

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2012

Diane M. Fremgen
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. 2012AP1426

Cir. Ct. No. 2010TR8034R

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF BRANDON H. BENTDAHL:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRANDON H. BENTDAHL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
ALAN J. WHITE, Judge. *Reversed and cause remanded with directions.*

¶1 KLOPPENBURG, J.¹ Brandon H. Bentsdahl was acquitted of the charges of operating while intoxicated and operating with a prohibited alcohol concentration, following a jury trial during which blood test evidence was presented. The circuit court subsequently dismissed the separate charge of improperly refusing to submit to a blood test under the provisions of WIS. STAT. § 343.305, finding that a messily written date on the notice of intent to revoke operating privilege constituted a fundamental error that deprived the court of personal jurisdiction. The State of Wisconsin appeals. As explained below, the notice of intent to revoke operating privilege contains no errors. Accordingly, this matter is remanded to the circuit court to address Bentsdahl’s alternative ground for dismissal, which asks the court to exercise its discretion to dismiss based on all of the facts of this case.

BACKGROUND

¶2 The parties stipulated to the following facts relevant to Bentsdahl’s motion to dismiss the refusal charge. Bentsdahl was arrested for operating a motor vehicle while intoxicated on November 17, 2010. The officer read to Bentsdahl the informing the accused form required under WIS. STAT. § 343.305(4) (which includes the statement: “If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties”), and asked Bentsdahl if he would submit to a blood test. Bentsdahl said, “no,” and the officer took Bentsdahl to the hospital where a blood sample was drawn. The officer then issued Bentsdahl a notice of intent to revoke operating

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

privilege as required by § 343.305(9). The notice includes the statements: “You have 10 days from the date of this notice to file a request for a hearing on the revocation If you do not request a hearing, the court must revoke your operating privileges 30 days from the date of this notice.” The date written on the notice appeared as 111710, with the “0” somewhat messily written.

¶3 Bentdahl did not request a hearing. On December 17, 2010, proceeding under WIS. STAT. § 343.305(10), the court revoked Bentdahl’s driver’s license for two years and ordered that he complete an alcohol assessment and equip his vehicle with an ignition interlock for two years. In addition, the court ordered lifetime disqualification of Bentdahl’s commercial driver’s license due to the refusal conviction being a second alcohol conviction within five years.

¶4 In January 2011, Bentdahl’s attorney met with the prosecutor and showed him the date on the notice, apparently indicating that if the third “1” were read as a “/”, the date would be November 7 (or ten days before the incident). The prosecutor agreed not to object to the court’s vacating the judgment on the refusal charge. The court granted Bentdahl’s motion and stayed the order for revocation of Bentdahl’s driver’s license on January 25, 2011.

¶5 The underlying operating-while-intoxicated charge was tried before a jury on January 5, 2012. The State presented the blood test evidence and did not offer any evidence that Bentdahl initially refused to submit to the blood test. The jury acquitted Bentdahl of operating while intoxicated and the companion charge of operating with a prohibited alcohol concentration.

¶6 The court scheduled a hearing on the refusal charge for March 20, 2012, and Bentdahl moved to dismiss the charge. Bentdahl argued that the notice was defective on account of the illegible date and therefore failed to provide the

notice required by the statute. Alternatively, Bentdahl asked the court to exercise its discretion to dismiss the refusal charge because of the acquittal and related facts.

¶7 At the hearing, the parties stipulated to the facts stated above, and also to the facts that, except for the date on the notice, the officer had complied with all other requirements under the refusal statute. After briefing, the court issued its decision finding the date illegible, and that Bentdahl had consequently been deprived of his right to know the exact dates when he could request a hearing and when his license would be revoked. The court found the defect to be “fundamental to the purpose of the statute therefore depriving the court of jurisdiction” and granted the motion to dismiss the refusal charge.

