COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2143
97-2409

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

No. 97-2143

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES P. SULLIVAN,

DEFENDANT-APPELLANT.

No. 97-2409

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

JAMES P. SULLIVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed*.

DEININGER, J.[1] The trial court ordered James Sullivan's operating privileges revoked for one year on account of his refusal to comply with § 343.305, STATS.[2] Subsequently, after a bench trial, the court entered a judgment convicting him of operating a motor vehicle while under the influence of intoxicants (OMVWI). Sullivan appeals both the order and the judgment, claiming that: (1) the trial court erred in refusing to grant his motion for summary judgment in the refusal proceedings; and (2) the trial court improperly considered his refusal as evidence of his guilt in the OMVWI trial. We conclude that summary judgment was properly denied because the motion is not available in refusal proceedings under § 343.305(9), and further that the trial court did not err in considering Sullivan's refusal when determining his guilt of OMVWI. Accordingly, we affirm the order and the judgment.

BACKGROUND

On July 26, 1996, a Dane County sheriff's deputy stopped Sullivan on the suspicion that he was OMVWI. The deputy administered field sobriety tests to Sullivan, arrested him for OMVWI, and took him to the public safety

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

[2] Section 343.305(2), STATS., provides that an operator of a motor vehicle in Wisconsin is "deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity … of alcohol … when requested to do so by a law enforcement officer." If an operator improperly refuses to take a test, a court shall revoke his or her operating privilege for a year, or longer, depending on the operator's record of past offenses and/or refusals. Section 343.305(10).

building to administer an Intoxilyzer test. At the public safety building, the deputy read Sullivan the "Informing the Accused" form and asked him to submit to a breath test. After Sullivan refused to take the test, the deputy took Sullivan's driver's license and issued him a "Notice of Intent to Revoke Operating Privilege," pursuant to § 343.305(9)(a), STATS.

Sullivan properly contested the revocation by timely filing a "Demand for Refusal Hearing." Prior to the refusal hearing, Sullivan took the deputy's deposition and the State deposed Sullivan. After the depositions, Sullivan filed a motion for summary judgment. Sullivan's motion challenged the existence of probable cause to arrest Sullivan for OMVWI. The trial court denied Sullivan's summary judgment motion, concluding that the refusal hearing itself was the exclusive procedure available to him under § 343.305(9), STATS. The court then conducted a refusal hearing and determined that the deputy had probable cause to arrest Sullivan for OMVWI. The court entered an order revoking Sullivan's operating privilege for one year and, following a bench trial, convicted Sullivan of OMVWI. Sullivan appeals both the revocation order and the judgment of conviction.

ANALYSIS

Sullivan argues that a motion for summary judgment under § 802.08, STATS., is available to parties to refusal proceedings because they are special proceedings for which no "different procedure [regarding summary judgment] is prescribed by statute or rule." *See* § 801.01(2), STATS.,[3] *and* ***State v. Jakubowski***,

[3] Section 801.01(2), STATS., provides as follows:

> Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings

(continued)

61 Wis.2d 220, 223-24 n.2, 212 N.W.2d 155, 156-57 (1973) (a proceeding under § 343.305, STATS., is a special proceeding). Resolution of this issue requires us to interpret § 343.305(9), to determine whether that section precludes summary judgment motions in refusal proceedings. Statutory interpretation presents a question of law which we decide independently of the trial court. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989).

Sullivan's argument relies heavily on this court's decision in ***State v. Schoepp***, 204 Wis.2d 266, 554 N.W.2d 236 (Ct. App. 1996), where we held:

> The plain language of § 801.01(2), STATS., provides that Chapter 804, governs practice in circuit courts in all special proceedings "except where different procedure is prescribed by statute or rule." Section 343.305, STATS., does not provide a different means for a defendant in a refusal hearing to obtain depositions, interrogatories and other discovery, nor does it provide that discovery is not available prior to refusal hearings. Because the statutes do not provide different discovery procedures for refusal hearings, we conclude that the discovery procedures of Chapter 804 apply.

