COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP213 **Cir. Ct. No. 2011TR3678**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WILLIAM NETZER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Joseph William Netzer, pro se, appeals a judgment convicting him of operating a motor vehicle while under the influence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. 752.31(2)(b) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a controlled substance, first offense, in violation of WIS. STAT. § 346.63(1)(am). Netzer argues on appeal that he received ineffective assistance of counsel, was denied his constitutional right to a jury trial, and that the results of his blood tests were impermissibly admitted into evidence. We conclude that Netzer possessed no constitutional right to effective assistance of counsel in a civil proceeding, that the trial court properly exercised its discretion in denying Netzer's motion to extend jury demand time limits, and that Netzer has failed to present a fully developed argument on and properly preserve his claims of improperly admitted evidence. Accordingly, we affirm the circuit court.

BACKGROUND

¶2 University of Wisconsin-La Crosse Police Officer Paul Iverson observed a vehicle traveling on a section of a street that was closed to motor vehicles. Officer Iverson pulled the vehicle over and identified Netzer as the driver. Netzer appeared nervous and eventually admitted to smoking THC at a friend's house. Netzer attempted and failed field sobriety tests and was subsequently arrested by Officer Iverson. Officer Iverson transported Netzer to Gunderson Medical Center where Iverson read the "Informing the Accused Form" to Netzer and obtained consent from him for a lab technician to draw his blood. Netzer was subsequently given a citation, charging him with the civil offense of operating a motor vehicle while under the influence of a controlled substance, first offense, in violation of WIS. STAT. § 346.63(1)(am).

¶3 The blood was sealed and Officer Iverson sent the sample to the Wisconsin State Lab of Hygiene (WSLH). WLSH was, at the time, experiencing an overload of samples that needed to be tested. To address the overload, WLSH

had contracted with NMS Labs in Pennsylvania to test blood samples. NMS labs tested Netzer's blood sample related to this incident.

¶4 The record indicates that Netzer instructed his first attorney, Nathan Schnick, to seek a jury trial. Schnick arranged for a not guilty plea to be entered at an initial appearance and it appears from the record that the plea was entered accordingly. However, Netzer's counsel failed to request a jury trial within the ten days of entering a plea, as required by WIS. STAT. § 345.43(1). The trial judge denied Netzer's motion to extend jury demand time limits and ordered a bench trial. Prior to trial, Netzer fired Schnick and hired a second attorney.

¶5 During the bench trial, over Netzer's objection, the trial court allowed the State to use expert testimony to lay foundation for the admissibility of Netzer's blood test results. The State called both Dr. Laura Liddicoat of WLSH and Ayako Chan-Hosokawa of NMS to testify. The court found that the test results constituted inadmissible hearsay, that they were created for the purpose of litigation, and struck Liddicoat's analyses of the blood test results. However, the court allowed Chan-Hosokawa's testimony wherein she based her independent conclusion on her expertise and the results of the test.

¶6 Based on the evidence presented at trial, the trial court found that Netzer had a prohibited detectable level of THC in his blood while operating a motor vehicle and found him guilty of violating WIS. STAT. § 346.63(1)(am), a civil infraction. Netzer appeals.

DISCUSSION

¶7 On appeal, Netzer challenges his conviction on three grounds: (1) he was denied the effective assistance of counsel; (2) he was denied the constitutional

right to a jury trial; and (3) the blood tests results were inadmissible because they were obtained contrary to statutory requirements. We address and reject each argument in turn.

I. Ineffective Assistance of Counsel

¶8 Netzer first argues that he received ineffective assistance of counsel because counsel improperly entered a plea on Netzer's behalf, failed to request a jury trial in a timely manner, and failed to properly prepare for Netzer's defense. The State responds that Netzer did not have a constitutional right to counsel and therefore he cannot claim that his right to effective assistance of counsel was violated. We agree with the State.

¶9 "The general rule is that civil litigants have no constitutional right to counsel and therefore no constitutional right to effective assistance of counsel." ***State v. Krause***, 2006 WI App 43, ¶11, 289 Wis. 2d 573, 712 N.W.2d 67. Here, Netzer was convicted of a civil traffic violation, first offense OWI, and accordingly has no constitutional right to the effective assistance of counsel. *See generally* ***County of Racine v. Smith***, 122 Wis. 2d 431, 435, 362 N.W.2d 439 (Ct. App. 1984) (concluding that a traffic violation is a civil conviction where the proscribed penalty is forfeiture).

II. Right to a Jury Trial

¶10 As we understand it, Netzer argues that the trial court erroneously exercised its discretion when it denied Netzer's motion to extend the time to file a jury demand. It appears from the record that Netzer's attorney entered a not guilty plea on Netzer's behalf on October 6, 2011. However, counsel did not file a timely jury demand. *See* WIS. STAT. § 345.43(1) (jury demand must be filed

within 10 days of entering a not guilty plea). In a letter to the court sent eight months later, Netzer's attorney requested an extension of the time limits to file a jury demand and to pay the jury fees. The court denied the request. The court determined that Netzer failed to demonstrate "excusable neglect" for his failure to make a timely jury demand or a continuance within the statutorily required ten days of entering a plea. On appeal, Netzer does not argue that the court's denial of his motion constitutes a misuse of discretion. Instead, he argues that it was "grossly unfair" for the trial court to continue the jury trial on multiple occasions so that the "State could restart its case and perhaps fix some of its hearsay problems" but not allow Netzer "a second chance to simply demand a jury trial." The State responds that Netzer forfeited his right to a jury trial and that the court properly found no excusable neglect for Netzer's failure to file a timely jury demand. We agree with the State.

