COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 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.

Nos. 98-0654
98-0655

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

NO. 98-0654

VILLAGE OF WATERFORD,

PLAINTIFF-RESPONDENT,

V.

KURT J. DOERR,

DEFENDANT-APPELLANT.

NO. 98-0655

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT J. DOERR,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed and cause remanded with directions.*

BROWN, J. Kurt J. Doerr appeals from an order finding that he unreasonably refused to submit to a test for intoxication and an order denying his motion to reopen a default judgment finding him guilty of operating a motor vehicle while intoxicated. He argues that he had a Sixth Amendment right to consult with his attorney before agreeing to take an intoxilyzer test and that the supreme court's holding to the contrary in ***Neitzel*** is dicta, *see* ***State v. Neitzel***, 95 Wis.2d 191, 289 N.W.2d 828 (1980); that the invocation of his right to counsel in a companion battery to a police officer felony charge "triggered his right to counsel on the operating while intoxicated charge;" and that the officers were compelled under the constitution and our statutes to allow counsel to consult with him before submitting to a breath test. We have thoroughly read the record and find no evidence that he raised these precise issues before the trial court. The arguments he makes are waived. Further, the issues raised have absolutely no relevance to the question of whether he excusably neglected to show up at his driving while intoxicated jury trial. In fact, the record shows that at the "motion to reopen," Doerr explicitly abandoned his request for the case to be reopened; he requested instead that the penalties be stayed pending appeal. For these reasons, we agree with the Village of Waterford that his appeal of the denial of the motion to reopen his default judgment is frivolous and is not made in good faith. We remand with directions that the trial court assess costs and attorney's fees to the Village.

The facts that need to be stated for purposes of deciding this appeal are few. Doerr was stopped for erratic driving. The officer smelled intoxicants and, because Doerr was uncooperative, called for backup. Officers performed

field sobriety tests at the scene and were of the opinion that Doerr had failed the tests. They placed Doerr under arrest and he resisted. Doerr kicked an officer while resisting. Once at the station, he told the officers he would not take the test until he had the opportunity to speak with his attorney first. He was marked with a refusal. Ultimately, he was charged with battery to a police officer, disorderly conduct and operating a vehicle while intoxicated.

Doerr requested a refusal hearing. The grounds were that the officer did not have probable cause, that the officer did not comply with the Informing the Accused statutes, that Doerr did not refuse to take the test and that, if refusal occurred, it was due to a physical inability to perform. He also brought a motion to suppress evidence from being used at his driving while intoxicated trial. Without specification, he claimed that his Fourth, Fifth and Fourteenth Amendment rights were violated.

A refusal hearing was held and testimony was taken. At the conclusion of testimony, Doerr asked for the opportunity to submit written argument and the request was granted. Briefs were submitted. Doerr's brief contended two things. First, that the intoxilyzer was not working and that a person cannot refuse to take a test until such point in time "when he could have actually given a breath sample." Second, that even if he initially refused to take the test, he had the right to change his mind later so long as the change in heart was within the three-hour limit and there was only minimal inconvenience to the police.

The parties and the trial court agreed that the court would make its decision regarding reasonable refusal from the bench on the same day that the driving while intoxicated jury trial was to take place. Neither Doerr nor his counsel appeared on that date. Notwithstanding the nonappearance, the court

announced its intention to proceed with the bench decision regarding the refusal hearing. The introductory portion of this decision is as follows:

> Both parties filed their respective briefs or memorandums with respect to the issue presented on motion. The defendant in his memoranda indicated that, and I quote from the memorandum, 'The primary legal point to be made by the defendant is that a refusal never occurred because the chemical breath testing equipment, the Intoxilyzer 5000, was not operating at the time the defendant allegedly refused the test. The Intoxilyzer 5000 test card, marked as Exhibit 9, shows that although the observation period began at 22:15 hours, that's military time, the refusal did not occur until 1:11 hours.'

The trial court understood Doerr to be asserting that because the machine was not operational, the statutory sequence was not followed, and since the statutory sequence was not followed, there can be no refusal. The court then rejected the argument and ruled that "there is no requirement under the law ... to have your equipment ready, up and working, if in fact the defendant refuses ab initio and I think that was the situation here, from the get-go the defendant was simply not going to take the test." The court denied the motion.

The trial court then went on to discuss the nonappearance for the jury trial. It noted that the time was then one hour past the time scheduled for the commencement of trial and there was still no appearance. It then found Doerr "guilty by default on his failure to appear." The court made the following comment:

> [T]his is in my view typical of Attorney Carroll's attitude toward the Court, no notification of whether he's going to come, not going to come, doesn't really care whether anybody is inconvenienced. His attitude toward this Court has always been poor at the very least. So the Court notes that in the event that there is a motion to reopen and if good cause is shown for the reopening that there is no question but that as a condition of reopening the costs would be taxed and payable by the defendant prior to the time of any reopening taking place ....

A motion to reopen was made. At the hearing on the motion, Doerr was represented by an attorney from the law office of John Miller Carroll. He requested that the order of refusal and the default operating while intoxicated judgment be stayed. Counsel stated that Doerr would be appealing the refusal finding. The Village responded that the subject of the possible appeal had nothing to do with the driving while intoxicated conviction. Doerr's counsel did not explain how the issue that Carroll wanted to raise on appeal had any relevance to the default intoxicated driving conviction. Instead, he simply stated again that Carroll wanted to appeal the trial court's refusal decision. Doerr's counsel again reiterated that what was wanted was a stay and that "[a]pparently, the motion to reopen is not precisely what we want. I could argue it could be reopened for some reasons; I would rather just have the stay." Based on this record, the trial court denied the motion to reopen and held the motion for stay in abeyance pending the actual notice of appeal.

Doerr has appealed the denial of the motion to reopen as well as the order finding an unreasonable refusal. The State has responded to the appeal regarding the refusal finding and the Village has responded to the appeal from the order denying the motion to reopen. We will address the appeals in turn.

Regarding the unreasonable refusal finding, we conclude that Doerr, through his counsel Carroll, raises issues that were not raised in the trial court. Doerr now claims that he had a Sixth Amendment right to consult with his attorney before agreeing to take an intoxilyzer test. Nowhere does the record show that this issue was raised before the trial court. Doerr claims that since he did invoke the right to counsel on the companion battery to a police officer charge, this also triggered a right to counsel on the operating while intoxicated charge.

That issue was never raised either. While Doerr's memorandum brief to the trial court admitted that the law was clear that a defendant may not refuse to take a breath test on grounds that he or she wants to talk to an attorney first, he now claims that the law is wrong and that the statement in the case which made that decision is dicta. This argument was never made at trial. Finally, Doerr claims that once he invoked his right to counsel, the sheriff's deputies were bound by the constitution and by statute to allow consultation with his attorney before taking a breath test. This issue also was not raised before. Issues raised for the first time on appeal are waived. *See* ***State v. Rogers***, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995). While waiver is a rule of administration and we are not bound by waiver, this court sees no reason not to apply waiver here. The order finding that Doerr's refusal to take a breath test was unreasonable is affirmed.

Regarding the appeal from the order denying the motion to reopen the default operating while intoxicated judgment, it is a patently frivolous appeal that has, for no just reason, caused the Village attorney to have to write a brief. First, there is no argument made on appeal that the refusal to reopen the default judgment was wrong; Doerr's brief is devoted only to raising issues concerning the refusal hearing, albeit new issues. Second, the record shows that Doerr abandoned any interest in seeking a reopening of the default judgment. The Village complains that it has been forced to expend costs and attorney's fees "by the mere fact that the appeal was filed." The Village explains how it has been forced to monitor the status of the case while on appeal, has been forced to obtain the appropriate transcripts and has been forced to respond to the meritless brief. We agree.

We hold that the appeal from the order denying the motion to reopen is frivolous pursuant to RULE 809.25(3)(a), STATS. We also note that

§ 802.05(1)(a), STATS., relates to the attorney's personal liability for expenses and fees incurred by the other party when a court document submitted by that attorney is not well-grounded in fact or there is no good faith argument being made. RULE 809.84, STATS., extends applicability of this sanction to appeals. Because this court has authority under the statute to invoke the statute on its own motion and because this court believes that no good faith argument on appeal was made regarding the order denying the motion to reopen, it is ordered that Carroll is jointly and severally liable for payment of the expenses, fees and attorney's fees incurred by the Village pursuant to § 802.05(1)(a). We affirm both orders and remand with directions that the trial court hold a hearing for the purpose of deciding the appropriate costs, fees and attorney's fees pursuant to RULES 809.25(3)(a) and 802.05(1)(a).

By the Court.—Orders affirmed and cause remanded with directions.

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