COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1335 **Cir. Ct. No. 2012TR7070**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIDNEY H. SAWICKY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

¶1 STARK, J.[1] Sidney Sawicky appeals an order denying his request for a refusal hearing. He argues the circuit court erred when it determined it lacked competency to consider Sawicky's request because Sawicky did not make

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

his request within the ten-day statutory time limit prescribed in WIS. STAT. § 343.305(9)(a)4. and 10(a). We reject Sawicky's arguments and affirm.

BACKGROUND

¶2 On June 5, 2012, Sawicky was arrested for operating while intoxicated (OWI). He then apparently refused the officer's request to submit to a chemical blood alcohol test under the implied consent law, and the officer issued him a "Notice of Intent to Revoke Operating Privilege." (Some capitalization omitted.) The notice was dated June 5 and informed Sawicky:

> You have 10 days from the date of this notice to file a request for a hearing on the revocation with the court named below …. If you do not request a hearing, the court must revoke your operating privileges 30 days from the date of this notice.

The notice directed Sawicky to address any hearing request to the Grand Chute Town Municipal Court.

¶3 The officer also issued Sawicky a citation for first-offense OWI. This citation required Sawicky to appear before the Grand Chute Town Municipal Court on June 27. However, a couple of days later, the officer discovered Sawicky had two prior OWI convictions. The officer voided the first-offense OWI citation and issued a new citation to Sawicky for third-offense OWI. The new citation indicated it was served by mail on Sawicky on June 7. The letter to Sawicky that accompanied the new OWI citation explained Sawicky's first-offense OWI citation was voided and reissued as a third-offense OWI citation. The letter stated Sawicky did not need to appear in municipal court on June 27; instead, he needed to appear before the Outagamie County Court Commissioner

on July 30. The letter did not refer to the notice of intent to revoke his driver's license or enclose a revised notice of intent to revoke.

¶4 On June 14, 2012, a revised notice of intent to revoke was filed with the Outagamie County Circuit Court. The revised notice differed from the one originally issued to Sawicky in that the revised notice instructed Sawicky to address any refusal hearing request to the Outagamie County Circuit Court instead of the Grand Chute Town Municipal Court.[2] The notice continued to indicate that Sawicky had been notified on June 5 that his license would be revoked if he did not request a refusal hearing within ten days.

¶5 Ultimately, Sawicky did not request a refusal hearing in the municipal court or the circuit court. On June 20, 2012, a default judgment was entered against Sawicky, revoking his operating privileges for violating the implied consent law.

¶6 On July 5, 2012, Sawicky filed a "Request for Refusal Hearing" and a "Motion to Reopen Refusal" in the circuit court. Sawicky argued he was entitled to a refusal hearing because: (1) the June 5 notice of intent to revoke directed him to request a refusal hearing in the wrong court; (2) the officer failed to properly serve him on June 5 with the entire notice of intent to revoke—he alleged a second page containing additional information was never given to him; and (3) Sawicky believed the letter informing him that his OWI citation was voided and reissued

[2] The revised notice also differed from the original notice in that the revised notice stated Sawicky had been arrested for third-offense OWI, instead of simply OWI, and the revised notice included the third-offense OWI citation number.

meant that the notice of intent to revoke was also voided and would be reissued and served at a later date.

¶7 Following an evidentiary hearing, the court commissioner found the officer served Sawicky with the notice of intent to revoke his license on June 5. The commissioner then reasoned the fact that the notice of intent directed Sawicky to make his request to the wrong court did not matter because Sawicky never "made any effort to contact any court to request a hearing within ten days." The commissioner emphasized WIS. STAT. § 343.305(9)(a)4. required Sawicky to make his request within ten days and, because he did not request a hearing, the court was without competency to hold a refusal hearing.

¶8 Sawicky sought review in the circuit court. The circuit court concluded the notice of intent to revoke that Sawicky received on June 5 was not fundamentally defective. It emphasized the notice properly advised Sawicky the court would revoke his driver's license unless he requested a refusal hearing within ten days. The court concluded the fact that the notice directed Sawicky to make his request to the municipal court instead of the circuit court did not matter because Sawicky failed to request a refusal hearing in either court within the statutory time limit. The court determined it lacked competency to hold a refusal hearing on Sawicky's violation of the implied consent law.

