Assembly Republican Majority

BILL SUMMARY

AB 666: Right to Discovery In Implied Consent OWI Cases

Date: March 24, 2000

BACKGROUND

Under Wisconsin law, a person arrested for an OWI offense who refuses to take a test to measure the amount of alcohol in his or her blood or breath has their operator's license taken and is given a notice of intent to revoke their driving privileges. This notice informs the person of a number of things, including their right to request a court hearing to contest the revocation order.

In 1996, the Wisconsin Court of Appeals held that any person who receives a notice of intent to revoke may employ the full range of discovery procedures under Wisconsin law, including the use of depositions and interrogatories if they elect to contest the revocation order.

SUMMARY OF ASSEMBLY BILL 666

Assembly Bill 666 would prohibit the use of discovery by both defendants and prosecutors in implied consent revocation cases. The bill makes an exception to allow defendants to receive a copy of any written or recorded statement made by a witness before that witness testifies at the hearing.

The bill also specifies that the court may, for cause, order the release of those written or recorded statements before the hearing, and has no effect on the right to discovery for either party in any criminal proceedings resulting from the same incident which led to the revocation hearing.

AB 666 was originally included in Governor Thompson's budget proposal, but was removed by the Joint Finance Committee as a non-fiscal policy item..

FISCAL EFFECT

No fiscal estimates were prepared for AB 666.

PROS

1. Discovery can be a costly and time-consuming process, and may be used by defendants in implied consent cases to delay the revocation of their driving privileges. AB 666 will help ensure that these matters are resolved in a timely and efficient manner.

2. AB 666 ensures that defendants will have available to them any statements made by those who might testify against them, and also provides the court with the option of releasing other materials to the defendant if there is a reason to do so.

3. AB 666 does not in any way affect the ability of a defendant to utilize the full range of discovery in any criminal proceeding that results from the offense which led to the implied consent revocation hearing.

CONS

1. Some may argue that discovery is a vital part of any court proceeding and that eliminating the right to discovery in implied consent cases will not allow a defendant to mount a full defense.

SUPPORTERS

Rep. Jeff Stone, author; Sen. Joanne Huelsman, lead co-author; Jeff Froehlich, Outagamie County District Attorney's Office; Brian Brophy, Dane County District Attorney's Office; Casey Perry, WI Troopers Association; Maureen D. Boyle, Walworth County District Attorney.

OPPOSITION

Barry Cohen, State Bar of Wisconsin - Criminal Law Section

HISTORY

Assembly Bill 666 was introduced on January 19, 2000, and referred to the Assembly Committee on Highway Safety. A public hearing was held on February 16, 2000. On march 1, 2000, the Committee voted 6-1-1 [Rep. Young voting no, Rep. Hasenohrl absent] to recommend passage of AB 666 as amended.

CONTACT: Mike Prentiss, Office of Rep. Jeff Stone

OUTAGAMIE COUNTY

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LAW CLERK
Jeffrey S. Froehlich

MEMORANDUM

TO: Jeff Stone
State Representative

From: Jeffrey S. Froehlich JSF

Date: February 15, 2000

Re: Assembly Bill 666

I have reviewed the Criminal Law Legislative Committee recommended positions on Assembly Bill 666. I disagree with the recommendation to oppose.

The first "big problem" listed is the fact that Assembly Bill 666 will overturn State v. Scoepp, 204 Wis. 2d 266 (Court of Appeals 1996). After actual reading the case, it seems clear that the court invited the legislature to make such a change. At page 272 the court states "[t]he plain language of Section 801.01(2), Stats., provides that chapter 804, Stats., governs practice in circuit courts in all special proceedings 'except where different procedure is prescribed by statute or rule.'" The court held that "[b]ecause the statutes do not provide different discovery for refusal hearings, we conclude that the discovery procedures of Chapter 804 apply".

Not only is there a legislative prerogative to change the underlying legislation, the court in Schoepp is openly inviting such change. In a footnote on page 272, the court states **"[t]he legislature could have provided that discovery is...not available in refusal hearings, but it did not do so."** See the attached copy of State v. Schoepp.

The second "big problem" listed are equal protection problems; a refusal hearing is a civil proceeding, I do not believe there are equal protection problems.

The third "big problem" stated is--police reports would not be available until the day of the hearing. I believe this concern is also unfounded and submit the attached memorandum prepared by Assistant District Attorney M. Cathleen Huber.

