COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1899 **Cir. Ct. No. 02-CT-41**

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

IN THE MATTER OF THE REFUSAL OF PETER J. DAVIES:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER J. DAVIES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

¶1 ROGGENSACK, J.[1] Peter Davies appeals a circuit court order revoking his driver's license. Davies argues that the circuit court erroneously exercised its discretion when it denied his request for a continuance of the refusal hearing and subsequently found that his refusal to submit to a chemical test for intoxication was unreasonable. Because we conclude that the record is inadequate to uphold the circuit court's finding that Davies's refusal was improper,[2] we reverse the circuit court's revocation order and remand for further proceedings.

BACKGROUND

¶2 The record presented on appeal is unclear about many facts. For example, the date of Davies's arrest for operating a motor vehicle while intoxicated (OMVWI) is represented in the criminal complaint as February 27, 2002. The complaint asserts that on February 27, 2002, Vernon County police officer Steven Bekkedal arrested Davies and transported him to the Vernon County Sheriff's Department for a breath test. At the station, Bekkedal read Davies the Informing the Accused form, as required by WIS. STAT. § 343.305(4). Davies refused to take the breath test and Bekkedal issued Davies a Notice of Intent to Revoke Operating Privileges. Bekkedal dated the Notice of Intent April 27, 2002.

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

[2] The test for a refusal under WIS. STAT. § 343.305 used to be "reasonableness." ***State v. Carlson***, 2002 WI App 44, ¶1 n.1, 250 Wis. 2d 562, 641 N.W.2d 451. The reasonableness test has been changed. ***Id.*** The current test is whether the person has shown that the refusal was due to a physical inability to submit to the test. Despite the change, many judges still use the language "reasonableness." ***Id.*** However, because most of the implied consent cases now use the words "proper" or "improper" when addressing a refusal instead of "reasonable" or "unreasonable," we do so here.

¶3 On May 10, 2002, Davies requested a refusal hearing, pursuant to WIS. STAT. § 343.305. It appears that the circuit court may have scheduled a hearing for July 8, 2002. However, there is no Notice of Hearing or Order to Appear on July 8 in the record. The parties seem to agree that a Vernon County clerk noticed Davies's attorney on June 19, 2002 for the July 8 appearance. However, the record reflects that on June 11, before the notice was given, Davies's attorney requested a "set-over" of the refusal hearing due to a scheduling conflict. Additionally, it appears that on June 25, Davies's attorney called the court's clerk to reschedule the hearing, but the clerk was unwilling to change the date without approval from the judge. Then on July 3, Davies's attorney sent a letter by fax to the judge, again requesting a set-over of the July 8 hearing. The attorney did not receive a response to his fax.

¶4 On July 8, the circuit court conducted the refusal hearing in the absence of both Davies and his attorney. The court noted that Davies's attorney did not follow the proper procedure for requesting a continuance and denied his request. The court then stated that Davies "has never been excused from appearing in court" and found that his refusal to submit to the breath test was unreasonable and ordered his license revoked for two years. Davies appeals.

DISCUSSION

Standard of Review.

¶5 The decision to grant or deny a continuance lies within the discretion of the circuit court. ***Robertson-Ryan & Assocs., Inc. v. Pohlhammer***, 112 Wis. 2d 583, 587, 334 N.W.2d 246, 249 (1983). We will uphold a discretionary determination if the court considered the relevant facts, applied the proper standard of law, and, using a demonstrative rational process, reached a conclusion

that a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

Refusal Hearing.

¶6 Davies argues that the circuit court erred by denying his request for a continuance without considering the criteria of ***Phifer v. State***, 64 Wis. 2d 24, 218 N.W.2d 354 (1974). Davies maintains that the circuit court must consider the circumstances present in the case to determine whether a continuance is appropriate. Because the court failed to consider the relevant factors, Davies argues that the circuit court erroneously exercised its discretion by denying his request and subsequently revoking his driver's license.

¶7 It is well settled that a continuance of a hearing is not a matter of right. ***Phifer***, 64 Wis. 2d at 30, 218 N.W.2d at 357. The circuit court is vested with the discretion to grant or deny a continuance. ***Id.*** The supreme court articulated six factors to be balanced in determining whether a continuance is appropriate: (1) length of the requested delay; (2) availability of other competent counsel; (3) whether the party had requested and received other continuances; (4) convenience or inconvenience to the parties, the witnesses, and the court; (5) whether the request is legitimate or dilatory; and (6) other relevant factors. ***Id.*** at 31, 218 N.W.2d at 358. Although the ***Phifer*** criteria do not establish a "mechanical test," the circuit court's decision to grant or deny a continuance must be demonstrably based on the facts present in the record. *See* ***State v. Robinson***, 146 Wis. 2d 315, 330, 431 N.W.2d 165, 170 (1988).

¶8 We agree with Davies that the circuit court did not *articulate* its consideration of the ***Phifer*** factors. The court's failure to do so, however, does not require an immediate reversal. Because the exercise of discretion is essential to

the circuit court's functioning, we will not reverse because the circuit court has inadequately expressed the reason for its holding. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990). We may independently review the record to determine whether it provides a basis for the circuit court's discretionary decision. *See* ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547, 552 (1983). In the instant case, we have reviewed the record and conclude that it is inadequate to uphold the circuit court's order denying the continuance and revoking Davies's driver's license because the record contains no evidence that there was other competent counsel, that other continuances had been granted and whether the request was dilatory. Therefore, we do not address further the merits of Davies's argument regarding his request for a continuance.

¶9 Under WIS. STAT. § 343.305, a court may order a driver's license revoked based on its determination that the defendant improperly refused to take a test for intoxication. At the July 8 hearing, the circuit court found that Davies's refusal to submit to the breath test was unreasonable. The court's finding was based exclusively on Davies's failure to appear at the refusal hearing. The court stated only that the "defendant … has never been excused from appearing in court" before finding his refusal improper. The court's reliance on Davies's failure to appear is problematic because there is no Notice of Hearing or Order for Appearance in the record that could require Davies's attorney or Davies, personally, to appear at the July 8 hearing. Additionally, there is nothing in the index to the criminal record supplied by the circuit court showing that any Notice or Order was ever issued. In our view, where the court finds that a refusal was improper based solely on the failure of a party to appear, letters containing vague and inconsistent references regarding a scheduled hearing are an inadequate substitute for an actual Notice or Order in the record. Additionally, there is an

apparent inconsistency in the record regarding the date of the underlying criminal offense. However, even assuming the offense occurred in April rather than February, we wonder whether the request for a hearing was timely made. *See* § 343.305(9).[3]

CONCLUSION

¶10 We conclude that the record is inadequate to uphold the circuit court's finding that Davies's refusal to submit to a test for intoxication was improper. Accordingly, we reverse the revocation order and remand for further proceedings.[4]

By the Court.—Order reversed and cause remanded.

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

[3] The State argues on appeal that the request for a hearing was not timely, but it did not raise this argument in the circuit court.

[4] On remand, the court should determine whether the request for a hearing was timely made, and if so, whether the refusal was improper. We caution Davies and his attorney that ***Carlson***, 2002 WI App 44, defines when a refusal is proper and a request for a refusal hearing is not to be used as a tactic to delay adjudication of the pending OMVWI charge.