

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2011

A. John Voelker
Acting 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. 2010AP2485

Cir. Ct. No. 2010CV62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF JESSE M. SCHAEFER:

VILLAGE OF MENOMONEE FALLS,

PLAINTIFF-RESPONDENT,

V.

JESSE M. SCHAEFER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LINDA M. VAN DE WATER, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Jesse M. Schaefer's operating privileges were revoked after he failed to request a refusal hearing within the ten-day time limit set forth in WIS. STAT. § 343.305(10). Schaefer requested that the municipal court reopen the proceedings based on excusable neglect. The municipal court denied Schaefer's request and the circuit court affirmed. Because a revocation order under § 343.305(10) is not subject to a request to reopen under WIS. STAT. § 806.07(1)(a), the municipal court lacked competency to grant Schaefer's request. We affirm the circuit court's order.

¶2 We begin by noting that the only source of the underlying facts in this case is the representations made by Schaefer's counsel during the municipal court hearing. Counsel stated as follows:

[Schaefer] was arrested on February 13th of 2009. [He was] apparently taken to the hospital. He had to be medically cleared by the hospital. At the same time, since he's on probation, his probation officer was notified and they placed a probation hold on him. He was transported from the hospital to the Waukesha County jail where he remained until April 7[, 2009.] When he was released on April 7th, eight days ago, he found this pink Notice of Intent to Revoke Operating Privilege in his property that had been seized by the Waukesha County Sheriff's Department upon his intake into the Waukesha County Jail. The first time he ever saw this Notice of Intent to Revoke Operating Privilege was on April 7th of 2009, obviously well past [the] deadline [that] was in place for him to request a refusal hearing in this case.

Schaefer asked the court to reopen the revocation order based on excusable neglect under WIS. STAT. § 806.07(1)(a).

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 The Village argued that Schaefer had failed to provide evidence of excusable neglect and that he was notified orally of his due process rights as to his refusal on February 13. The Village further argued the court lacked authority to reopen a revocation based on WIS. STAT. § 806.07 because WIS. STAT. § 343.305 is administrative and there is no “judgment” to reopen. The municipal court agreed with the Village’s interpretation of the law, but determined that even if § 806.07(1)(a) applied, Schaefer had failed to demonstrate excusable neglect. The court denied Schaefer’s motion to reopen.² Schaefer then requested a transcript review of the municipal court ruling pursuant to WIS. STAT. § 800.14(5). The circuit court determined that Schaefer’s request to vacate the revocation under § 806.07(1)(a) was proper, but that the municipal court did not err in its finding as to a lack of evidence demonstrating excusable neglect. Schaefer appeals.

¶4 As a threshold matter, we address the Village’s contention that the municipal court lacked competency to proceed on Schaefer’s WIS. STAT. § 806.07 motion to reopen. Whether a court has lost competence to proceed presents a question of law that we review de novo. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶7, 273 Wis. 2d 76, 681 N.W.2d 190. A court’s competence refers to the ability of a court “to adjudicate the particular case before [it].” *Id.*, ¶9. Courts have routinely held that the failure of a party to act within a statutorily mandated time limit results in the court’s loss of competence to hear the specific case before it. *See, e.g., Green Cnty. DHS v. H.N.*, 162 Wis. 2d 635, 656, 469 N.W.2d 845 (1991); *see also Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 706, 495 N.W.2d

² After the court’s ruling, Schaefer requested, and was granted, the opportunity to provide evidence at a later hearing. While the record reflects that another hearing was scheduled, the transcript of that hearing is not included in the record nor is it referenced in Schaefer’s brief.

660 (1993). “[A] court’s loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived.” *Green Cnty.*, 162 Wis. 2d at 657.

¶5 Under WIS. STAT. § 343.305, the “implied consent” law, a law enforcement officer may request a person to provide a sample of his or her breath, blood or urine following an arrest for a violation of WIS. STAT. § 346.63. *See* § 343.305(3)(a). The implied consent law deems any person who drives a motor vehicle on public highways “to have given consent to one or more tests of his or her breath, blood or urine ... when requested to do so by a law enforcement officer.” Sec. 343.305(2). If, despite this consent, a driver refuses to submit to such a test, he or she is issued a “notice of intent to revoke” operating privileges. Sec. 343.305(9). This notice must advise “[t]hat the person may request a hearing within 10 days by mailing or delivering a written request to the court If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.” Sec. 343.305(9)(a)4. The revocation following a refusal is “automatic.” *See State v. Piddington*, 2001 WI 24, ¶35, 241 Wis. 2d 754, 623 N.W.2d 528.

¶6 Schaefer does not dispute that he failed to request a hearing within the ten-day time limit set by statute. As a result of Schaefer’s failure to meet the deadline set forth in WIS. STAT. § 343.305(9)(a)4., the municipal court lost competency to proceed. Accordingly, the court properly dismissed the motion to reopen the refusal revocation proceedings.

¶7 The circuit court affirmed the municipal court’s dismissal; however, it did so on grounds that Schaefer had failed to demonstrate excusable neglect under WIS. STAT. § 806.07(1)(a). *See State v. Alles*, 106 Wis. 2d 368, 391, 316

N.W.2d 378 (1982) (we will not reverse the circuit court's opinion where we determine that its decision was correct but was made for the wrong reason). Schaefer has provided no authority for the application of § 806.07(1)(a) to this proceeding. Although the municipal court properly dismissed the motion for lack of competency, even if § 806.07(1)(a) provided a viable means of reconsidering Schaefer's revocation, we conclude that he failed to demonstrate grounds for doing so.

¶8 It is well established that a motion to reopen under WIS. STAT. § 806.07(1)(a) must demonstrate that the judgment against the movant was obtained as a result of mistake, inadvertence, surprise or excusable neglect and that the movant has a meritorious defense to the action. *See J.L. Phillips & Assocs. v. E&H Plastic Corp.*, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998). Schaefer failed on both counts. Schaefer's assertion of excusable neglect rested on his representations to the municipal court that he was transported to jail and deprived of his property (including his notice of revocation form) from February 13 until April 7, 2009. However, Schaefer failed to provide any evidence supporting these assertions. Notably, he fails to provide any detail about the time period between receiving the notice and having it taken away.

¶9 Further, Schaefer failed to provide any evidence demonstrating that he had a meritorious defense to the refusal revocation. While Schaefer's counsel references information in the police report that the police had to repeat information four or five times because Schaefer apparently did not understand what was going on, Schaefer's counsel did not provide the police report or any other evidence at the hearing. In sum, Schaefer failed to demonstrate that the arresting officer lacked probable cause to request the test or failed to comply with notice requirements, nor did he provide evidence to support a claim that he had not

actually refused the test. *See* WIS. STAT. § 343.305(9)(a)5.a.-c. Thus, even if WIS. STAT. § 806.07(1)(a) applied to a refusal revocation, Schaefer would not be entitled to relief.

¶10 We conclude that the municipal court properly dismissed Schaefer's motion to reopen a refusal revocation. Not only did the municipal court lack competency to do so, but Schaefer had failed to demonstrate any grounds for WIS. STAT. § 806.07(1)(a) relief. We affirm the circuit court's order.

By the Court.—Order affirmed.

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

