COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3219

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

IGNACIO P. GONZALEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Reversed and cause remanded.*

¶1 CURLEY, J.[1] Ignacio P. Gonzalez appeals the trial court's order denying the State's request to dismiss the refusal charge brought against him after he was arrested for operating while intoxicated. Because the trial court grounded

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

its exercise of discretion on an erroneous reading of the law that Gonzalez had the burden of proof at the refusal hearing, this court reverses.

I. BACKGROUND.

¶2 On July 20, 1999, Gonzalez was arrested in the village of Whitefish Bay for operating an automobile while intoxicated. After his arrest, Gonzalez refused to submit to a chemical test and the arresting officer seized his driver's license and served Gonzalez with a notice of intent to revoke his driving privileges, pursuant to WIS. STAT. § 343.305(9).[2] The notice given to Gonzalez advised him that his driving privileges would be "revoked for a period of not less than one year or more than three years" unless he requested a hearing to determine whether: the officer was entitled to request that he submit to the test; he was given the proper notice; he failed to submit to the test; or he was, by virtue of a physical disability or disease, unable to submit to the test. Although there is some dispute as to whether Gonzalez actually demanded a hearing, he did appear in court on a date set for the refusal hearing and the trial court held that he made a timely demand for a hearing. Prior to the refusal hearing date, Gonzalez resolved the operating while intoxicated charge by entering a plea of no contest in municipal court.

¶3 At the refusal hearing, the State moved to dismiss the refusal charge. The State reasoned that, because Gonzalez had previously disposed of the citation for operating while intoxicated, under the holding in ***State v. Brooks***, 113 Wis. 2d 347, 335 N.W.2d 354 (1983), it was obligated to dismiss the refusal charge. The

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

trial court refused to dismiss the charge and, instead, ordered the parties to file briefs. The trial court also appointed counsel for Gonzalez after finding that Gonzalez was indigent. The trial court stated that it believed that the procedure to dismiss refusal hearings after the underlying operating while intoxicated charge had been resolved was unique to Milwaukee County and contrary to a literal reading of the statute. The trial court indicated it was concerned that ***Brooks*** was no longer good law. In ***Brooks***, the supreme court concluded that the trial court did not erroneously exercise its discretion in dismissing the refusal charge. *See* ***id.*** at 359. The supreme court approved the dismissal of the refusal charge, reasoning that, once a defendant pleads to the operating while intoxicated charge, the refusal statute's purpose—to remove a drunk driver from the road as expeditiously as possible—had been met. *See* ***id.*** Both parties filed briefs claiming that the holding in ***Brooks*** had not been overturned or changed by a subsequent change in the law. In refusing to dismiss the refusal charge, the trial court determined that Gonzalez had the burden of proof at the refusal hearing.

II. ANALYSIS.

¶4 The question presented in this appeal is which party has the burden of proof at a refusal hearing? Gonzalez urges this court to conclude that the trial court erred when it found that Gonzalez has the burden of proof in a refusal hearing. The State joins in Gonzalez's request. Although a trial court's decision to dismiss a charge is a discretionary one, when a trial court grounds its decision on an error of law, it is an erroneous exercise of discretion. ***State v. Hutnik***, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968) (When a judge bases his or her exercise of discretion upon an error of law, the judge's conduct is beyond the limits of discretion.). This court is satisfied that the trial court based its decision to deny the State's motion to dismiss the refusal charge on an error of law.

¶5 The trial court reasoned that "The natural tendency to place the burden of proof on the party seeking change mandates placing the burden of proof upon the driver." Further the trial court noted that "No unfairness follows from requiring the driver to bear the burden of proof." Finally, the trial court concluded: "Thus, I hold the driver and not the State bears the burden of proving one or more issues at the refusal hearing favorably to the driver if the driver is to avoid a mandatory license revocation for refusing to submit to a chemical test." While this court shares the trial court's stated concern in ruling in the manner it did, that its ruling promoted the protection of Wisconsin's roads, the trial court failed to consider case law precedent which held that the burden of proof belongs to the State.

¶6 In ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994), the issue on appeal was whether issue preclusion prohibited a driver from relitigating the probable cause issue in his criminal case when he had failed to prevail at the refusal hearing with the identical defense that no probable cause existed for his arrest. *See* ***id.*** at 676. In deciding that issue preclusion did not apply, the court observed: "Thus, the State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***Id.*** at 681. Although the court used the term "burden of persuasion" rather than "burden of proof," it is undisputed in ***Wille*** that the court was referring to the burden of proof. This court also notes that Black's Law Dictionary defines burden of persuasion as "[t]he onus on the party with the burden of proof to convince the trier of fact of all elements of his case." BLACK'S LAW DICTIONARY 178 (5th ed. 1980). Thus, this court concludes that, in ***Wille***, the court concluded the burden of proof was on the State in a refusal charge.

¶7 Moreover, other cases support the holding in ***Wille***. In ***State v. McMaster***, 206 Wis. 2d 30, 556 N.W.2d 673 (1996), the supreme court presumed that the State was the prosecuting party at a refusal hearing in deciding that double jeopardy did not apply. *See* ***id.*** at 33-34. Had the court believed that the driver had the burden of proof, the issue would not have been couched as a double jeopardy question. *See also* ***State v. Nordness***, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) (by implication the supreme court found that the State bears the burden of proof at a refusal hearing).

¶8 Finally, the procedural structure strongly suggests that it is the State which bears the burden of proof in a refusal hearing. The statute requires that the district attorney be given a copy of the notice of intent to revoke operating privilege and, after a demand is made for a hearing, the case is captioned "State v. Driver." Further, it is the State who calls its witnesses first, a role traditionally given to the party having the burden of proof.

¶9 For all of the reasons stated, the trial court's decision is reversed and this matter is remanded to the trial court for a determination consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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