COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-2473
99-2474

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

VILLAGE OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

RYAN S. WOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Ryan S. Wood appeals from a judgment imposing forfeitures for operating a motor vehicle while intoxicated (OWI),

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

operating left of center and driving with open intoxicants in a motor vehicle.[2] Wood argues that the circuit court erred when it vacated an earlier order determining that his refusal to submit to a chemical test was proper and then allowed evidence of the refusal at the jury trial. Specifically, Wood complains that the court's action vacating the earlier order was taken sua sponte without an opportunity for him to be heard. He also complains that the court allowed evidence of his refusal at the jury trial without conducting a separate hearing as to whether his refusal was proper.

¶2 Under the facts of this case, we hold that the trial court had the inherent authority to revisit the propriety of its prior order. We also hold that the court gave Wood a meaningful opportunity to be heard on the matter because the court revisited the entire question during the trial of the underlying charges. Finally, we hold that the court did not err in the exercise of its discretion by vacating the prior order and by admitting evidence of Wood's refusal at the jury trial. We therefore affirm the judgment.

FACTS

¶3 The facts are undisputed. During the early morning hours of January 24, 1999, Wood was stopped by a Village of Walworth police officer for erratic driving. After failing several field sobriety tests, Wood was arrested and his vehicle was searched. The search revealed several cans of beer, two of which were open. Wood was issued citations for the municipal ordinance corollaries of

[2] Wood's notice of appeal challenges "the whole of the final judgment," but his argument focuses exclusively on the OWI conviction. Nonetheless, we consider the appeal to encompass all of the counts recited in the judgment.

WIS. STAT. §§ 346.63(1)(a), OWI; 346.05(1), driving left of center; and 346.935(3), open intoxicants in a motor vehicle.

¶4 Wood was transported to the Walworth County Sheriff's Department where he was informed pursuant to the implied consent law. *See* WIS. STAT. § 343.305(4). When asked if he would submit to chemical testing, Wood responded that he wanted to talk to his lawyer before he did anything. The officer told Wood that his answer would be considered a refusal and again asked Wood whether he would submit to testing. Wood continued to insist on talking to his lawyer. The officer recorded this as a refusal and issued Wood a notice of intent to revoke under the implied consent law. *See* § 343.305(9).

¶5 Wood then filed various discovery requests in the refusal proceeding pursuant to ***State v. Schoepp***, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996). The State responded with a motion pursuant to WIS. STAT. § 967.055(2), asking the trial court to "find the refusal reasonable."[3] It appears that the State took this action without prior notice to Wood. In support of the request, the motion stated, "The State submits that this motion to find the refusal reasonable is consistent with the public's interest in deterring the operation of motor vehicle[s] by those who are under the influence of an intoxicant because the Village of Walworth will continue to prosecute the underlying offense." The foot of the motion contained a proposed order finding Wood's refusal to be reasonable. The trial court signed the

[3] While "reasonableness" was once the test for measuring the validity of a refusal, that is no longer the test. Under current law, the test is whether a refusal is proper. *See* WIS. STAT. § 967.055(2)(a) (referring to an "improper refusal"). A refusal is proper if probable cause did not support the arrest, the suspect was not properly advised under the implied consent law, or the suspect refused the test due to a physical inability to submit to the test. *See* WIS. STAT. § 343.305(9)(a)5a, b, c.

order. The court did not conduct a hearing on this motion. Wood, of course, makes no complaint about this action.

¶6 About seven months later and shortly before the trial in this case, the Village brought a motion asking the trial court to amend the OWI charge to one of reckless driving and to dismiss the other two citations. The motion was based upon an attached stipulation between the parties in which Wood agreed to plead no contest to the amended charge, to pay a forfeiture of $733.50 within thirty days and to successfully complete an "Assessment and Rehabilitation course." In support of the request, the Village's motion stated:

> That [the Village] believes it unlikely that the plaintiff will obtain a conviction of the OWI charge in that:
>
> a. The Court entered an order in this case finding that the defendant's refusal to take a blood alcohol test was reasonable.
>
> b. That the arresting officer is the only witness who has an opinion that the defendant was under the influence on the date in question. Two other sheriff's deputies, who spent time in the presence of the defendant at the time of the incident have no opinion as to the defendant's sobriety at the time in question.
>
> c. That the physical sobriety tests administered to the defendant on the evening in question did not provide a good indication that the defendant was under the influence.

