COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1262 **Cir. Ct. No. 2015TR1433**

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

IN THE MATTER OF THE REFUSAL OF KEITH D. MCEVOY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH D. MCEVOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.[1] Keith McEvoy appeals his judgment of conviction, which revoked his driver's license for three years, for refusing to

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

submit to a chemical test of his blood under the Wisconsin implied consent law, WIS. STAT. § 343.305(9). McEvoy argues that the State is estopped from pursuing the refusal action to revoke his license, because the State had temporarily suspended his license under WIS. STAT. § 343.305(7). For the reasons set forth below, I conclude that McEvoy's reliance on his receipt of a notice to suspend, to mean that the State had changed its mind and was no longer pursuing a refusal action to revoke his license, was not reasonable. Accordingly, I affirm the judgment.

BACKGROUND

¶2 On January 30, 2015, McEvoy was arrested for allegedly operating a motor vehicle while under the influence of an intoxicant, fifth offense, in violation of WIS. STAT. § 346.63(1)(a). The arresting officer read McEvoy the "Informing the Accused" form as required under WIS. STAT. § 343.305(4) and asked McEvoy to submit to a chemical test of his blood. McEvoy refused. The officer obtained an involuntary blood sample from McEvoy.

¶3 The officer provided McEvoy with a notice of intent to *revoke* operating privilege, which stated that McEvoy refused a request to submit to a test under WIS. STAT. § 343.305(3) and, therefore, his operating privilege may be revoked. The notice further stated that he had ten days to request a hearing on the revocation, and that if he did not request a hearing, "the court must revoke [his] operating privileges 30 days from the date of this notice." McEvoy made a timely request for a refusal hearing on February 5, 2015.

¶4 Meanwhile, on February 18, 2015, after McEvoy's chemical test result returned indicating a prohibited alcohol concentration, the officer issued a

notice of intent to *suspend* operating privilege under WIS. STAT. § 343.305(7). The notice of intent to suspend stated:

> On [January 30, 2015] you submitted to chemical testing administered in accordance with s.343.305 Wis. Stats. The test result indicated a prohibited alcohol concentration .... Your operating privilege will be administratively suspended for six months. You have a right to obtain administrative and judicial review of the suspension under the provisions of s.343.305(8) Wis. Stats.

McEvoy did not take any action as to the notice of intent to suspend.

¶5 McEvoy pled not guilty to the underlying OWI charge at an arraignment hearing on March 11, 2015. At that hearing, the court scheduled the refusal hearing for April 28, 2015.

¶6 On March 20, 2015, the Department of Transportation notified McEvoy that his license was suspended for six months effective that date.

¶7 At a subsequent hearing on April 9, 2015, McEvoy's counsel informed the assistant district attorney that McEvoy's license was suspended. The assistant district attorney contacted the Department of Transportation to reinstate McEvoy's license, and McEvoy's license was reinstated on or before April 14, 2015.

¶8 On April 27, 2015, one day before the refusal hearing, McEvoy filed a motion to dismiss the refusal action to revoke his license under WIS. STAT. § 343.305(9), arguing that the State is estopped from pursuing the refusal action because it had already suspended his license. The circuit court heard arguments from both parties at the April 28, 2015 refusal hearing, and held that the temporary suspension of McEvoy's license did not preclude the State from pursuing the refusal action to revoke his license. McEvoy now appeals.

DISCUSSION

¶9 "Wisconsin's implied consent law is intended to facilitate the ability of police to secure evidence of intoxication or controlled substances by persuading drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***State v. Padley***, 2014 WI App 65, ¶24, 354 Wis. 2d 545, 849 N.W.2d 867. "More pointedly, its purpose is 'to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar.'" ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶31, 348 Wis. 2d 282, 832 N.W.2d 121 (quoted source omitted).

¶10 "[A]ll persons accept [their 'implied consent'] as a condition of being licensed to drive a vehicle on Wisconsin public road ways." ***Padley***, 354 Wis. 2d 545, ¶26; WIS. STAT. § 343.305(2). When a law enforcement officer requires that a driver decide whether to give consent to a requested primary chemical test, such as a blood test, the driver may either choose or refuse to consent. ***Padley***, 354 Wis. 2d 545, ¶¶25-28. Under WIS. STAT. § 343.305(9), a driver who declines to comply with the implied consent law by *refusing* to consent to a requested blood test suffers the penalties specified in the implied consent law, and those penalties include automatic license *revocation*. ***Id.***, ¶¶27, 31. "Revocation of the license is automatic, in the sense that revocation may be overturned only if the driver prevails before a court at a refusal hearing requested by the driver within ten days of receipt of the notice of intent to revoke his or her license." ***Id.***, ¶31.

¶11 On the other hand, under WIS. STAT. § 343.305(7), "[i]f a person *submits* to chemical testing administered in accordance with this section and any test results indicate the presence of a detectable amount of a restricted controlled

substance in the person's blood or a prohibited alcohol concentration," the person's operating privilege is "administratively *suspended* for 6 months." (Emphasis added.)

¶12 McEvoy concedes that he refused to consent to a requested chemical test after his arrest on January 30, 2015 and, thus, is subject to the penalties under the implied consent law. However, McEvoy narrowly argues that the State is estopped from pursuing a refusal action to revoke his license under WIS. STAT. § 343.305(9), because the State had, instead, suspended his license under WIS. STAT. § 343.305(7). McEvoy asserts that the notice of intent to suspend induced his reasonable reliance that the State had "opted" for a six-month administrative suspension instead of a refusal action to revoke and, therefore, he chose not to challenge the suspension to his detriment. As I explain below, McEvoy fails to prove that his reliance was reasonable and, therefore, estoppel has not been established.[2]

A. Standard of Review

¶13 "When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established."

[2] I do not address other reasons why McEvoy's argument may fail because the conclusion that McEvoy fails to prove reasonable reliance disposes of this appeal. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (declining to consider alternative arguments where resolution of one issue disposes of the appeal).

McEvoy appears to suggest that the circuit court's credit of twenty-five days from his license suspension—March 20, 2015 to on or before April 14, 2015—towards his three-year term for license revocation is insufficient because he did not know that his license was reinstated until April 28, 2015. However, McEvoy did not raise this argument in the circuit court. Therefore, I do not consider it. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702 ("We generally do not consider arguments not raised in the circuit court.").

Milas v. Labor Ass'n of Wisconsin, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997). "This court determines questions of law independent of the circuit court, benefiting from its analysis." ***Id***.

B. Doctrine of Estoppel Defined

¶14 Generally, the doctrine of equitable estoppel is not applied as freely against the government as it is in the case of private persons. ***Milas***, 214 Wis. 2d at 14. "Courts have recognized 'the force of the proposition that estoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals.'" ***Id.*** "If we allow the estoppel doctrine to hinder the government's exercise of its police power, we will be 'expos[ing] a significant number of persons to a risk the legislature has determined to be contrary to their safety, welfare, health or morals.'" ***Village of Hobart v. Brown Cnty.***, 2005 WI 78, ¶29, 281 Wis. 2d 628, 698 N.W.2d 83 (quoted source omitted). "Nevertheless, we have recognized that estoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public interest would not be unduly harmed by the application of estoppel." ***Milas***, 214 Wis. 2d at 14.

¶15 "The estoppel doctrine, also called equitable estoppel or estoppel *in pais*, focuses on the conduct of the parties." ***Id.*** at 11. "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which *induces reasonable reliance* thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Id.*** at 11-12 (emphasis added). "The party asserting estoppel must prove the elements by

clear, satisfactory and convincing evidence." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2005 WI App 189, ¶17, 286 Wis. 2d 403, 703 N.W.2d 737.

C. McEvoy Fails to Prove Reasonable Reliance

¶16 It appears to be undisputed there was action by the State in the form of the notice of intent to suspend dated February 18, 2015. However, McEvoy fails to prove the third element—that the notice induced reasonable reliance.

¶17 As noted above, McEvoy asserts that he believed the State had "opted" for a six-month suspension instead of a revocation and, therefore, he chose not to challenge the suspension to his detriment. However, such reliance is not reasonable. McEvoy attended the arraignment hearing on March 11, 2015, which was after the notice of intent to suspend but before his license was effectively suspended, during which time McEvoy could have sought review of the suspension notice. During that hearing, the parties expressly addressed the refusal action and the court scheduled the refusal hearing for April 28, 2015. Thus, McEvoy knew that the State was proceeding with the refusal action to revoke his license on March 11, 2015, within the time period McEvoy had to seek review of the suspension notice.

¶18 Additionally, the notice of intent to suspend stated: "On the above date you *submitted* to chemical testing administered in accordance with s.343.305 Wis. Stats." (Emphasis added.) McEvoy knew that he did not submit to a chemical testing, but rather, refused to submit to chemical testing in accordance with WIS. STAT. § 343.305. The notice neither mentioned the January notice of intent to revoke, nor indicated that the State had changed its mind and was proceeding with the suspension as an alternative to revocation.

¶19 In sum, McEvoy's reliance on the February notice of intent to suspend to mean that the State had "opted" to pursue administrative suspension instead of the refusal action to revoke is not reasonable. Therefore, McEvoy's estoppel argument fails.

CONCLUSION

¶20 For the reasons set forth above, I conclude that McEvoy fails to prove that the State is estopped from pursuing a refusal action to revoke his license. Therefore, I affirm.

By the Court.—Judgment affirmed.

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