COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2846 **Cir. Ct. No. 01-TR-3222**

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

CITY OF APPLETON,

PLAINTIFF-RESPONDENT,

V.

LAMAR J. TYRRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Lamar Tyrrell appeals from an order concluding that he had no basis to refuse to submit to chemical testing of his blood alcohol content after being arrested for operating a motor vehicle while under the influence of an

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

intoxicant. Prior to the refusal hearing, Tyrrell sought dismissal of the refusal proceeding, contending that the application of the penalties mandated by WIS. STAT. § 343.305 for refusing to submit to chemical testing constituted an infringement on his rights under the Fourth and Fourteenth Amendments. The trial court denied that motion and ultimately concluded that Tyrrell had no basis to refuse to submit to the requested test.

¶2 The only issues before the court at a refusal hearing are:

> (1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol [and lawfully placed the suspect under arrest]; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol.

State v. Wille, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994). If at least one of the issues is determined in favor of the defendant, "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." WIS. STAT. § 343.305(9)(d).

¶3 Tyrrell does not dispute that the officer had probable cause to arrest him and that the officer complied with the informational provisions of WIS. STAT. § 343.305(4). Tyrrell also does not claim that his refusal to submit to the test was due to a physical inability unrelated to his use of alcohol. Nor does he allege that the arresting officer made any specific threats or applied coercion beyond that which he claims arises under § 343.305, Wisconsin's implied consent law.

¶4 WISCONSIN STAT. § 343.305(2) provides in part:

> Any person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given

> consent to one or more tests 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 ... when requested to do so by a law enforcement officer.

¶5 The warnings provided under the implied consent law, WIS. STAT. § 343.305(4), include the following:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

¶6 Further, WIS. STAT. § 343.305(9)(a) provides in relevant part:

> If a person refuses to take a test under sub. (3)(a) [authorizing a law enforcement officer to "request the person to provide one or more samples of his or her breath, blood or urine"], the law enforcement officer shall immediately take possession of the person's license and prepare a notice to revoke ... the person's operating privilege.

Thus, the legislature has specified that if a person refuses to take a test, his or her license will be revoked and the officer, upon the refusal, shall immediately take action to bring about the revocation.

¶7 On appeal, Tyrrell makes his contention more specific by arguing that the refusal statute, at least to the extent that it imposes penalties for refusing to submit to testing, is unconstitutional because an individual has an absolute right to refuse to consent to a search and seizure. He reasons that although the State may have the lawful right to secure evidence from an accused, that does not imply that the State has the legal right to compel the accused to consent to providing that

evidence, nor does it allow the State to punish the person who refuses a request to do so. Tyrrell argues that the threatened sanction of a loss of driving privileges constitutes an impermissive coercive measure. He reasons that the legislature may not by statute circumvent Fourth and Fourteenth Amendment protections, which he contends the legislature has done by enacting WIS. STAT. § 343.305.

¶8 Thus, the sole issue on appeal is whether portions of WIS. STAT. § 343.305 are unconstitutional. This presents a question of law that we review de novo. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Tyrrell carries a heavy burden if he is to prevail in his attack upon the constitutionality of the statute. It is not enough that he establish doubt as to the act's constitutionality. Nor is it sufficient that he establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality. ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

¶9 Tyrrell's entire argument is based on the premise that his consent is coerced because of the sanctions provided by the implied consent statute. However, as the City correctly notes, the statute does not require the officer to ask for the accused's consent. That consent was given once Tyrrell elected to apply for a driver's license and operate a motor vehicle on a Wisconsin highway. As stated in ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980):

> Moreover, the state points out correctly that the accused intoxicated driver has no choice in respect to granting his consent. He has, by his application for a license, waived whatever right he may otherwise have had to refuse to submit to chemical testing. It is assumed that, at the time a driver made application for his license, he was fully

> cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute.

¶10 Tyrrell states that whether driving an automobile upon a public highway is a privilege is irrelevant to the constitutional issue. We disagree. Driving upon a public highway is a privilege and not an inherent right. ***Kopf v. State***, 158 Wis. 2d 208, 214, 461 N.W.2d 813 (Ct. App. 1990). As such, it is subject to reasonable regulation pursuant to the State's police power to regulate in the interest of public safety and welfare. We see no reason why the State cannot place conditions upon the exercise of this privilege. Nor has Tyrrell cited any authority prohibiting the State from placing such a condition upon the granting of this privilege. When people elect to exercise the privilege of operating a motor vehicle upon one of our public highways, they have also elected to consent to the taking of a lawfully requested chemical test of their blood alcohol content. By refusing to submit to such testing, thereby effectively withdrawing their consent, they cannot be expected to retain that privilege. This is not coercion. Rather, it is simply the result that occurs when one refuses to take the lawfully requested test after having initially consented to this condition.

¶11 Therefore, the circuit court correctly rejected Tyrrell's contention that the implied consent statute is unconstitutional and properly found that he had refused the lawfully requested chemical test.

By the Court.—Order affirmed.

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