Cc: Rep. Steve Wieckert

OFFICE OF THE DISTRICT ATTORNEY

MEMORANDUM

TO: Attorney Jeffrey Froehlich
Public Service Special Prosecutor

FROM: M. Cathleen Huber
Assistant District Attorney

RE: Applicable Discovery Procedures for Violations under the Wisconsin Implied Consent Law - §343.305, Wis. Stats.

DATE: November 5, 1999

I have reviewed the draft legislation which is recommending that there should no pre-trial discovery with respect to refusal cases. This appears to be consistent with current law in the criminal and traffic regulation areas, given the current case law as it pertains to the Implied Consent Law. The basis for a refusal hearing are very narrow and are set forth in §343.305(9), Wis. Stats. The Appellate courts have noted that the State's burden or persuasion at a refusal hearing is substantially less than what would be required at a hearing to suppress evidence. At the refusal hearing, the State must only present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of intoxicants. The court has noted that the State is not even required to prove this probable cause to a reasonable certainty. The State need only show that the officer's account is plausible. The trial court is not to weigh the evidence for or against the probable cause or to determine the credibility of witnesses. Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible. State v Willie, 185, Wis. 2d 673, 681-2 (Ct. App. 1994). The requirement that the State need only show probable cause and the fact that the court is not to weigh the credibility of witnesses is similar to the procedures followed for a preliminary examination in a criminal case. Under the circumstances of a criminal preliminary examination, there is no discovery prior to the preliminary examination hearing. *See* §971.31(5)(b), Wis. Stats.

State v Willie relied strongly on a previous Supreme Court decision, State v Nordness, 128 Wis. 2d 15 (1986). In that case, the court found that the trial court had imposed an improper burden on the State, the requirement of showing to a reasonable certainty that the defendant was actually the operator of the vehicle. The court stated that they view revocations hearings as a determination merely of an officer's probable cause, not as a form to weigh the State's and the defendant's evidence. The court indicated that the State need only demonstrate that the arresting officer had probable cause for his belief that the defendant was driving under the influence of intoxicants to have the court uphold a determination of an unreasonable refusal. The court in fact found that testimony of two alibi witnesses that the defendant wished to present, were irrelevant to the determination of probable cause. It is only the evidence which

speaks the facts and circumstances available to the officer at the time of the arrest that is held to be relevant to the determination of probable cause at a revocation hearing. Therefore, it was not a violation of the defendant's due process rights to limit the testimony or to refuse to allow witnesses, the defendant's alibi, to testify on the defendant's behalf. Given the very narrow scope of refusal hearings as determined by the Nordness and Willie cases, it does not appear to be necessary for there to be an exchange of evidence under discovery procedures, such as those which are normally available in the typical civil case, i.e., written interrogatories, depositions, statements for admission of facts, etc. If anything, the refusal hearings are more closely akin to the criminal preliminary examinations where there is no discovery allowed.

This issue has largely come to light because of recent Appellate Court decisions finding that refusal hearings are not considered traffic regulatory cases, but purely civil matters. If this were a traffic regulatory case, it would be controlled by §345.421. Section 345.421 specifically says that neither side is entitled to pre-trial discovery unless the defendant's moves within 10 days of the violation itself to be able to test or inspect any devices used to prove the violation. In this case, the allegation is that the defendant refused to take any type of evidentiary test and therefore there would be no device subject to testing. Therefore, there would be no pre-trial discovery.

For the reasons outlined in this memo, I do not believe that pre-trial discovery is appropriate in refusal hearing situations. For years, our office believed that §345.421 did apply to refusal hearings, prior to the court's determination that it was strictly a civil matter. Under §345.421, we were not providing discovery to defense counsel. There did not appear to be any significant difficulties in handling refusal hearings given the Outagamie County District Attorney's Office posture. There have been some difficulties encountered, however, under recent situations in which defense counsel has made extensive demands for pre-trial discovery under the civil discovery procedures as it applied to refusal hearings. A recent filing would have resulted in, conservatively speaking, approximately forty man hours of research and investigation to answer the interrogatories, demands for admissions and other discovery matters filed by defense counsel.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Douglas D. SCHOEPP, Defendant-Appellant.

Court of Appeals

No. 95-2249. Submitted on briefs July 12, 1996.—Decided August 29, 1996.

(Also reported in 554 N.W.2d 236.)

RESEARCH REFERENCES

Am Jur 2d, Automobiles and Highway Traffic §§ 122–132; Criminal Law § 948.
See ALR Index under Appeal and Error; Breath Tests.