The foot of the motion contained a proposed order granting the motion.

¶7 However, the trial court did not sign the proposed order. Instead, the court entered a handwritten denial of the motion on the proposed order. In support of its order, the court wrote, "The court is vacating its order in [the refusal case] and resetting same." The court further wrote, "1) not in public interest to find said refusal 'reasonable' 2) no basis in fact for this is set forth in State's motion." In addition, the court wrote, "This file will be heard by Court contemporaneous with

jury trial and the court will make its findings after the case is sent to the jury." Once again, this action was taken without advance notice to either the Village or Wood.

¶8 Wood responded by filing motions in limine seeking to exclude any evidence of his refusal at the trial. As relevant to this appeal, Wood challenged the trial court's sua sponte action in vacating the prior order.[4] At the opening of the trial and outside the presence of the jury, the trial court heard arguments on Wood's motions. At the conclusion of these arguments, the court rejected the motions. However, in order to protect Wood's due process rights, the court withheld a final ruling on the admissibility of the refusal evidence pending the presentation of evidence that Wood had been properly advised under the implied consent law. *See* ***State v. Zielke***, 137 Wis. 2d 39, 50-51, 403 N.W.2d 427 (1987). The court indicated that the jury would be excused when the evidence broached this topic, that the court would then hear the evidence outside the jury's presence and that the court would then make a ruling on the question.[5]

¶9 In keeping with this procedure, the jury was excused when the Village's evidence at trial moved to the implied consent phase. After hearing this evidence, the court determined that Wood had been properly advised under the implied consent law. As such, the court ruled that the Village could present

[4] Wood also argued that the State had effectively admitted that he had not refused the test because the State had failed to respond to his pretrial request for an admission as to that fact. Wood also sought permission to introduce as evidence the representations made by the Village in support of its motion to reduce the charge. Wood does not renew these arguments on appeal.

[5] Under this procedure, the State, represented by an assistant district attorney, was present during the trial but did not participate in the jury trial phase of the proceedings. However, when the jury was excused, the State actively participated in the implied consent phase of the proceedings.

evidence of Wood's refusal. The jury then returned to the courtroom and the Village introduced the refusal evidence.

¶10 The jury found Wood guilty on all counts. In light of the guilty verdict, the State moved to dismiss the refusal matter. The court agreed. Wood appeals from the forfeiture judgment.

DISCUSSION

¶11 When the sum of all of Wood's arguments on appeal are distilled to their essence, we are left with an evidentiary question: was evidence of Wood's refusal properly admitted at his trial on the underlying OWI charge? In support of his contention that it was not, Wood argues that the trial court did not have the authority to sua sponte vacate its earlier order, that the prior order was final, and that the court denied him notice or an opportunity to be heard. Wood further argues that the refusal evidence was improperly admitted because the court failed to make a separate judicial determination on this question prior to trial.

¶12 Evidentiary questions are addressed to the trial court's discretion. *See* ***State v. Ingram***, 204 Wis. 2d 177, 182, 554 N.W.2d 833 (Ct. App. 1996). In evaluating the trial court's ruling, we look to whether the trial court applied the correct legal standard and if its conclusion was grounded on a logical interpretation of the facts. *See* ***id***.

