

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 30, 2018**

Sheila T. Reiff  
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. 2017AP1079**

**Cir. Ct. No. 2017TR406**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN THE MATTER OF THE REFUSAL OF DONALD L. MCPHAIL:**

**COUNTY OF DOOR,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DONALD L. MCPHAIL,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed.*

¶1 STARK, P.J.<sup>1</sup> Donald McPhail's privilege to operate a motor vehicle was revoked due to his refusal to submit to a blood test after his arrest for

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

operating a motor vehicle while intoxicated (OWI). On appeal, McPhail argues that an error in the return address on the form providing notice of intent to revoke his operating privilege required the circuit court to dismiss the refusal citation. We reject McPhail's argument and affirm the order revoking his operating privilege.

### BACKGROUND

¶2 McPhail was arrested for first-offense OWI. After he was read an Informing the Accused form containing the information required under WIS. STAT. § 343.305(4), McPhail refused a request for a blood test. As a result, McPhail was issued a form providing him with notice of intent to revoke his operating privilege. *See* WIS. STAT. § 343.305(9)(a). The form advised McPhail that he had ten days to request a hearing on the revocation. On the return address line of the form, the arresting deputy wrote "Door County Circuit Court" at "1201 S Duluth Ave Sturgeon Bay WI 54235." The Door County Sheriff's Department is located at that address. The street address that should have been written on the form was 1205 South Duluth Avenue.<sup>2</sup>

¶3 It is undisputed that the circuit court did not receive a request for a hearing from McPhail after the notice was issued and that McPhail's operating privilege was revoked without a refusal hearing. McPhail subsequently filed an emergency motion to vacate and dismiss the refusal charge based on the address discrepancy. At a hearing on the motion, the circuit court concluded that the error

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<sup>2</sup> As the circuit court stated at the hearing in this case, 1205 South Duluth Avenue is the address of the clerk of circuit court, whereas the court's address is 1209 South Duluth Avenue. For the sake of simplicity, we refer to the 1205 address as belonging to the circuit court.

in the address on the notice form was merely technical and that McPhail had not been prejudiced. The court noted that both the sheriff's department and the circuit court occupied the Door County Justice Center. The court found that had McPhail mailed a hearing request that was received by the sheriff's department, the request would have been forwarded to the court. The court also observed that McPhail presented no evidence through testimony or an affidavit that he actually requested a hearing. Accordingly, the court entered an order in which it denied McPhail's motion and revoked his operating privilege for twelve months. McPhail appeals.

### DISCUSSION

¶4 Under WIS. STAT. § 343.305(9)(a), a law enforcement officer must prepare a notice of intent to revoke a person's operating privilege if he or she deems that person has refused to permit a chemical test. The form provides the person with notice that they have ten days to request a hearing on the revocation and the address where they should file the request. *See* § 343.305(9)(a)4. As noted, the form here directed McPhail to file his request for a refusal hearing to the address of the sheriff's department, despite listing the circuit court as the recipient of the request. McPhail argues the failure to provide him with the correct address for the Door County Circuit Court was a fundamental defect under *State v. Gautschi*, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24, requiring dismissal of the refusal charge.

¶5 The issue in *Gautschi* was whether an alleged error in the notice of intent to revoke form required the order revoking Gautschi's operating privilege to be vacated for a lack of personal jurisdiction. *Id.*, ¶¶1, 4. As we explained, a notice of intent to revoke provided to a defendant pursuant to WIS. STAT. § 343.305(9)(b) "is similar to a summons, in that it provides the court with

personal jurisdiction over its recipient.”<sup>3</sup> *Gautschi*, 240 Wis. 2d 83, ¶8; *see also State v. Moline*, 170 Wis. 2d 531, 539, 489 N.W.2d 667 (Ct. App. 1992) (“*In personam* jurisdiction is a necessary requirement before a court may lawfully exercise its authority over an individual.”).

¶6 In addressing the issue, we first determined that the notice was deficient because the form did not correctly identify all of the issues a defendant could raise at a refusal hearing. *See Gautschi*, 240 Wis. 2d 83, ¶¶6-7. We concluded that this “significant deviation or omission from the required statutory information [wa]s not cured by the fact that other required information [wa]s properly provided, or because a statutory reference [wa]s included.” *Id.*, ¶7.

