COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0022

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

WESLEY S. LEONARD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

SNYDER, P.J. The State of Wisconsin appeals from an order granting Wesley S. Leonard's motion to vacate an order revoking Leonard's driver's license because he refused to take a § 343.305(3)(a), STATS.,[1] chemical

[1] Section 343.305(3)(a), STATS., provides in part:

> Upon arrest of a person for violation of s. 346.63(1) … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine ....

(continued)

test.[2] The State contends that because the trial court lacked authority to vacate the revocation, the court erroneously exercised its discretion. We conclude that the trial court had authority to grant Leonard relief from the revocation order and that the court did not erroneously exercise its discretion. We therefore affirm.

On July 5, 1997, Leonard was issued a citation for operating a motor vehicle while under the influence of an intoxicant (OWI) in violation of § 346.63(1)(a), STATS. Leonard refused to submit to a chemical test and was given a "Notice of Intent to Revoke Operating Privilege" advising him that he could request a hearing within ten days. He did not do so and his license was revoked for three years effective July 18, 1997. The State filed a criminal traffic complaint on July 24, 1997, charging Leonard with a fourth OWI offense. Leonard entered a not guilty plea to the OWI charge on July 28, 1997, and the case was tried to a jury. On October 9, 1997, the jury acquitted Leonard of the OWI charge.

On November 18, 1998, Leonard sent a letter to the trial court requesting relief from the July 18 license revocation order and the trial court granted Leonard a hearing. At the December 4, 1998 hearing, Leonard told the trial court that the reason the jury acquitted him was that he was not driving a motor vehicle on July 5, 1997. After exploring Leonard's eligibility for an occupational license and determining that the State had obtained an involuntary blood sample after Leonard had refused to voluntarily submit to a chemical test, the trial court made the following findings:

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[2] Although the trial court's order granting Leonard's motion was entitled an "Order Vacating Refusal And Removing From Record," it is more appropriately referred to as an order vacating a revocation order.

> Mr. Leonard did initially refuse the test, and a refusal is justified on that grounds, but based on his subsequent compliance, I will make the finding that he did comply with the test.
>
> Further, I accept the jury's verdict that he wasn't driving that day, and on that basis, if Mr. Leonard had had the savvy to request an administrative hearing, he might have prevailed on that point as well.

Based on those findings, the trial court issued an order vacating the revocation order on December 14, 1998. The State appeals from that order.

The State argued at the motion hearing that the only relief available to Leonard was the obtaining of an occupational license under ch. 351, STATS., but never directly challenged the trial court's authority to either hold a hearing on Leonard's motion or to grant the requested relief from the revocation order. As we understand the State's appellate argument, it first contends that the trial court lacked legal authority to reopen the refusal matter. We disagree.

We are satisfied that the trial court construed Leonard's letter as a motion for relief from an order under § 806.07(1)(a), STATS.[3] The interpretation and application of a statute present questions of law which we review de novo. *See* ***Revenue Dep't v. Milwaukee Brewers***, 111 Wis.2d 571, 577, 331 N.W.2d 383, 386 (1983). The State does not cite to, nor are we aware of, any prohibition against § 806.07 relief from § 343.305, STATS., revocation orders. We conclude

[3] Section 806.07, STATS., reads in relevant part as follows:

> **(1)** On motion and upon such terms as are just, the court ... may relieve a party or legal representative from a[n] ... order ... for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.

that the trial court had authority to address Leonard's motion for relief from an order under § 806.07.

Because Leonard failed to appear at his refusal hearing, we view the revocation order as a default for purposes of § 806.07, STATS. In order to vacate a default order, Leonard must demonstrate (1) that the order was obtained as a result of mistake, inadvertence, surprise or excusable neglect, *see* § 806.07(1)(a); and (2) that he has a meritorious defense to the revocation order. *See* ***J.L. Phillips & Assocs. v. E&H Plastic Corp.***, 217 Wis.2d 348, 358, 577 N.W.2d 13, 17 (1998). We address the application to vacate an order on § 806.07(1)(a) grounds to the discretion of the trial court, and the trial court's order will not be reversed except for an erroneous exercise of discretion. *See* ***J.L. Phillips***, 217 Wis.2d at 364, 577 N.W.2d at 20. A trial court erroneously exercises discretion if its discretion is based upon an error of law. *See* ***State v. Woods***, 173 Wis.2d 129, 137, 496 N.W.2d 144, 147 (Ct. App. 1992).

