COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 15, 1996

No. 96-1124

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH C. LUEDKE,

Defendant-Appellant.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions.*

LaROCQUE, J. Kenneth Luedke appeals an order revoking his driving privileges for his refusal to take a chemical test under Wisconsin's implied consent law. Luedke contends that the circuit court erred by finding that he refused the officer's request that he take a blood test. He also challenges the validity of the local court rules of Outagamie County assigning the court commissioner the duty of conducting the refusal hearing followed by a circuit court review of the record. This court reluctantly agrees with Luedke's contention that § 757.69, STATS., fails to authorize court commissioners to conduct refusal hearings in OWI cases. The order of revocation is therefore reversed and the refusal hearing remanded for a de novo hearing in the circuit court.

Although a new hearing is necessary, because the legal issue whether Luedke's conduct constituted a refusal will arise again on remand, this court addresses Luedke's argument. Luedke was taken to a local hospital for a blood test following an OWI arrest. Luedke initially consented to the test, but when the lab technician approached, Luedke said that he wanted to give a breath sample instead of blood. The officer advised Luedke that a breath test was not an option at that point, and Luedke maintained that he wanted to give a breath sample instead. Luedke was advised that the officer had designated the blood test as the primary test and that if he was requesting an alternative test, he first had to provide a blood test. The officer repeated two or three times that he needed a "yes" or "no" to a blood test. Luedke would say only that "I will give you a breath test." The officer then advised the technician to take the blood as a search incidental to arrest rather than as an implied consent test. The technician was unable to locate a vein from which to withdraw blood. The officer testified that Luedke had "some wide mood swings. He'd go from cooperative to uncooperative. Quickly." After several tries, the technician abandoned the effort to find a cooperative vein. Luedke was then transported to another hospital facility. No further attempt was made to obtain Luedke's consent and blood was drawn.[1]

Luedke contends that because he did nothing to physically resist the test, he cannot be deemed to have refused the test. This court disagrees. It is established beyond question that the drunk driving statutes are to be liberally construed to effect their legislative purpose. The implied consent law has the clear policy of facilitating the identification and removal of drunk drivers from the highways. ***State v. Neitzel***, 95 Wis.2d 191, 193, 289 N.W.2d 828, 830 (1980). A person arrested for OWI should not be entitled either to treat the process of testing as a game or, in cases where the person's ability to think is impaired, use his confusion as an excuse. The question presented to a subject is simple and direct: "Do you consent to this test?" If the subject declines to affirmatively consent, he may be deemed to have refused. It would be bad policy indeed to treat the behavior of a subject as a refusal only if there is physical resistance to the test. That is not the law, and this court concludes that a subject's refusal to verbally consent may justifiably be ruled a refusal. However, because the following discussion reveals that a hearing before the court is a statutory right,

[1] Apparently the blood sample was inadequately presented to the state testing laboratory so that no test result was ever obtained.

the court commissioner's findings may not serve as the basis to revoke Luedke's operating privileges.

As indicated, Luedke questions the statutory authority for the use of a court commissioner to conduct the refusal hearing.[2] The powers of court commissioners are set forth in § 757.69, STATS.[3] This statute authorizes a judge to

[2] Luedke also summarily raises a due process challenge to the rule authorizing court commissioners to conduct refusal hearings. First, his argument is inadequately developed and need not be addressed. Second, because the statute does not authorize court commissioners to conduct refusal hearings, it is unnecessary to decide the constitutional issue. Finally, however, this court strongly suspects that because a subject is offered adequate notice and hearing before a court commissioner, a statutory scheme authorizing the Outagamie County procedure would provide due process of law.

[3] Section 757.69, STATS., provides in part:

> Powers and duties of court commissioners. (1) On authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge of the judicial administrative district, a court commissioner appointed under s. 48.065, 757.68, 757.72 or 767.13 may:
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> (a) Direct a case to the proper court if the defendant wishes to enter a plea after intelligent waiver of rights.
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> (b) In criminal matters issue summonses, arrest warrants or search warrants and conduct initial appearances of persons arrested and set bail to the same extent as a judge. At the initial appearance, the court commissioner shall, when necessary, inform the defendant in accordance with s. 970.02 (1). If the defendant appears or claims to be unable to afford counsel, the court commissioner, in accordance with s. 970.02 (6), may refer the person to the authority for indigency determinations specified under s. 977.07 (1). If the court commissioner is a full-time court commissioner, he or she may conduct the preliminary examination and arraignment to the same extent as a judge and, with the consent of both the state and the defendant, may accept a guilty plea. If a court refers a disputed restitution issue under s. 973.20 (13) (c) 4., the court commissioner shall conduct the hearing on the matter in accordance with s. 973.20 (13) (c) 4.
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> (c) Conduct initial appearances in traffic cases and county ordinance cases, in traffic regulation cases and county ordinance cases receive noncontested forfeiture pleas, order the revocation or suspension of operating privileges and impose monetary penalties according to a schedule adopted by a majority of the judges of the courts of

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record within the county, and refer applicable cases to court for enforcement for nonpayment.