DISCUSSION

¶8 The State argues: (1) Bentdahl waived the personal jurisdiction defense because he never raised it before the circuit court; (2) of the two possible readings of the date “111710”—November 7 (11/7) or November 17 (1117)—only the latter is reasonable because the former was ten days before the incident, and so the date is at most a technical error with no prejudice to Bentdahl because the initial refusal conviction was promptly vacated and he received a hearing; and (3) the court lacks the discretionary authority to dismiss the refusal charge on the facts of the case.

¶9 Bentdahl concedes that he “did not expressly raise the issue of whether the trial court was deprived of personal jurisdiction,” but argues that such a challenge was inherent in his motion to dismiss. It is not necessary to reach the issue because, consistent with the State’s second issue, this court concludes that the notice was not defective.

¶10 The incident occurred on November 17, 2010. The date on the notice appears as “111710” with the “0” somewhat messily written. Bentdahl suggests that with the messy “0,” the third and fifth “1” could be read as slashes so that the date would be “11/7/10.” However, November 7 was ten days earlier, and so it would be absurd for that date to be on the notice. A reasonable person would recognize the date as the date of the incident, November 17, and would reject any earlier date. Moreover, if Bentdahl found the date unclear, the next line showing his birth date as “071681” confirmed that the officer did not use slashes in his dates. It did not make sense to disregard the ten-day and thirty-day deadlines in the notice by inserting slashes so as to come up with a date that was ten days before the incident, when the date without slashes matched the date of the incident.

¶11 The officer’s writing the date as “111710” with a messy “0” did not make the notice defective. Accordingly, Bentdahl’s first basis for dismissal fails. However, Bentdahl also moved the court to dismiss the refusal charge using its discretionary authority based on all the facts, including, as the court stated, “even though the defendant initially refused, his blood was eventually withdrawn and the state used the blood in it[s] prosecution at trial at which the defendant was acquitted.”

¶12 The Wisconsin Supreme Court recognized the circuit court’s discretionary authority to dismiss a refusal charge in *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983). In that case, the defendant pleaded guilty after refusing to submit to an intoxication test. *Id.* at 349-50. The court concluded that it was appropriate to dismiss the refusal charge because the purposes of the statute—to secure convictions of drunk drivers and to get them off the highways, as well as to conserve limited judicial resources—were served when the defendant

who refused pleaded guilty before the refusal hearing. *Id.* at 356-57. These same purposes may be served where a court dismisses a refusal charge against a defendant who was acquitted before the refusal hearing, in a trial where intoxication evidence was presented, depending on all of the pertinent facts.

¶13 The State argues that *Brooks* cannot apply here where the refusing defendant went to trial and was acquitted; Bentsdahl argues that the key is that the State was able to prosecute the operating-while-intoxicated charge using blood test evidence that had been promptly obtained despite Bentsdahl's refusal. The State's argument goes to whether a court properly exercises its discretion on the facts before it, not whether it has that discretionary authority in the first place. Based on *Brooks*, the circuit court does have the discretionary authority to dismiss a refusal charge at a hearing after a guilty plea or trial, with the outcome of the trial being just one factor for the court to consider. *See Brooks*, 113 Wis. 2d at 356 ("Those who refuse may still be convicted of OWI after a trial, but even if they are not, they face revocation ... for the refusal"). "[T]he power to dismiss is a discretionary one" and whether the decision to dismiss (or not dismiss) "can be justified as a proper exercise of discretion will be dependent upon the ambience of the particular case." *Id.* at 359.

¶14 Having ruled for Bentsdahl on his defective notice argument, the circuit court in this case did not address Bentsdahl's alternative argument for dismissal based on the exercise of its discretionary authority. Because the notice was not defective, this matter must be remanded to the circuit court for its exercise of discretion based on the facts before it.

CONCLUSION

¶15 The circuit court's order granting Bentsdahl's motion to dismiss is reversed and this matter is remanded for proceedings consistent with the reasoning above.

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.