¶11 In failing to demand a jury trial in a timely manner, revocation of the waiver is at the discretion of the court. *See* ***State ex rel. Prentice v. County Court of Milwaukee Cnty.***, 70 Wis. 2d 230, 240, 234 N.W.2d 283 (1975). The trial court may grant additional time for the defendant to request a trial if it finds "excusable neglect" as a reason for the original waiver. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). The term excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.' It is not synonymous with neglect, carelessness or inattentiveness.'" ***Id.*** (quoting another source). An appellate court will sustain a discretionary act if it finds that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Dane Cnty. DHS v. Mable K.***, 2013 WI 28 ¶39, 346 Wis. 2d 396, 828 N.W.2d 198.

¶12 Netzer has not argued, nor can we discern from the record, that any "excusable neglect" occurred. In its order denying Netzer's motion for a continuance, the trial court held that "excusable neglect" does not include failing to know the rules of the court or the fact that there were issues yet to be discovered after the time period within which to demand a jury. Additionally, the court found that Netzer's attorney could have anticipated the delay in obtaining test results prior to the jury demand time limits passing. We conclude that it was reasonable for the court to deny Netzer's motion for these reasons.

III. Admissibility of Evidence

¶13 Netzer argues that Officer Iverson lacked probable cause to make an arrest or draw blood, rendering the blood tests inadmissible. Netzer's argument is based on minor inconsistencies between Officer Iverson's testimony and his initial report and that Iverson did not call a specially trained drug recognition officer to the scene.[2] The State argues this argument is undeveloped and therefore forfeited. We agree.

¶14 Generally, we will not consider arguments that are not fully developed or inadequately briefed. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992). Netzer does not fully develop an argument on this topic in his brief-in-chief, and to the extent that Netzer elaborates on the issue only in the

[2] With respect to the admissibility of evidence claim, Netzer raises three new arguments on appeal: that the lab technician drew his blood without his consent, that Officer Iverson and the lab technician contaminated his blood by touching the draw site, and there were chain of custody violations due to a seven-day span between when Officer Iverson took custody of the blood and when it arrived at WSLH. Because Netzer raises these arguments for the first time on appeal, he has forfeited these arguments. We decline to review issues raised for the first time on appeal. *See, e.g.*, ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838.

reply brief, arguments not fully developed in appellant's brief-in-chief afford the respondent no opportunity to respond, and will not be reviewed. ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶34, 296 Wis. 2d 337, 723 N.W.2d 131. We conclude that Netzer has forfeited this argument.

¶15 To the best of our understanding, Netzer next argues that the blood test results used by Chan-Hosokawa in her expert testimony are inherently invalid because the State did not comply with WIS. STAT. § 343.305(6)(a). Netzer argues that statutory noncompliance precluded the State from laying an adequate foundation to admit the test results and therefore the trial court erroneously exercised its discretion in admitting this expert testimony. The State argues that statutory noncompliance only strips the presumption of admissibility, but allows the State to lay a proper foundation using expert testimony.

¶16 Our review of the record shows that Netzer did not preserve this objection at trial on the grounds that he raises on appeal, summarized in the previous paragraph. At trial, Netzer objected to the admissibility of Chan-Hosokawa's testimony only on hearsay grounds, not to the inherent invalidity of the test results as he argues on appeal. "In order to preserve an issue for appeal as a matter of right, a party must object to the error at trial, stating the proper ground for the objection." ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988). Because Netzer failed to lodge at trial the objection he now raises on appeal to Chan-Hosokawa's testimony, he has forfeited the right to raise this argument on appeal.

¶17 Finally, Netzer argues that the blood test results are inadmissible because they were prepared in anticipation of litigation and are not supported by testimony from a "qualified witness," in violation of his Sixth Amendment right to

confrontation. Netzer argues that he has the right to confront the analyst who made the report, not a coworker who did not participate in testing his individual blood sample. ***Bullcoming v. New Mexico***, 131 S.Ct. 2705, 2710 (2011). The State argues that the Sixth Amendment does not apply here because Netzer's violation is a civil matter and the right to confrontation under the Sixth Amendment does not extend to civil proceedings. We agree with the State.

¶18 We have held that, in a civil proceeding, "no independent right to confront witnesses exists under the Wisconsin and United States Constitutions." ***W.J.C. v. County of Vilas***, 124 Wis. 2d 238, 240, 369 N.W.2d 162 (Ct. App. 1985). Accordingly, because this is a civil proceeding, Netzer has no constitutionally guaranteed right to confront a witness. It follows that Netzer cannot claim that the State has violated a constitutional protection that he does not have.

CONCLUSION

¶19 We conclude that Netzer possesses no constitutional right to effective assistance of counsel, that his right to a jury trial was not compromised, and he failed to preserve for appeal his claims of improperly admitted evidence. Accordingly, we affirm the circuit court.

By the Court.—Judgment affirmed.

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