Id. at 272, 554 N.W.2d at 238-39 (footnote omitted). Sullivan asserts that to decide the present issue, all we need do is "substitute 'summary judgment' for 'discovery'" in the preceding excerpt from ***Schoepp.*** We disagree.

The purpose of summary judgment procedure is to determine whether a factual dispute can be resolved without a trial. ***In re Philip W.***, 189 Wis.2d 432, 436, 525 N.W.2d 384, 385 (Ct. App. 1994). It is a method to "avoid trial when there are no issues to be tried." ***In re the Estate of Martz***, 171 Wis.2d

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> whether cognizable as cases at law, in equity or of statutory origin *except where different procedure is prescribed by statute or rule*.

(Emphasis added.)

89, 94, 491 N.W.2d 772, 774 (Ct. App. 1992). The refusal hearing provided for in § 343.305(9), STATS., is not a trial. Rather, it is itself a summary proceeding with a limited purpose involving limited issues. *See* § 343.305(9)(a)5 and (c).[4] It is not a trial in the sense that a court or jury will be required to weigh credibility and choose among competing versions of the facts, at least insofar as the issue of probable cause for arrest is concerned. ***State v. Nordness***, 128 Wis.2d 15, 36, 381 N.W.2d 300, 308 (1986) (refusal hearing is "a determination merely of an officer's probable cause, not … a forum to weigh the state's and the defendant's evidence"). Thus, while refusal proceedings are special proceedings in which "regular" civil procedures generally apply, since proceedings under § 343.305(9) do not culminate in a trial, we conclude that civil procedures designed to avoid trials when they are unnecessary have no necessary application in refusal proceedings.

More importantly, however, we conclude that permitting summary judgment motions would be contrary to the legislative intent underlying the procedures set forth in § 343.305(9), STATS. In ascertaining legislative intent, we first look to the language of the statute. ***State v. Rognrud***, 156 Wis.2d 783, 787-88, 457 N.W.2d 573, 575 (Ct. App. 1990). We note initially that unless a person requests "a hearing on the revocation," a revocation for refusal to consent to a test is effective thirty days from the date of the refusal. Section 343.305(9)(a)4 and (10). The purpose of the refusal hearing is thus to provide procedural due process to persons who have refused a test, that is, "an opportunity to be heard at a

[4] The issues at a refusal hearing are limited to "[w]hether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … and whether the person was lawfully placed under arrest for [OMVWI];" whether the officer complied with the "informing the accused" provisions of the statute; and "[w]hether the person refused to permit the test." Section 343.305(9)(a)5, STATS.

meaningful time and in a meaningful manner" before the revocation of their operating privilege is effected. ***Nordness***, 128 Wis.2d at 34, 381 N.W.2d at 308. The hearing provides a "general opportunity to present evidence and cross-examine the arresting officer." ***Id.***

If summary judgment procedure is available to Sullivan under § 343.305(9), STATS., it would also be available to the State. *See* ***In re F.Q.,*** 162 Wis.2d 607, 612, 470 N.W.2d 1, 2-3 (Ct. App. 1991) (summary judgment is available to the State in proceeding to find a child in need of protection or services under Chapter 48). Reading § 343.305(9) to permit summary judgment motions would thus lead to an unreasonable result: the State could thereby preempt a hearing whose purpose is to ensure Sullivan's due process rights. But even where a summary judgment motion is filed by a defendant, as in the present case, an unreasonable or absurd result is reached under Sullivan's interpretation: the statute, which expressly grants him the right to "request a hearing on the revocation," would then allow Sullivan to forfeit the very right he exercised, and the only relief to which the statute entitles him. We thus reject Sullivan's interpretation because we avoid statutory constructions which lead to absurd or unreasonable results. ***State v. Mendoza***, 96 Wis.2d 106, 115, 291 N.W.2d 478, 483 (1980).