1. Vacation of the Prior Order

¶13 We first address whether the trial court had the authority to vacate its original order and, if so, whether the court properly exercised its discretion in vacating that order. Wood argues that the court did not have such authority because the order was final. We do not see the issue that way. While these two proceedings were separate, they nonetheless were closely related. The refusal

sprang from the underlying OWI offense. Case law demonstrates that the two proceedings are interrelated. For instance, under ***Zielke*** evidence of a refusal can be admitted at the trial of the underlying OWI charge. And, under ***State v. Brooks***, 113 Wis. 2d 347, 348, 335 N.W.2d 354 (1983), where the defendant has been convicted of the underlying offense, the trial court may dismiss the refusal proceeding.[6]

¶14 More importantly, the State's original motion was premised on its express representation that the Village would pursue the underlying OWI charge. Relying on that premise, the court signed the order finding Wood's refusal to be reasonable. However, that premise proved to be incorrect when the Village later sought to reduce the OWI charge to reckless driving and to dismiss the other two citations.

¶15 We hold that the trial court had the inherent power to revisit its original order in light of this subsequent development. The powers of a court can be inherent or derived from common law or from statute. *See* ***Estate of Boyle v. Wickhem, Buell, Meier, Wickhem & Southworth, S.C.***, 134 Wis. 2d 214, 220, 397 N.W.2d 124 (Ct. App. 1986). An inherent power stems from the need for an orderly and efficient exercise of the court's jurisdiction. *See* ***id***. If a court is powerless to reconsider an order issued under a mistake, misapprehension or incorrect information, the court is functionally barred from exercising its jurisdiction in an efficient and fair manner. That strikes at the very heart of the judicial role and frustrates the judicial obligation to do justice.

[6] That is what occurred in this case. After the jury found Wood guilty of OWI, the State asked the trial court to dismiss the refusal matter. The court did so.

¶16 That obligation is re-enforced in this case by WIS. STAT. § 967.055(1)(a), which announces the legislature's concern about drunk driving and its intent to "encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant." ***State v. Dums***, 149 Wis. 2d 314, 322, 440 N.W.2d 814 (Ct. App. 1989). To that end, the legislature provided in subsec.(2)(a) of the statute:

> **(2)** DISMISSING OR AMENDING CHARGE. (a) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge … [for] improper refusal under s. 343.305, the prosecutor shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The court may approve the application only if the court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant ….

Section 967.055(2)(a).

¶17 This same public policy underpins the implied consent law and the courts have been instructed to liberally construe that law to achieve its goals. *See* ***Scales v. State***, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974).

¶18 Reconsideration rulings are committed to the trial court's discretion. *See* ***State v. Alonzo R.***, 230 Wis. 2d 17, 21, 601 N.W.2d 328 (Ct. App. 1999). Our review of discretionary decisions is highly deferential. *See* ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis. 2d 549, 572, 521 N.W.2d 182 (Ct. App. 1994). The record need only reflect a reasoned application of appropriate legal standards. *See* ***id***. at 572-73. This requires that the record reflect an exercise of such discretion and a reasonable basis for its determination. *See* ***id***. at 573. We search the record for reasons to sustain the court's discretionary decision. *See* ***id***.

¶19 When the State presented the original order to the trial court, it represented that the Village would pursue the underlying OWI charge. When the court later learned that this was not the case, the court had the authority (perhaps even the obligation) to assure that the public policy concerns set out in WIS. STAT. § 967.055(2)(a) and the implied consent law had been properly considered. The court spoke directly to this concern when it took up this matter with the parties at the opening of the jury trial:

> I'm reopening [the refusal case] because … I feel that I signed an order without looking at it in detail, and without knowing the impact that it was going to have on this case for sure at the time it was signed, and it looked like a set-up deal type of a thing where you get both of these things reduced and not have a hearing on either one of them or both of them.

¶20 These statements represent a reasonable basis for the trial court's decision to vacate the prior order. We hold that the court had the inherent authority to reconsider its original order. We further hold that the court did not misuse its discretion in vacating the order.

¶21 We likewise reject Wood's contention that the manner in which the trial court reinstated the refusal charge denied him an opportunity to be heard. While the better practice would have been to conduct a hearing on the Village's motion at the time it was presented, the court accorded all of the parties a full hearing on the propriety of the court's action at the commencement of the jury trial.

2. Admissibility of Refusal Evidence

¶22 Wood's further argument is that evidence of a refusal may not be admitted at an OWI trial unless there has been a prior judicial determination

regarding the propriety of the refusal. Wood argues that no such prior hearing occurred in this case. Again, we disagree.