1. **Automobiles And Other Motor Vehicles § 754.50*—refusal to take breathaliser test—classification of refusal hearing under civil practice rules—special proceeding.**

In defendant's interlocutory appeal from order granting state's motion to quash subpoenas issued by defendant to depose officers involved in defendant's drunk driving arrest in which defendant argued that statutory rules of discovery applied to refusal proceedings instituted under drunk driving statute, court of appeals concluded that refusal hearing was special proceeding for purposes of civil practice rules (Stats §§ 343.305(9), 801.01(2), 809.50).

2. **Automobiles And Other Motor Vehicles § 754.50*—refusal to take breathaliser test—applicability of statutory discovery procedures to refusal hearings—de novo review.**

*See Callaghan's Wisconsin Digest, same topic and section number.

Issue of whether there is different statutory discovery procedure for refusal hearings and whether statutory chapter governing discovery applies to them is issue of statutory construction and interpretation, which court of appeals reviews de novo (Stats Chapter 804).

3. **Process § 3*—necessity of summons or notice—requirement in civil actions.**

In most civil actions in Wisconsin, summons and complaint must be served on defendant, and purpose of complaint is to give notice of nature of claim (Stats §§ 801.11, 801.14).

4. **Automobiles And Other Motor Vehicles § 754.50*—refusal to take breathaliser test—applicability of statutory discovery procedures to refusal hearings.**

In defendant's interlocutory appeal from order granting state's motion to quash subpoenas issued by defendant to depose officers involved in defendant's drunk driving arrest in which defendant argued that statutory rules of discovery applied to refusal proceedings instituted under drunk driving statute, court of appeals concluded that plain language of statute delineating scope of discovery rules provides that discovery statute governed practice in circuit courts in all special proceedings "except where different procedure was prescribed by statute or rule," and since drunk driving statute did not provide different means for defendant in refusal hearing to obtain depositions, interrogatories and other discovery, nor did it provide that discovery was not available prior to refusal hearings, procedures of discovery statute applied (Stats §§ 343.305, 801.01(2), Chapter 804).

5. **Statutes § 202*—construction—necessity to examine scope, history and context of statute—clear and unambiguous statutory language.**

Wisconsin Supreme Court, has stated that when statutory language is clear and unambiguous, court of appeals is to ascertain legislature's intent by construing plain language

*See Callaghan's Wisconsin Digest, same topic and section number.

of statute, and court is not then to look to statute's scope, history, context, subject matter or purpose.

6. **Courts § 259*—purview of court of appeals—error correction.**

Court of appeals is error correcting court.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Reversed and cause remanded.*

For the defendant-appellant the cause was submitted on the briefs of *Ralph A. Kalal* of *Kalal & Associates* of Madison.

For the plaintiff-respondent the cause was submitted on the brief of *James E. Doyle*, attorney general, and *Pamela Magee*, assistant attorney general.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

DYKMAN, P.J.[1] This is an interlocutory appeal heard pursuant to § 809.50, STATS. Douglas D. Schoepp appeals from an order granting the State's motion to quash subpoenas issued by Schoepp to depose officers involved in his arrest. Schoepp argues that the rules of discovery provided by Chapter 804, STATS., apply to refusal proceedings instituted under § 343.305(9), STATS. We agree and therefore reverse.

BACKGROUND

On January 29, 1995, Lieutenant William Housley of the Madison Police Department arrested Schoepp for operating a motor vehicle while under the influence of an intoxicant, contrary to a city ordinance conforming

[1] The chief judge ordered that this case would be heard by a three-judge panel. *See* § 809.41, STATS.

*See Callaghan's Wisconsin Digest, same topic and section number.

with § 346.63(1)(a), STATS. Housley read Schoepp the "informing the accused" form[2] and requested that Schoepp submit to a chemical blood alcohol test.[3] Schoepp allegedly refused to submit to the test, and Housley issued a notice of intent to revoke Schoepp's operating privilege.[4] Pursuant to § 343.305(9), STATS., Schoepp filed a demand for a refusal hearing.

Prior to the refusal hearing, Schoepp issued subpoenas for the deposition of the arresting officer and other police officers who were involved in his arrest and the events leading up to his alleged refusal to submit to chemical testing. The State moved the circuit court for an order quashing the subpoenas. The circuit court concluded that a defendant is not entitled to discovery prior to a refusal hearing and quashed Schoepp's subpoenas. Schoepp appeals.

[2] When a chemical test specimen is requested from a person arrested under an ordinance conforming with section 346.63(1), STATS., the arresting officer must read the "informing the accused" form to the person arrested. Section 343.305(4), STATS.

