COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0381-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DILLIS V. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, J.[1] Dillis V. Allen seeks reversal of the trial court's order granting a blanket protective order barring any discovery before a refusal hearing. We have no choice but to reverse the trial court's order because there are

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

no facts of record upon which the trial court could base a rational exercise of its discretion.

¶2 A law enforcement officer issued Allen a Notice of Intent to Revoke Operating Privilege after he refused to submit to a chemical test of his blood. Sometime after the notice was issued, Allen served demands for discovery upon the State under WIS. STAT. ch. 804.[2] In response to Allen's discovery demands, the State filed a motion with the trial court seeking a protective order under WIS. STAT. § 804.01(3) "limiting discovery … to that which can be obtained through the State's open file policy." Without a hearing, the trial court granted the State's motion. Allen responded with a motion to set aside the order; he argued that the information sought in his discovery demands was not available through the State's open file policy and that he was entitled to the discovery under ***State v. Schoepp***, 204 Wis. 2d 266, 554 N.W.2d 236 (Ct. App. 1996).

¶3 The trial court refused to vacate the protective order. The trial court reasoned:

> [WISCONSIN STAT. §] 343.305 requires that the State establish three things when determining the reasonableness of a refusal.
>
> One, whether there was probable cause for the stop and the arrest;
>
> whether the Informing the Accused was read to the person who was arrested;
>
> and, whether the person arrested refused to take the test.
>
> Those are the things that are found in virtually every police report. To go beyond that would be irrelevant.

[2] Allen's discovery demands are not part of the record; the parties agree that the demands included written interrogatories, demands for production of documents and requests to admit. We have no reason to doubt the parties' representations.

> And so for that reason alone the discovery requests should be denied, but I'm going to add another reason; and that is, public policy reasons.
>
> This would have the effect were—if wide open to discovery by people who refused to take a test or allegedly refused to take a test, it would cause it to be to the advantage of everybody operating a motor vehicle to refuse to take the test because it's at that point that they can get complete discovery which could be used in a criminal prosecution. That is absolutely not the purpose of the implied consent law. The idea is not to create a loop hole by which someone can gain an advantage in a prosecution by refusing to take the test as opposed to doing what they are supposed to do, which is taking the test which they are required to by law.
>
> So it's for public policy reasons and also for relevance grounds. The motion to set aside the order is denied.

¶4 We granted Allen's Petition for Leave to Appeal Nonfinal Judgment or Order. Allen maintains that the issue on appeal is "whether he should be permitted to obtain civil discovery in a refusal hearing." He contends that the trial court abused its discretion in granting the State a protective order because the State failed to meet its burden of establishing good cause. He also contends that the trial court could not rule on the potential relevance of his discovery demands because the trial court never reviewed the demands he served on the State.

¶5 There is no question that Allen can request discovery from the State. We have held that "the rules of discovery provided by Chapter 804, Stats., apply to refusal proceedings instituted under § 343.305(9), Stats." ***Schoepp***, 204 Wis. 2d at 268. All of the rules of discovery apply to refusal hearings, including the provision permitting a party to seek a protective order:

> **804.01(3)** PROTECTIVE ORDERS. (a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

> expense, including but not limited to one or more of the following:
>
> 1. That the discovery not be had;
>
> 2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> 3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> 4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> 5. That discovery be conducted with no one present except persons designated by the court;
>
> 6. That a deposition after being sealed be opened only by order of the court;
>
> 7. That a trade secret, as defined in s. 134.90(1)(c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> 8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Under this provision, the State sought a protective order to limit Allen's discovery to what he could learn through the State's open file policy. The trial court's order in this case does not ignore ***Schoepp*** as Allen argues; rather, it grants the State a protective order, which is permitted under our holding in ***Schoepp*** that the rules of discovery apply to refusal hearings.

¶6 The question on appeal is not whether the trial court ignored ***Schoepp*** and denied Allen discovery; rather, the question is whether the trial court erroneously exercised its discretion in granting a protective order.

> Issuance of a protective order in a discovery proceeding is within the trial court's sound discretion. Upon a showing of good cause, sec. 804.01(3)(a), Stats., authorizes the trial court to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense in a discovery

> proceeding. Appellate review of a trial court's refusal to issue a protective order is therefore limited to whether the court properly exercised its discretion. The proper exercise of discretion requires that the trial court's reasoning be based on proper legal standards and consideration of legally relevant factors.

State v. Beloit Concrete Stone Co., 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981).