DISCUSSION

¶9 WISCONSIN STAT. § 343.305(9)(a) provides that, if an individual refuses to submit to a chemical test under the implied consent law, the officer shall prepare a notice of intent to revoke the person's operating privilege. Section 343.305(9)(a)4. requires that the notice inform the individual that he or she may request a hearing on the revocation within ten days and that, if no request is

received within the ten-day period, the individual's license will be revoked. Section 343.305(10)(a) directs the court to revoke the individual's license if the individual does not request a hearing within ten days after being served with the notice of intent to revoke.

¶10 In ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶44, 348 Wis. 2d 282, 832 N.W.2d 121, our supreme court concluded the ten-day time limit set forth in WIS. STAT. § 343.305(9)(a)4. and (10)(a) is mandatory and a court is without competency to consider a refusal hearing request made outside the ten-day period. The court also concluded that, because the time limit is mandatory, the time limit cannot be extended, even due to excusable neglect. ***Id.***

¶11 On appeal, Sawicky acknowledges ***Brefka***, but advances several arguments in support of his assertion that the circuit court erred by concluding it lacked competency to hold a refusal hearing. "Whether a circuit court has lost competency is a question of law that we review independently." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190.

¶12 Sawicky first argues the circuit court is competent to hold a refusal hearing and he is entitled to a hearing because the "State violated Mr. Sawicky's due process rights by providing [a] defective Notice of Intent to Revoke Operating Privileges, thereby the court had no personal jurisdiction to enter a default judgment." He argues the notice he received on June 5 was defective because: (1) it directed him to make any hearing request to the municipal court instead of the circuit court; (2) it was not "completely and wholly served" on him; and (3) it was automatically voided when the officer voided the first-offense OWI citation, which is problematic because a new notice of intent to revoke was not served on him.

¶13 The fundamental requirements of procedural due process are notice and an opportunity to be heard. ***City of S. Milwaukee v. Kester***, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710. Here, the notice Sawicky received on June 5 informed him that his driver's license was subject to revocation, that he had ten days to request a hearing on the revocation, and that, if he failed to request a hearing within ten days, his license would be revoked. Although the notice of intent to revoke directed Sawicky to make his hearing request to the municipal court instead of the circuit court, this error does not amount to a violation of Sawicky's right to due process because, as the circuit court found, Sawicky never requested a hearing from any court within the statutory time limit. Because Sawicky was given notice and an opportunity to be heard, his due process rights were not violated.

¶14 Sawicky also argues his right to due process was violated because the notice of intent to revoke was not "completely and wholly served" upon him. *See* ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450 ("Constitutional requirements of due process require that a court have personal jurisdiction over a defendant in order to render a judgment in a civil suit."). Specifically, Sawicky asserts the officer did not serve him on June 5 with all of the notice of intent to revoke information. He emphasizes the officer conceded on cross-examination that he did not know for sure how many pages were included in the actual notice of intent to revoke he gave to Sawicky.

¶15 However, Sawicky overlooks that the officer also testified that the computer generated "four pages total with the Notice of Intent to Revoke" and he gave Sawicky everything the computer generated. Further, both the circuit court and the court commissioner found Sawicky was served with the notice of intent to revoke on June 5. Neither court determined the June 5 service to be insufficient

factually. *See* WIS. STAT. § 343.305(9)(b) (officer's issuance of notice of intent to revoke is sufficient to give court jurisdiction); *see also* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (on appeal, factual findings upheld unless clearly erroneous). We conclude Sawicky was properly served on June 5 with the notice of intent to revoke and the court therefore had personal jurisdiction over Sawicky. His right to due process was not violated for lack of personal jurisdiction.

¶16 We also reject Sawicky's argument that the June 5 notice of intent to revoke was automatically voided when the officer voided the first-offense OWI citation. Sawicky contends that, because the officer failed to issue a separate citation for his violation of the implied consent law, the notice of intent to revoke became linked to his first-offense OWI citation and, when the officer voided the OWI citation, the notice of intent to revoke was automatically voided. Sawicky argues a new notice of intent to revoke was required to be issued and served on him before his license could be revoked.