Finally, we note that § 343.305(9), STATS., contemplates timely and expeditious resolution of refusal issues. A hearing must be requested within ten days of the State's notice of intent to revoke. Section 343.305(9)(a)4. The court "shall be prepared to hold any requested hearing to determine if the refusal was proper." Section 343.305(9)(c). The court must decide the matter "[a]t the close of the hearing, or within 5 days thereafter." Section 343.305(9)(d). A revocation is effective "immediately upon a final determination that the refusal was

improper," provided at least thirty days have elapsed since the refusal. Section 343.305(10)(a). In short, the provisions of the statute with respect to refusal proceedings are consistent with the overall purpose of § 343.305, which is "'to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar.'" ***State v. McMaster***, 206 Wis.2d 30, 46, 556 N.W.2d 673, 680 (1996) (quoted source omitted). We agree with the trial court that the purpose and timing provisions of the statute would be thwarted by grafting onto it the more leisurely procedures of § 802.08, STATS., where a motion for summary judgment may be filed within eight months of commencement of the action, service must occur at least twenty days prior to the hearing on the motion, and no specific timeline is established for a court to decide the motion.[5]

For the foregoing reasons, we conclude that the trial court did not err in denying Sullivan's motion for summary judgment. Sullivan next argues that if we conclude summary judgment procedure is available, we must reverse the

[5] Although our review in this case requires a de novo interpretation of § 343.305(9), STATS., we benefit from the trial court's thoughtful and thorough analysis. *See* ***Heier's Trucking, Inc. v. Waupaca County***, 212 Wis.2d 593, 598, 569 N.W.2d 352, 354 (Ct. App. 1997). In its written decision denying Sullivan's summary judgment motion, the trial court stated:

> A refusal hearing, if held separately from the trial of an OWI charge, rarely takes more than one hour. If held in conjunction with a trial, the refusal issues rarely add more than a few minutes to the evidentiary presentations. The use of summary judgment methodology with all of its attendant time allowances will, as it has done here, cause delay, unnecessary expense and a waste of limited judicial and prosecutorial resources with no assurance that it will in fact resolve the dispute. It is likely that in many cases summary judgment motions will be filed, briefed, perhaps orally argued and ultimately considered and decided by the court with the conclusion that summary judgment is inappropriate because there are disputed issues of material fact. A refusal hearing will then be held that could have been promptly conducted many months earlier. In short, even if a particular case could appropriately be decided by summary judgment, it would take longer, both in a calendar and a clock sense, to do so than it would to simply hold the hearing.

revocation order because his motion is meritorious and should have been granted by the trial court. He does not, however, challenge the trial court's findings and conclusions made at the close of the refusal hearing itself. (His second argument is "THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO THE DEFENDANT," and in the conclusion of his brief, he requests a remand to the circuit court "with directions to grant the defendant's summary judgment motion.") Since we have concluded that summary judgment is not available under § 343.305(9), STATS., and since Sullivan does not attack the revocation order on the basis of the evidence presented at the hearing, we need not address his arguments for reversal based on the matters submitted in support of his motion for summary judgment. We thus affirm the revocation order.

By the same token, Sullivan's challenge to his conviction for OMVWI is premised solely on the trial court's allegedly improper consideration of his refusal in determining his guilt. Since we have affirmed the revocation order, and with it the court's underlying conclusion that Sullivan improperly refused to consent to a breath test, the trial court did not err when it considered Sullivan's refusal as evidence of his "consciousness of guilt" at the trial on the OMVWI offense. ***State v. Crandall***, 133 Wis.2d 251, 259, 394 N.W.2d 905, 908 (1986); *and see* ***State v. Schirmang***, 210 Wis.2d 325, 333, 565 N.W.2d 225, 229 (Ct. App. 1997). We thus affirm the judgment of conviction for OMVWI.

By the Court.—Judgment and order affirmed.

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