¶7 Next, we considered whether this deficiency in the form amounted to either a “technical” error, which the State could overcome by showing the defendant was not prejudiced, or a “fundamental” error in which prejudice was presumed. *See id.*, ¶9. We explained a fundamental error occurs “where a defect prevents the purpose of the statute from being served,” whereas a technical error relates only to content or form but otherwise fulfills the purpose of the statute in question. *Id.*, ¶11. The purpose of the statute is to give notice of what is going to be happening as a result of the refusal and an opportunity to be heard before it happens. *See id.*, ¶13. We concluded that the defect in *Gautschi*’s notice to

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<sup>3</sup> Despite our explanation in *State v. Gautschi*, 2000 WI App 274, ¶8, 240 Wis. 2d 83, 622 N.W.2d 24, that a defective notice infringed upon personal jurisdiction, McPhail appears to suggest that other “due process” facets require dismissal of the refusal charge in this case. For example, McPhail contends that the alleged error in the notice failed to provide a “meaningful opportunity to present a complete defense” or undermined “notions of procedural due process.” McPhail does not develop these issues any further, and we shall not abandon our neutrality to develop arguments on his behalf. *See Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

revoke form was simply a technical error because it nevertheless “fulfilled the purpose of WIS. STAT. § 343.305(9)(a)” and “provided meaningful notice and the opportunity to be heard.” *Gautschi*, 240 Wis. 2d 83, ¶14. We also concluded that Gautschi suffered no prejudice due to the error because he filed a timely request for a hearing, received a hearing, and was not barred from raising the statutorily permitted issues at the hearing. *Id.*, ¶15.

¶8 In the present case, the parties appear to agree the inaccurate address rendered the form deficient. However, they dispute whether the typographical mistake in the address was either a fundamental or a technical error and, if technical, whether McPhail suffered prejudice. Whether a defect in the notice sent to a defendant is fundamental or technical is a question of law that we review de novo. *State v. Carlson*, 2002 WI App 44, ¶24, 250 Wis. 2d 562, 641 N.W.2d 451.

¶9 Assuming without deciding that the address inaccuracy rendered the notice deficient, we agree with the County that any error was technical. McPhail argues that the inaccurate address was fundamental because the form directed him to file a request for a hearing to an address other than that of the circuit court. Because the purpose of the form is in part to provide a defendant with an opportunity to be heard, McPhail contends this address error ensured that the court would never receive his response, thus making it impossible for him to receive a hearing. McPhail’s argument implicitly appears to be that any inaccuracy in the return address noted on the form, however slight, voids a citation for a refusal from the beginning.

¶10 McPhail’s argument is unavailing, as the form in this case readily served the purposes of WIS. STAT. § 343.305(9). The form accurately gave

McPhail notice of what was going to happen as a result of the refusal—he “was notified that his operating privilege would be revoked, that he had a right to a hearing,” and that the issues to be considered at the hearing were limited. *See Gautschi*, 240 Wis. 2d 83, ¶14. In addition, the form provided McPhail with an opportunity to be heard because it directed any request for a hearing to the “Door County Circuit Court,” regardless of the erroneous last digit of the address. The circuit court found that had McPhail “sent this notice in, it would have been received downstairs [at the sheriff’s department] and ... shipped upstairs” to the court. McPhail cites nothing to the contrary in the record that leads us to conclude this finding is clearly erroneous. *See* WIS. STAT. § 805.17(2). Furthermore, the address error could have been remedied through other means. McPhail could have delivered the request in person, in which case he would have been directed to the correct location. In the alternative, he could have discovered the circuit court’s correct location without reference to the address on the form, as the form clearly told McPhail any hearing request was to be provided to the Door County Circuit Court. The error in the last digit of the address did not deprive McPhail of notice of the issues and an opportunity to be heard on the refusal charge. *See Gautschi*, 240 Wis. 2d 83, ¶14; *Moline*, 170 Wis. 2d at 541-42.

¶11 Finally, we conclude that this technical “error” did not result in prejudice to McPhail. The burden is on the County to establish that McPhail was not prejudiced. *See Gautschi*, 240 Wis. 2d 83, ¶15. The County asserts there is no evidence that McPhail ever filed a request for a hearing by mail or in person in response to the notice, be it to either 1201 or 1205 South Duluth Avenue. McPhail had the opportunity to provide evidence in response that he “file[d] a timely request for a hearing” or that the incorrect final digit of the street address prevented any such request from being delivered to the circuit court. *See id.* He

did not do so in the affidavit filed in support of the motion to vacate the revocation, and he failed to appear in person at the hearing on his motion. Thus, the circuit court properly concluded that any error in the street address on the form did not deprive McPhail of the opportunity to be heard.

¶12 McPhail criticizes the County’s argument as speculative, and in his reply brief, he cites a statement from his lawyer at the motion hearing that McPhail “had actually filed a request for the refusal hearing as far as I know.” That statement, however, is not a substitute for sworn testimony from McPhail or a sworn affidavit in which he averred that he sent a timely request for a hearing to the listed address on the form. McPhail cites no other evidence that he mailed a request for a hearing, and thus, he cannot rebut the County’s showing that he was not prejudiced by the address error on the form.

*By the Court.*—Order affirmed.

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

