

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 18, 2001

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-3441**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL A. SENEAL,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Fond du Lac County:  
ROBERT J. WIRTZ, Judge. *Reversed and cause remanded with directions.*

¶1 NETTESHEIM, J.<sup>1</sup> Michael A. Senecal appeals from an order revoking his driving privileges based upon the trial's court determination that

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Senecal improperly refused to submit to a chemical test under the Implied Consent Law, WIS. STAT. § 343.305.<sup>2</sup> On appeal, Senecal argues that the trial court erred by denying his motion to dismiss when the State was unprepared to proceed at a previously scheduled refusal hearing. Instead, the court granted the State's motion to adjourn the hearing.

¶2 We agree with Senecal that the trial court did not adequately explain its reasons for granting the adjournment. We therefore conditionally reverse the order and remand for the trial court to further address the adjournment request.

### ***FACTS AND PROCEDURAL HISTORY***

¶3 The facts and procedural history of this case as they bear upon the appellate issue are undisputed. On March 6, 1999, Senecal was arrested for operating a motor vehicle while intoxicated. Senecal refused to submit to a chemical test so the arresting officer issued him a Notice of Intent to Revoke Operating Privileges pursuant to WIS. STAT. § 343.305(9). Senecal requested a hearing on the propriety of his refusal.

¶4 The first hearing was scheduled for April 26, 1999. Senecal requested and received an adjournment because his counsel had only recently been retained. The matter was next scheduled for January 3, 2000. That hearing was adjourned upon the joint request of the State and Senecal. The next hearing was scheduled for April 13, 2000. That hearing was adjourned without objection at the request of the State due to the unavailability of a police officer witness. The next

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<sup>2</sup> The order states that Senecal's refusal was "unreasonable." "Reasonableness" was once the test for a refusal under the Implied Consent Law. *See, e.g.*, WIS. STAT. § 343.305(2)(b)5 (1975). However, the test under current law is whether the refusal was "improper." WIS. STAT. § 343.305(10)(a).

hearing was May 15, 2000. That hearing was adjourned without objection at the request of the State because a citizen witness had not been notified and was not present.

¶5 The next hearing was August 7, 2000, which is the proceeding at issue on this appeal. Once again, the citizen witness had not been notified and was not present. In addition, a police officer witness was not present because he had been summoned to a SWAT call. The State again asked for an adjournment. Senecal objected and asked the trial court to dismiss the action. The trial court denied Senecal's motion to dismiss and granted the State a further adjournment.

¶6 The matter was finally heard on August 21, 2000. At the close of the evidence, the trial court decided all of the issues adversely to Senecal and revoked his operating privileges. Senecal appeals, challenging the trial court's grant of the adjournment of the August 7, 2000 hearing.

### ***DISCUSSION***

¶7 The parties agree that *State v. Wollman*, 86 Wis. 2d 459, 273 N.W.2d 225 (1979), sets out the controlling law on the appellate issue. A motion for a continuance is a matter addressed to the trial court's discretion. *Id.* at 468. An overriding consideration in such an inquiry is the public interest in the prompt and efficient administration of justice. *Id.*<sup>3</sup> Five factors bear on this question:

1. the length of the delay requested;

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<sup>3</sup> In *State v. Wollman*, 86 Wis. 2d 459, 273 N.W.2d 225 (1979), the issue was whether the trial court erred by *denying* the defendant's motion for a continuance. *Id.* at 468. In light of that, the supreme court said that the public interest in the prompt and efficient administration of justice must be balanced against the defendant's constitutional right to adequate representation by counsel. *Id.* Here, the issue is whether the trial court erred by *granting* the State's motion for a continuance. So Senecal's right to adequate representation by counsel is not implicated.

2. whether other continuances had been requested and received by the party seeking the continuance;
3. the convenience or inconvenience to the parties, witnesses and the court;
4. whether the delay seems to be for legitimate reasons; or
5. whether its purpose is dilatory; and other relevant factors.