[3] Under § 343.305(3)(a), STATS.:

> Upon arrest of a person for violation of s. 346.63 (1) . . . or a local ordinance in conformity therewith . . . a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose [of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, a combination of alcohol and controlled substances, other drugs or a combination of alcohol and other drugs]. . . .

[4] Under § 343.305(9)(a), STATS., "If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke . . . the person's operating privilege."

DISCUSSION

Schoepp argues that under § 801.01(2), STATS., the rules of discovery in Chapter 804, STATS., apply to refusal hearings. Section 801.01(2) provides: "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule."

In determining whether the discovery procedures of Chapter 804, STATS., apply to refusal hearings, § 801.01(2), STATS., directs us to make two inquiries. First, we must determine whether refusal hearings are "civil actions" or "special proceedings." Second, we must determine whether the statutes prescribe different discovery procedures for refusal hearings.

[1]

In *State v. Jakubowski*, 61 Wis. 2d 220, 224 n.2, 212 N.W.2d 155, 157 (1973), the Wisconsin Supreme Court concluded that "a proceeding under sec. 343.305 is a special proceeding and must be so defined." The State does not take issue with this holding. We conclude that a refusal hearing is a special proceeding for purposes of § 801.01(2), STATS.

[2]

The State does argue, however, that there is a different statutory discovery procedure for refusal hearings, and therefore Chapter 804, STATS., does not apply to them. This is an issue of statutory construction and interpretation, which we review *de novo*. *See DOR v. Milwaukee Brewers Baseball Club*, 111 Wis. 2d 571, 577, 331 N.W.2d 383, 386 (1983). First, we examine the language of the statutes to determine whether the language is clear or ambiguous. *State v. Dwyer*, 181 Wis. 2d 826, 836, 512 N.W.2d 233, 236 (Ct.

App. 1994). If the language is clear, we must give effect to its plain meaning. *Id.*

Section 343.305(9)(a), STATS., provides that "[t]he officer shall issue a copy of the notice of intent to revoke the privilege to the person."[5] The State argues that the notice of intent to revoke provides the defendant with much of the information relevant in a refusal hearing, and therefore it provides a discovery procedure different than the procedure set forth in Chapter 804, STATS. The notice of intent to revoke, however, is akin to the summons and complaint requirements of Chapters 801 and 802, STATS., not the discovery procedures provided for in Chapter 804. And the issues Schoepp raises in this case go beyond the information given to him by the notice of intent to revoke.

[5] Section 343.305(9)(a), STATS., provides in relevant part:

> The notice of intent to revoke the person's operating privilege shall contain substantially all of the following information:
>
> 1. That prior to a request under sub. (3)(a), the officer had placed the person under arrest and issued a citation, if appropriate, for a violation of s. 346.63 (1) . . . or a local ordinance in conformity therewith . . . .
>
> 2. That the officer complied with sub. (4) or both subs. (4) and (4m).
>
> 3. That the person refused a request under sub. (3)(a).
>
> 4. That the person may request a hearing on the revocation within 10 days . . . .
>
> 5. That the issues of the hearing are limited to:
>
> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol . . . and whether the person was lawfully placed under arrest for violation of s. 346.63 (1) . . . or a local ordinance in conformity therewith . . . .
>
> b. Whether the officer complied with sub. (4) or both subs. (4) and (4m).
>
> c. Whether the person refused to permit the test. . . .
>
> 6. That, if it is determined that the person refused the test, there will be an order for the person to comply with assessment and a driver safety plan.

[3]

In most civil actions in Wisconsin, a summons and complaint must be served on the defendant. *See* §§ 801.11 and 801.14, STATS. The purpose of the complaint is to give notice of the nature of the claim. *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660, 664 (1979). Likewise, the notice of intent to revoke gives a defendant notice of the allegations pursuant to which the State intends to revoke the defendant's operating privilege. Chapter 804, STATS., on the other hand, provides for depositions, interrogatories and other forms of discovery.

[4]

The plain language of § 801.01(2), STATS., provides that Chapter 804, STATS., governs practice in circuit courts in all special proceedings "except where different procedure is prescribed by statute or rule." Section 343.305, STATS., does not provide a different means for a defendant in a refusal hearing to obtain depositions, interrogatories and other discovery, nor does it provide that discovery is not available prior to refusal hearings.[6] Because the statutes do not provide different discovery procedures for refusal hearings, we conclude that the discovery procedures of Chapter 804 apply.

[5, 6]

The State argues that it would be inconsistent with the purpose behind drunk driving laws to allow discovery prior to refusal hearings.[7] The Wisconsin

[6] Section 345.421, STATS., provides that defendants to civil and criminal traffic proceedings may not obtain discovery except in limited circumstances. The legislature could have provided that discovery is also not available in refusal hearings, but it did not do so.