¶7 Because a protective order can only be issued for good cause, the burden was upon the State to establish good cause. *Cf.* ***Franzen v. Children's Hosp. of Wis., Inc.***, 169 Wis. 2d 366, 386, 485 N.W.2d 603 (Ct. App. 1992) ("If it is asserted that information is privileged, the party asserting the privilege bears the burden to establish that the privilege exists"). The State offered several arguments supporting its request for a protective order. First, the State argued that the information Allen sought was not relevant under WIS. STAT. § 804.01(2)(a) to the limited issues in a refusal hearing.[3] Second, the State contended that most of the information requested in the discovery demands had been provided through the open file policy. Third, the State pointed out that much of the information requested bore on the officers' credibility and then reasoned that the credibility of officers is not an issue because all that must be proven at the refusal hearing is that the officers' account of the arrest was probable. Finally, the State claimed that the discovery demanded would create an undue and unnecessary burden in the expense of having the arresting officers appear at the district attorney's office to help prepare the answers to Allen's discovery demands.

[3] WISCONSIN STAT. § 343.305(9)(a)5 limits the issues at a refusal hearing to (a) whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, (b) whether the officer read the person the Informing the Accused form, and (c) whether the person refused to permit the test.

¶8 In granting the protective order, the trial court held that the evidence sought through discovery exceeded the scope of the refusal hearing and the evidence necessary to contest the limited issues was readily available in the police reports provided to Allen. While we agree with the trial court and the State that the issues in a refusal hearing are strictly limited and that the right to discovery only applies to material relevant to the subject matter of the pending hearing, ***State ex rel. Rilla v. Circuit Court for Dodge County***, 76 Wis. 2d 429, 435, 251 N.W.2d 476 (1977), this consensus does not dispose of this appeal.

¶9 The discovery demands Allen made upon the State were not part of the record below and we are at a loss to explain how the trial court could reach such a conclusion without having, at a minimum, reviewed Allen's specific demands. As we pointed out, we review a ruling on the request for a protective order for an erroneous exercise of discretion. A trial court properly exercises its discretion if it examines the relevant facts, applies the proper standard of law and, using a rational process, reaches a conclusion that a reasonable judge could reach. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). If this court's review of the record indicates that the facts of record fail to support the trial court's decision, the trial court erroneously exercised its discretion. *See* ***State v. DeSantis***, 155 Wis. 2d 774, 792-95, 456 N.W.2d 600 (1990).

¶10 Allen's discovery demands are not part of the record and neither the trial court nor this court can speculate as to what evidence he sought to uncover. The failure to include the discovery demands in the record precludes us from searching the record to determine if there are facts present that support the

issuance of a protective order.[4] Because there are no facts in the record to support the conclusion that the evidence Allen sought through discovery was immaterial to the limited issues of the refusal hearing, we are constrained to find that the issuance of the protective order was an erroneous exercise of discretion.

¶11 In granting the protective order, the trial court also held that it believed there was an important policy reason for denying Allen's discovery demand—granting a defendant discovery would create a disincentive to comply with the requirements of the Implied Consent Law. We cannot join with the trial court in expressing a similar public policy concern because we implicitly rejected all public policy arguments against discovery in refusal hearings when we held in ***Schoepp*** that the rules of discovery were applicable to refusal hearings.

¶12 We remand this case to the trial court to permit it to develop the record that is necessary for the proper exercise of discretion. After remand, the parties should be permitted to produce evidence in support of and opposition to the issuance of the protective order. There is no need for a time consuming evidentiary hearing. All that is required is that Allen's discovery demands be introduced into the record and then the State has the burden of showing that a protective order is necessary to protect it from annoyance, embarrassment, oppression or undue burden or expense.[5] After the proper record is developed, the

[4] An appellate court may engage in its own examination of the record to determine whether the facts provide support for the trial court's decision. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

[5] The trial court should be mindful of our comments in ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 272, 306 N.W.2d 85 (Ct. App. 1981), "All interrogatories are, however, burdensome and expensive to some degree. The question is whether the particular burden and expense is justified in the particular case. When the burden and expense are determined, courts must weigh this burden and expense against the value of the information sought." (Citations omitted.)

trial court then should engage in reasoning based upon the facts of record and the application of proper legal standards.[6]

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

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

[6] We direct the parties' and trial court's attention to a statute that has not been discussed up to this point. WISCONSIN STAT. § 804.08(3) provides:

> OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.