(d) In small claims actions, conduct initial return appearance and conciliation conferences.

(e) Conduct noncontested probate proceedings.

(f) Issue warrants and capiases for those who do not appear as summoned.

(g) When assigned to the court assigned jurisdiction under ch. 48, a court commissioner may, under ch. 48, issue summonses and warrants, order the release or detention of children apprehended, conduct detention and shelter care hearings, conduct preliminary appearances, conduct uncontested proceedings under ss. 48.12 and 48.13, enter into consent decrees and exercise the powers and perform the duties specified in par. (j) or (m), whichever is applicable, in proceedings under s. 813.122 or 813.125 in which the respondent is a child. Waiver hearings under s. 48.18 and dispositional hearings under ss. 48.33 to 48.35 shall be conducted by a judge. When acting in an official capacity and assigned to the children's court center, a court commissioner shall sit at the children's court center or such other facility designated by the chief judge. Any decision by the commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order or ruling by the commissioner may be certified to the branch of court to which such case has been assigned upon a motion of any party for a hearing de novo.

(h) Hear petitions for commitment and conduct probable cause hearings under ss. 51.20, 51.45 and 55.06 (11), conduct reviews of guardianships and protective placements and protective services under chs. 55 and 880, advise a person alleged to be mentally ill of his or her rights under the United States and Wisconsin constitutions and, if the person claims or appears to be unable to afford counsel, refer the person to the authority for indigency determinations specified under s. 977.07 (1) or, if the person is a child, refer that child to the state public defender who shall appoint counsel for the child without a determination of indigency, as provided in s. 48.23 (4).

(i) Conduct inquests under ch. 979.

(j) Hold hearings, make findings and issue temporary restraining orders under s. 813.122.

(k) Exercise the power of a juvenile court commissioner appointed under s. 48.065, a probate court commissioner appointed under s. 757.72 or a family court commissioner appointed under s. 767.13.

(m) Hold hearings, make findings and issue orders under s. 813.125.

(2) A judge may refer to a court commissioner appointed under s. 48.065, 757.68, 757.72 or 767.13 cases in which:

(a) The trial of an issue of fact requires the examination of an account, in which

refer to a court commissioner cases in which "[a] question of fact other than upon the pleadings arises." Section 757.69(2)(c), STATS. It therefore becomes necessary to decide whether the questions of fact decided at a refusal hearing are "other than upon the pleadings."

The court of appeals recently decided that refusal hearings are civil in nature and constitute a "special proceeding" within the meaning of ch. 801 of the Wisconsin Civil Procedure Code. ***State v. Schoepp***, No. 95-2249 (Wis. App. Aug. 29, 1996, ordered published Sept. 24, 1996). That case held that a notice of intent to revoke in a refusal proceeding is akin to the summons and complaint requirements of chs. 801 and 802 of the code. The issue in ***Schoepp*** was whether refusal proceedings fell within the rules of civil procedure, which grant the defendant the right to discovery pursuant to ch. 804. ***Id.*** The case holds that discovery was available because there was no exception for refusal hearings. ***Id.***

Pursuant to the holding in ***Schoepp***, the notice of intent to revoke is a pleading.[4] Thus at a refusal hearing, there does not arise, in the words of the statute empowering court commissioners to act, "[a] question of fact *other than upon the pleadings* ...." Section 757.69(2)(c), STATS. (Emphasis added.) To the contrary, the limited factual issues resolved at a refusal hearing are those alleged in the notice of intent to revoke: whether the officer had probable cause

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> case the court commissioner may be directed to report upon any specific question of fact involved therein.
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> (b) The taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect.
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> (c) A question of fact other than upon the pleadings arises.
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> (d) Proposed findings of fact and conclusions of law are to be prepared pertaining to default mortgage and land contract foreclosures and mechanics liens.

[4] It is worth noting that a notice of intent to revoke substantially complies with the form of pleadings established by § 802.04, STATS. It includes a caption: "NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE." It sets forth the name of the court and venue: "Outagamie County Circuit Court." It contains a title of the action: "IN THE MATTER OF: Kenneth C. Luedke." Like a complaint, it sets forth the essential facts: The name of the arresting officer and his occupation, the date and time of the incident, the allegation that Luedke was arrested and the statutory charge; that Luedke was advised of the statutory information required, that he refused the test and that he may request a hearing within 10 days.

to arrest, whether he gave the accused the information required by § 343.305(4), STATS., and whether the person refused the test except for a physical disability or inability unrelated to alcohol or drugs.

Because the notice of intent to revoke is a "pleading," the factual issues resolved at the subsequent hearing are not "other than upon the pleadings." The circuit court therefore lacks the statutory authority to delegate the task of conducting refusal hearings to a court commissioner.

This is not a good result in this court's opinion. There is no good reason to deny the court the authority to delegate court commissioners to conduct refusal hearings. Nevertheless, because the statute fails to authorize the procedure, until the statute is changed either by legislation or supreme court rule, that's the way it is.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.