¶17 The fact the officer did not issue a separate citation for Sawicky's violation of the implied consent law does not mean the notice of intent to revoke his driver's license became linked to, or dependent on, the continued validity of the first-offense OWI citation. An implied consent law violation is different from an OWI violation—the offenses fall under two different statutory schemes and the State's ability to pursue one is not dependent on the continued validity of the other. *See* WIS. STAT. §§ 343.305, 346.63; *see also* ***State v. Brooks***, 113 Wis. 2d 347, 356, 359-60, 335 N.W.2d 354 (1983) ("Those who refuse may still be convicted of OWI after a trial, but even if they are not, they face revocation … for the refusal."). The officer's act of voiding and reissuing the OWI citation did not automatically void the notice of intent to revoke Sawicky's driver's license. The

June 5 notice of intent to revoke remained valid and a new notice did not need to be created and served on Sawicky.

¶18 Sawicky next objects to the revised notice of intent to revoke that was filed in the circuit court on June 14. He argues the officer had "unclean hands" because the officer revised the notice of intent to reflect the proper court to which Sawicky should address his hearing request, failed to serve the revised notice on Sawicky, and "backdat[ed]" the revised notice to reflect Sawicky received notice on June 5. Sawicky asserts the "backdating" prevented him from timely requesting a hearing. He argues that, if he received the revised notice, "he wouldn't have likely received it until June 13," which would not have given him sufficient time to request a hearing within ten days from June 5.

¶19 Sawicky, however, never raised an "unclean hands" argument in the circuit court. We will not consider it. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (arguments raised for the first time on appeal need not be considered). In any event, there is no evidence that the officer or the State acted with unclean hands. *See* ***Timm v. Portage Cnty. Drainage Dist.***, 145 Wis. 2d 743, 753, 429 N.W.2d 512 (Ct. App. 1988) (principle of unclean hands doctrine is that "he who has been guilty of substantial misconduct … shall not be afforded relief when he comes into court"). Moreover, the unclean hands doctrine is inapplicable because this is not a case in equity. *See* ***id.*** at 752 (unclean hands doctrine used to deny plaintiff relief in equity). Because Sawicky did not request a hearing within the ten-day time limit, the officer's actions in revising the notice of intent to reflect the proper court did not prejudice Sawicky or prevent him from timely requesting a hearing. Further, although Sawicky argues the officer backdated the revised notice to reflect that Sawicky received notice on June 5, Sawicky overlooks that he was notified on June 5 that he had ten days to

request a hearing. Finally, Sawicky fails to explain how his hypothetical receipt of the revised notice on June 13 impacted his ability to timely request a hearing. He never requested a refusal hearing within ten days of the hypothetical June 13 receipt date. Rather, he waited until July 5 to request a hearing.

¶20 Sawicky next argues we should conclude his actions within the statutory time limit were enough to constitute a request for a refusal hearing. He highlights two emails he sent—one to the municipal prosecutor and one to the chief of police. These emails, however, do not amount to a request for a refusal hearing. The emails contain neither a request for a hearing nor a mention of the refusal or the notice of intent to revoke his license. Further, the notice Sawicky received about requesting a refusal hearing specifically advised Sawicky that he needed to make his request for a hearing to the *court*—not to a prosecutor or the police. We conclude these emails are insufficient to amount to a request for a refusal hearing.

¶21 Finally, Sawicky asserts that, because the State created confusion about where and when Sawicky was supposed to request a refusal hearing, we should decline to apply ***Brefka***'s holding that the ten-day time limit is mandatory. He asserts ***Brefka*** "doesn't account for situations where an officer creates confusion of the type that causes the accused to miss a deadline or because an officer backdates materials." He argues we should conclude that the State's actions in this case show any neglect was excusable.

¶22 However, the ***Brefka*** court specifically determined the ten-day time limit in WIS. STAT. § 343.305(9)(a)4. and (10)(a) is mandatory and excusable neglect cannot be used to extend the time limit. ***Brefka***, 348 Wis. 2d 282, ¶44. Sawicky's argument that we should conclude the ten-day time limit is not

mandatory, and, given the circumstances, any neglect in this case was excusable is in direct conflict with ***Brefka***. We are bound by ***Brefka***. *See* ***State v. Carviou***, 154 Wis. 2d 641, 644-45, 454 N.W.2d 562 (Ct. App. 1990) (court of appeals bound by supreme court precedent).

¶23 In sum, because Sawicky failed to request a refusal hearing within ten days after receiving notice that his license would be revoked, the circuit court lost competency to hold a refusal hearing. *See* ***Brefka***, 348 Wis. 2d 282, ¶44. We affirm the circuit court's order concluding it lost competency.

By the Court.—Order affirmed.

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