[7] The State cites *State v. Brooks*, 113 Wis. 2d 347, 359, 335 N.W.2d 354, 359 (1983), in which the court stated that the

Supreme Court, however, has stated that when statutory language is clear and unambiguous, we are to ascertain the legislature's intent by construing the plain language of the statute. We are then not to look to the statute's scope, history, context, subject matter or purpose. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 281-82, 548 N.W.2d 57, 60 (1996). We agree that discovery adds some time to a case. But § 801.01(2), STATS., is clear. We would have to ignore the supreme court's holding in *UFE* were we to adopt the State's argument. It is a legislative function to say that because of one statute's purpose, we will add language which simply does not now exist to another statute. This is an error correcting court. *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732, 735 (1986). What the State asks us to do is hardly error correcting.

The State does not argue that the statutes are ambiguous. We, too, have concluded that § 801.01(2), STATS., unambiguously states that Chapter 804, STATS., applies to refusal hearings except where different procedure is prescribed by statute. We have also concluded that neither § 343.305, STATS., nor any other statute provides a procedure for discovery in refusal hearings different than the procedure set forth in Chapter 804. Because both § 343.305 and § 801.01(2) are clear and unambiguous with respect to the issue in this case, we conclude that the discovery procedures contained in Chapter 804 apply to refusal hearings.

purpose behind drunk driving laws is "to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar."

STATE BAR
of WISCONSIN
5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

MEMORANDUM

To: Assembly Highway Safety Committee

From: State Bar of Wisconsin Criminal Law Section

Date: February 16, 2000

Re: AB666—Right to discovery in OWI cases.

The State Bar of Wisconsin Criminal Law Section **opposes AB666**—relating to the right to discovery in implied consent cases involving drunk driving.

The Section feels the bill is flawed because of its pretrial discovery components:

- It eliminates pretrial discovery, which is available to all civil litigants, even in small claims courts.
- Pretrial discovery allows both parties to learn about the strengths and weaknesses of the case outside of court.
- Pretrial discovery increases the likelihood of settlement without court litigation, thereby preserving precious judicial resources.

While the Criminal Law Section applauds efforts to reduce the devastating effect drinking and driving, an end run around pretrial discovery is inappropriate. In some cases the opportunity for one party to accept an offer out of court may no longer occur, because an attorney would have no way of knowing what evidence is available against his or her client.

Please consider these concerns carefully when deliberating on this important issue.

If you would like more information on the Criminal Law Section's position on AB666, please contact Cory Mason, State Bar of Wisconsin Government Relations Coordinator at 608/250-6128 or email him at cmason@wisbar.org.

STATE OF WISCONSIN CIRCUIT COURT BRANCH II MARINETTE COUNTY

STATE OF WISCONSIN,
Plaintiff

vs. Case No.00-CT-15

JAMES M. TAYLOR,
Defendant

REQUEST FOR ADMISSIONS

The State of Wisconsin, by the Marinette County District Attorney's Office, requests that the Defendant, James M. Taylor, admit or deny, prior to the refusal hearing, the following facts. This request is pursuant to Sec. 804.11, Stats.

As admission made under this section is for the purpose of the refusal hearing only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

If you cannot truthfully admit or deny such facts, you must set forth in detail the reasons why such admission or denial cannot be made.

You are advised that lack of information or knowledge may not be given as a failure to admit or deny unless you have made a reasonable inquiry.

****

1. Do you admit or deny that at approximately 6:26 p.m. on December 12, 1999, you were operating a motor vehicle on County W, in the Town of Stephenson in Marinette County, Wisconsin?
2. Do you admit or deny that you were arrested by Marinette County Sheriff's Deputy Daniel Beauchamp on December 12, 1999?

3. If you were so arrested, do you admit or deny that Deputy Daniel Beauchamp had probable cause for that arrest at the time of the arrest?

4. Do you admit or deny that at Bay Area Medical Center an officer requested that you submit to a test of your blood on December 12, 1999?

5. Do you admit or deny that the officer complied with Section 343.305(4), reading the required information prior to requesting a test?

6. Do you admit or deny that you refused to permit a chemical test of your blood on December 12, 1999?

7. Do you admit or deny that you were physically capable of submitting to the test of your blood on December 12, 1999?

_____

James M. Taylor, Defendant Date

Subscribed and sworn before me
this ____ day of _____, 2000.

_____

Notary Public
My commission expires: