

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2840-FT

Cir. Ct. No. 2009CV2748

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF BRYAN W. FRICANO:

VILLAGE OF BUTLER,

PLAINTIFF-RESPONDENT,

v.

BRYAN W. FRICANO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
RICHARD CONGDON, Judge. *Dismissed.*

¶1 SNYDER, J.¹ Bryan W. Fricano appeals from an order denying his motion to reopen an implied consent adjudication stemming from a September 2008 traffic stop. Fricano contends that his attorney's failure to timely request a refusal hearing should not have been imputed to him. He further contends that the circuit court should have reopened the implied consent hearings based on excusable neglect under WIS. STAT. § 806.07(1)(a). Because the circuit court did not have competency to hear the matter, we dismiss this appeal.

¶2 Fricano was stopped and cited by the Waukesha County Sheriff's Department for operating a motor vehicle while intoxicated (OWI) on July 13, 2008. He hired attorney Ryan Harrington to represent him in the matter. On September 3, 2008, Fricano received a citation for OWI from the Village of Butler Police Department. Because Fricano refused to submit to an evidentiary chemical blood test as required by Wisconsin's implied consent law, *see* WIS. STAT. § 343.305(2), he was issued a notice of intent to revoke his operating privilege. The notice informs the recipient of the right to request a hearing on the revocation within ten days. *See* § 343.305(9)(a)4. Fricano sought legal representation from Harrington again. No request for a refusal hearing was made.

¶3 Approximately one month later, Fricano received a notice from the Wisconsin Department of Motor Vehicles informing him that his license was revoked. Fricano sought to reopen the refusal matter in the Village of Butler municipal court. That court denied his motion, holding that the court had no power to grant the motion. It stated in relevant part:

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

In order to reopen a judgment, there must be, in fact, a judgment to reopen.... The court's material involvement was sending to the DMV a notification that the defendant did not request a hearing to challenge the reasonableness of the refusal. Since the court has not entered a Judgment in this matter, there is no Judgment to reopen.

¶4 Fricano appealed from the municipal court order, seeking de novo review in the circuit court. At the circuit court hearing, Harrington testified that Fricano had come to him for representation on two separate OWI matters. He explained that on September 9, 2008, Fricano had come to his office with the September 3 OWI citation. Harrington stated that Fricano did not tell him about the refusal and did not provide a copy of the notice of intent to revoke that Fricano received when he refused to submit to the blood test. He explained that it is his normal practice to discuss the details of the arrest with a client and, although he had no specific recollection of the conversation with Fricano, he stated that "I'm sure it would have been typical practice for me to do so, certainly." He also stated that Fricano did not provide a copy of the informing the accused form that Fricano received during the arrest. Harrington asserted that if he would have received a copy of the form, it would have indicated to him that there was a potential refusal issue related to Fricano's September 2008 OWI.

¶5 Fricano also testified at the hearing. He stated that when he sought representation on the second OWI, he brought three papers: the OWI citation, the informing the accused form indicating Fricano had refused the blood test, and the notice of intent to revoke his operating privileges. He confirmed that he and Harrington discussed the facts surrounding the arrest. Fricano testified that he told Harrington he had declined to submit to the evidentiary chemical test of his blood. On cross-examination, Fricano conceded that he did not read the notice of intent to revoke before he gave it to Harrington. Once the time for the refusal hearing

request had passed, and Fricano's driving privileges were revoked, his July 2008 OWI matter was revised to a second offense, which is a criminal prosecution.

¶6 The circuit court found that Harrington had “dropped the ball,” but that Fricano “was not totally without blame” because he had sufficient notice that his operating privileges would be revoked after a refusal, and he received notice of the time limit for a hearing. The court determined that the facts did not rise to the level of excusable neglect, but resolved the motion in its entirety on jurisdictional grounds. The court cited *Achtor v. Pewaukee Lake Sanitary District*, 88 Wis. 2d 658, 277 N.W.2d 778 (1979),² for the proposition that failure to bring an action within a prescribed time period deprives the court of subject matter jurisdiction. Because Fricano failed to meet the ten-day time limit to request a hearing, the court dismissed the motion for lack of subject matter jurisdiction.

¶7 We agree that dismissal was appropriate, but we employ a different analysis. The question here is one of competency rather than jurisdiction. The circuit court has jurisdiction to hear matters concerning implied consent. *See* WIS. STAT. § 343.305(9)(a)4. (court hearing on the refusal revocation is available). However, when the statutory time limit is not met, the question becomes whether the court has competency to proceed in this particular case.

¶8 Whether a court has lost competence to proceed presents a question of law that we review de novo. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. Competency is not the same as subject

² “A court not only has the power to dismiss when it becomes aware of its lack of subject-matter jurisdiction but has the duty sua sponte to do so.” *Achtor v. Pewaukee Lake Sanitary Dist.*, 88 Wis. 2d 658, 664, 277 N.W.2d 778 (1979).

matter jurisdiction. *Id.*, ¶9. WISCONSIN CONST. article VII section 8 provides that: “[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state.” Accordingly, in Wisconsin, “no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.” *Trempealeau*, 273 Wis. 2d 76, ¶8.

¶9 In contrast, a court’s competence refers to the ability of a court “to adjudicate the particular case before [it].” *Id.*, ¶9. Courts have routinely held that the failure of a party to act within a statutorily mandated time limit results in the court’s loss of competence to hear the specific case before it. *See e.g. Green County DHS v. H.N.*, 162 Wis. 2d 635, 656, 469 N.W.2d 845 (1991); *see also Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 706, 495 N.W.2d 660 (1993). In other words, failure to abide by statutory time limits does not deprive a court of subject matter jurisdiction, which is its ability to decide the type of controversy presented. However, such failure prevents the court from adjudicating the specific case before it. *See Green County*, 162 Wis. 2d at 656. As our supreme court has stated, “[W]e have consistently ruled that a court’s loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived.” *Id.* at 657.

¶10 Fricano does not dispute that he failed to request a hearing within the ten-day time limit set by statute. As a result of his failure to meet the statutory deadline, the circuit court lost competency to proceed. Accordingly, the court properly dismissed the motion to re-open the refusal revocation proceedings. On grounds of competency rather than jurisdiction, we dismiss the appeal.

By the Court.—Appeal dismissed.

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