We first consider whether the trial court's finding that "[Leonard] wasn't driving that day" provided a meritorious defense to the revocation. At a refusal hearing, the arresting officer is required to show that he or she had probable cause to believe that the defendant was driving or operating a motor vehicle. *See* § 343.305(9)(a)5.a, STATS. Although no refusal hearing was held in this case, we are satisfied that the record supports the trial court's conclusion that Leonard had a meritorious defense to the refusal because Leonard did not drive or operate a motor vehicle on July 5, 1997.

First, as the only sworn witness at the motion hearing, Leonard stated: "But the thing is I was not driving that car that day. I proved that in a jury

trial. That I was not driving that car." In addition, he told the trial court, "I mean, that's pretty much why [the jury] let me off, because I wasn't driving the car. The officer never seen me behind the wheel or nothing." The trial court responded, "You know, I think that's right ...." The State called no witnesses, presented no evidence and did not contest Leonard's testimony that he was not driving or operating a motor vehicle on July 5, 1997.

Second, the record supports the trial court's finding that Leonard's defense had merit. The OWI complaint indicates that the police were investigating a "domestic abuse situation" on July 5, 1997, rather than a traffic matter, when an individual, identified as David Sanchez, told City of Sheboygan Police Officer Brad Riddiough that Leonard had been drinking and driving earlier that day. Riddiough made contact with Leonard and "*at that time* smell[ed] strongly the odor of intoxicants coming from [Leonard's] breath and observed that [his] eyes were very blood shot and glassy and that his speech was very slurred." (Emphasis added.) The complaint lacks any reference to a traffic stop, to an officer observing Leonard driving or to Leonard being in or near a motor vehicle during the domestic abuse investigation. Leonard was then placed under arrest for domestic abuse and OWI, the latter resulting in the implied consent law request.[4]

We next address whether the trial court erroneously exercised its discretion in holding that Leonard was entitled to relief under § 806.07(1)(a), STATS. The trial court found that "[Leonard] wasn't driving that day, and on that basis, if Mr. Leonard had had the savvy to request an administrative hearing, he

[4] The City of Sheboygan also cited Leonard for open intoxicants and operating after revocation. While the disposition of those citations are unknown to this court, the violations would also require proof of Leonard's driving a car on July 5, 1997.

might have prevailed on that point as well." Leonard was pro se in all matters relating to the July 5, 1997 OWI arrest and chemical test refusal. While the trial court did not specifically make findings using the § 806.07(1)(a) terms, we are satisfied that the trial court found that Leonard successfully demonstrated that the revocation order was obtained as a result of his inadvertence and excusable neglect in failing to request a refusal hearing. A trial court's failure to use "magic words" is not error. *See* ***Michael A.P. v. Solsrud***, 178 Wis.2d 137, 151, 502 N.W.2d 918, 924 (Ct. App. 1993). The trial court did not erroneously exercise its discretion in granting Leonard relief under § 806.07(1)(a).

While we are satisfied that the trial court had authority to grant Leonard relief from the revocation order and that it properly did so, the State also maintains that the trial court erred in vacating the revocation based upon the jury's OWI acquittal. We agree that the refusal to submit to a chemical test under § 343.205(2), STATS., is a separate substantive offense from OWI under § 346.63(1), STATS. *See* ***State v. Zielke***, 137 Wis.2d 39, 48, 403 N.W.2d 427, 431 (1987). However, we do not agree that the trial court's order is based solely on the jury's OWI acquittal.

While the trial court accepted the jury's conclusion that Leonard was not driving a car on July 5, 1997, it did so independently based upon the evidence presented at the § 806.07, STATS., motion hearing. This evidence included Leonard's statement that he had not been driving prior to the OWI citation. While Leonard testified at the motion hearing, the record indicates that he did not testify at the OWI trial because the trial court read WIS J I—CRIMINAL 315, "Defendant

Elects Not To Testify," to the jury.[5] Because the trial court considered evidence that was not before the jury, we reject the State's argument that the court granted relief from the revocation order based only upon the jury's OWI acquittal.

Lastly, the State complains that the trial court wrongly found that Leonard had complied with the implied consent requirement based upon the State later obtaining an involuntary blood test sample. Because we affirm the trial court's grant of § 806.07(1)(a), STATS., relief from the revocation order for a different reason, we need not address the merits of the State's subsequent involuntary test compliance argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938); ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Order affirmed.

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

[5] WIS J I—CRIMINAL 315 informs the jury that "[a] defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner."