notice, but in the timing of its issuance. There is no question that the officer did not issue the Notice until six days after Ambort's refusal, thus violating the statutory directive that the notice of intent to revoke be prepared and given to a defendant *immediately* after a refusal. *See* § 343.305(9)(a). The issue is whether the tardy issuance of the Notice requires a reversal of the revocation order on either statutory or constitutional grounds. We conclude that neither the statute nor the Constitution requires us to reverse the order.

¶12 We determined in ***State v. Moline***, 170 Wis. 2d 531, 489 N.W.2d 667 (Ct. App. 1992), that the language requiring an officer to immediately prepare and serve a copy of the notice of intent to revoke a person's operating privilege is directory, not mandatory. ***Id.*** at 541-42. We explained that the legislative purpose behind the notice requirement in WIS. STAT. § 343.305(9)(a) was to "satisfy due process" by providing someone facing a revocation for refusing a test "'notice and an opportunity to be heard at a meaningful time and in a meaningful manner.'" ***Id***. at 541 (citation omitted). We concluded that immediate preparation and service of the notice was not crucial to achieving the legislative purpose, so long as the defendant receives a notice containing the required information regarding "what would happen to him as a result of his refusal" and is given "an opportunity to be heard at a meaningful time and in a meaningful manner" before a revocation was imposed. *See* ***id***.

¶13 As we did in ***Moline***, we conclude in this case that Ambort received adequate notice and a meaningful opportunity to be heard regarding his refusal, despite the tardy preparation and service of the Notice of Intent to Revoke. We

cannot determine from the record precisely when Ambort received a copy of the Notice of Intent to Revoke. The Notice is dated September 23, 2005, and it bears an October 14 file stamp by the clerk of court. The arresting officer did not testify regarding when he sent the notice to or served it on Ambort, and Ambort did not testify regarding when he received it. However, we may reasonably infer from the fact that Ambort requested a refusal hearing during a court appearance on October 17 that Ambort had received the Notice by that date. Moreover, he seemingly acknowledges in his reply brief that the officer "sent" the Notice on September 23 and that he received a copy of the Notice some time prior to its being filed with the court on October 14.

¶14 The circuit court conducted the refusal hearing on November 16, 2005, which means that Ambort received the Notice of Intent to Revoke at least thirty days prior to the hearing. We conclude that Ambort thus received the pertinent information contained in the Notice soon enough to allow him a meaningful opportunity to be heard. Accordingly, we also conclude that Ambort's right to due process was not violated simply because the arresting officer did not prepare and serve the Notice of Intent to Revoke Operating Privilege immediately after Ambort's refusal to submit to the blood test. *See* ***Moline***, 170 Wis. 2d at 542.

¶15 Ambort also seems to contend that his right to due process was violated because he did not receive copies of the relevant police reports prior to the refusal hearing. As we have described, however, the record shows that the circuit court issued only a tentative decision on the refusal issue after the hearing, expressly reserving a final decision until Ambort had the opportunity to review the police reports and present additional arguments based on anything in the reports Ambort believed significant. We conclude that Ambort's lack of access to the police reports prior to the refusal hearing did not prevent his being heard at a

meaningful time and in a meaningful manner. He thus suffered no infringement of his right to due process stemming from the handling of the police reports.[3]

CONCLUSION

¶16 For the reasons discussed above, we affirm the order of the circuit court revoking Ambort's driving privilege for two years.[4]

By the Court.—Order Affirmed.

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

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[3] We note that WIS. STAT. § 343.305(9)(a) has been amended, effective April 29, 2006, to include the following language:

> Neither party is entitled to pretrial discovery in any refusal hearing, except that, if the defendant moves within 30 days after the initial appearance in person or by an attorney and shows cause therefor, the court may order that the defendant be allowed to inspect documents, including lists of names and addresses of witnesses, if available, and to test under s. 804.09, under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed.

See 2005 Wis. Act 332, § 4. This provision was not in effect at the time of Ambort's refusal proceedings in 2005.

[4] We note that Ambort has raised on appeal only the procedural issues we discuss in this opinion. He has *not* challenged the circuit court's findings or its conclusion that he refused to submit to a blood test in violation of WIS. STAT. § 343.305. More particularly, we note that Ambort has not argued that, because he submitted to a timely breath test, he should not be found to have violated the implied consent law. Neither has he asserted that the arresting officer's failure to confiscate his license and prepare a Notice of Intent to Revoke immediately after Ambort refused the blood test shows that the officer did not intend to seek a refusal revocation until some time after it was determined that the breath test result would not support a prosecution for OMVWI. Because Ambort has not made these claims, we have no reason to address them.