*Id.* at 470.<sup>4</sup>

¶8 Senecal breaks his appellate argument out into two segments. He first argues that the trial court erred in granting the State’s motion for a continuance and denying his motion for dismissal. Senecal bases this argument on the procedural history of this case which we have detailed. Alternatively, Senecal contends that the trial court inadequately explained its reasons for granting the State’s continuance request. However, we conclude that the latter argument governs this appeal and subsumes the former. Therefore, we focus on the trial court’s decision.

¶9 When denying Senecal’s motion to dismiss and granting the State’s motion for a further continuance at the August 7, 2000 hearing, the trial court said:

I understand your frustration, Mr. Bethke [defense counsel], at having probably been here several times and people aren’t here when they’re supposed to be here. I do find that there have been numerous adjournments in this case requested by both sides and on whether those have been good reasons or bad reasons, I’m not going to pass judgment, but I will say that there have been some that have been joined in by [the defense and the State]; some that—one that was requested by [the defense] alone; some that have been requested by [the State] alone because witnesses aren’t here. I’m going to find that witnesses

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<sup>4</sup> *Wollman* sets out a sixth factor where the defendant has sought the continuance based upon the alleged unavailability of counsel—whether the lead counsel has associates prepared to try the case. *Wollman*, 86 Wis. 2d at 470. This added factor is not relevant to this case since the State, not Senecal, sought the continuance.

aren't here today and that the matter should be reset for a hearing within a week.

¶10 We now apply the *Wollman* factors to the trial court's decision. As to the first factor, the trial court directed that the adjourned hearing be conducted within a week. Although the hearing was actually conducted two weeks later, this delay was not lengthy. This factor supports the trial court's grant of the continuance. As to the second and third factors, the court also noted the inconvenience to the defense caused by the prior absences of the State's witnesses and that most of the prior continuances had been at the behest of the State. These factors argue against the trial court's grant of the continuance.

¶11 While the preceding factors are relevant to the inquiry, we conclude under the somewhat tortured history of this case that the fourth factor under *Wollman* is the most important. This factor asks whether the further delay is for legitimate or dilatory reasons. And it is on this factor that we find the trial court's decision lacking because the court said it was not going to "pass judgment" on that history. However, we conclude that the legitimacy of a request for a further adjournment cannot be divorced from prior history in the case. That is especially so where, as here, the reasons for the further continuance—the failure to notify witnesses or the absence of such witnesses—are the same as asserted in the past. We agree with Senecal that the trial court's decision is lacking on this critical point.

¶12 In some instances, a reviewing court may look to the entire record to affirm a trial court's discretionary ruling when the trial court has failed to adequately explain its ruling. *Tralmer Sales & Serv., Inc. v. Erickson*, 186 Wis. 2d 549, 573, 521 N.W.2d 182 (Ct. App. 1994). However, we are not obligated to

do so. Here, the trial court is in the better position to assess the legitimacy of the State's latest request for an adjournment in light of the prior history of the case.

¶13 We conditionally reverse the order finding Senecal's refusal improper. We remand for the trial court to reconsider the State's August 7, 2000 request for a further continuance under the *Wollman* factors, especially whether the request was for a legitimate reason.<sup>5</sup>

¶14 If, after readdressing the issue, the trial court concludes that the State's August 7, 2000 request for a further continuance was proper, the court is authorized to reinstate the revocation order. On the other hand, if the court concludes that the State's latest request for a further continuance was improper, our reversal of the revocation order stands.

*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.

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<sup>5</sup> In so doing, the court may wish to consider our observations in *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 114, 479 N.W.2d 557 (Ct. App. 1991) where we said:

Continuances and delay are the bane of the judicial system....

Perhaps in earlier and more leisurely times, the type of adjournment sought in this case would have been routinely granted. However, given the volume of litigation burdening the trial courts, the bar and litigants must understand that Wisconsin trial judges will monitor their calendars to avoid the damaging effects of unwarranted delay.