¶23 The results of a properly administered breathalyzer test are admissible in court. *See* ***State v. Schirmang***, 210 Wis. 2d 324, 331, 565 N.W.2d 225 (Ct. App. 1997). Fairness dictates that a defendant who refuses to take a chemical test should be placed in a position no better than that of a defendant who cooperates with police. *See* ***id***. at 331-32. Therefore, evidence of a refusal to submit to mandatory testing has been held admissible as relevant to the defendant's consciousness of guilt. *See* ***id***. at 332. However, due process considerations require that evidence of a refusal cannot be used in an OWI trial unless the defendant has been properly advised under the implied consent law. *See* ***Zielke***, 137 Wis. 2d at 50-51.[7]

¶24 Wood relies on ***State v. Bolstad***, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), to support his contention that a separate hearing should have been held prior to trial to determine whether his refusal was proper. There, the defendant was arrested for OWI and thereafter refused to submit to chemical testing. *See* ***id***. at 577. At the refusal hearing, the trial court determined that the refusal was improper. *See* ***id***. at 578. At the later OWI trial, the court prohibited the defendant from presenting evidence of the reasons for his refusal because of the prior determination that his refusal was not proper. *See* ***id***. at 579-80. The supreme court reversed, holding that despite the prior determination, the defendant was entitled to introduce his evidence to rebut the consciousness of guilt inference created by the evidence of his refusal. *See* ***id***. at 585-86. Wood says that ***Bolstad***

[7] Wood does not contend that he was not properly advised under the implied consent law.

stands for the proposition that "a prior judicial determination that Mr. Bolstad had refused to submit to a chemical test made the evidence of Mr. Bolstad's refusal automatically admissible."

¶25 We reject Wood's attempt to stretch ***Bolstad*** to cover the issue in this case. While a separate refusal hearing occurred in ***Bolstad***, the *timing* of the hearing had nothing to do with the issue in the case or the supreme court's holding. What the court decided was that a defendant had a right to explain the reasons for a refusal even if the refusal was improper under the implied consent law. In short, ***Bolstad*** has no bearing on this case.

¶26 Wood also argues that "[a]bsent a hearing held prior to trial, it cannot be presumed that the evidence of a defendant's alleged refusal is admissible." This is not entirely accurate. Rather, the admissibility of a refusal is predicated on the defendant being properly advised under the implied consent law. *See* ***Zielke***, 137 Wis. 2d at 50-51. This court has previously held that ***Zielke*** does not mandate a formal revocation hearing under the implied consent law. *See* ***State v. Donner***, 192 Wis. 2d 305, 313, 531 N.W.2d 369 (Ct. App. 1995). In ***Donner***, the State did not pursue a revocation hearing under the implied consent law. *See* ***id***. Instead, the matter was pursued at the OWI trial via a motion in limine and during the evidentiary phase of the trial itself. *See* ***id***. at 314. This court approved that procedure. *See* ***id***.

¶27 The same procedure occurred here. While a separate refusal hearing was not held prior to Wood's OWI trial, its functional equivalent was conducted outside the presence of the jury during the course of the trial. The court adopted this procedure so that it could determine if Wood had been properly advised of the information set out in the implied consent law. By this procedure, the court

protected Wood's due process rights under ***Zielke***. Satisfied that Wood had been properly advised, the court correctly allowed evidence of Wood's refusal to be presented to the jury.

CONCLUSION

¶28 We hold that the trial court had the inherent authority to reconsider its previous order. Under the facts of this case, we further hold that the court did not misuse its discretion in vacating the previous order. We also hold that the court's action, although initially taken without notice to Wood, was not prejudicial because the court allowed Wood to be meaningfully heard on this matter prior to the commencement of the jury trial. Finally, we hold that the trial court properly determined outside the presence of the jury that Wood had been correctly informed under the implied consent law. As such, the court properly admitted the refusal evidence.

By the Court.—Judgment affirmed.

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