COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and Rule 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0429

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK S. WITKOWSKI,

Defendant-Appellant.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

ANDERSON, P.J. Mark S. Witkowski appeals from an order of the circuit court finding that his refusal to submit to a chemical test of his breath was unreasonable. We affirm because we conclude that his criticisms of the informing the accused form are not well founded and he was given fair notice that if he had two or more convictions within ten years, it was possible that he would lose the use of his vehicle.

Witkowski was stopped and arrested by an officer from the New Holstein Police Department for drunk driving in violation of § 346.63(1)(a), STATS. In the ordinary course of the arrest, Witkowski was transported to the Calumet County Sheriff's Department to be given a chemical test of his blood. In anticipation of the test, the arresting officer read Witkowski the informing the accused form, and when asked if he would submit to a chemical test of his blood, Witkowski refused.

At the hearing on the reasonableness of his refusal, Witkowski insisted that portions of the informing the accused form were inaccurate statements of the potential penalties faced by three-time losers and there was a lack of certainty with regard to what penalties would apply. Specifically, he criticizes the language in paragraph five of Section A of the informing the accused form:

> If you have a prohibited alcohol concentration **or** you refuse to submit to chemical testing **and** you have two or more prior suspensions, revocations or convictions within a 10 year period and after January 1, 1988, which would be counted under s. 343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

His criticism incorporates language from §§ 343.307(1), (2) and 343.23, STATS., prescribing the length of time the Department of Transportation should retain certain records of licensed drivers. Witkowski constructs an argument that the information is so confusing that a person intent on obeying the law would not know if convictions within five or ten years of the date of

arrest would be counted in determining whether to deny the person the use of a motor vehicle he or she might own. He then relates this argument to due process principles that penalties must be prescribed with certainty or run afoul of constitutional protections.

The circuit court resolved all of Witkowski's claims against him and entered an order finding that his refusal was unreasonable.[1] On appeal, Witkowski raises the same claims. The State counters with two arguments. First, it argues that there was substantial compliance with the statute, and because Witkowski was a first time offender, the language he claims to be confusing did not apply to him. Second, on the merits, the State asserts that the language is not confusing, that a reasonable person would know that if he or she had two or more convictions within ten years of the arrest, the person could be subject to the vehicle forfeiture, immobilization and other provisions of the statutes.

This case presents an undisputed set of facts to which this court must apply a statute, thereby presenting a question of law to be reviewed de

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[1] The opinion and order of the circuit court were not included in the appendix to Witkowski's brief. RULE 809.19(2), STATS., provides, in part:

> The appellant's brief shall include a short appendix providing relevant docket entries in the trial court, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

Because Witkowski's brief utterly fails to comply with even the most basic requirements for an appendix, a separate order has been issued imposing a penalty on appellate counsel for Witkowski.

novo. ***State v. Zimmerman,*** 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994).

Section 343.305(4), STATS., sets out warnings that an officer must give to a drunk driving suspect who is requested to submit to chemical testing. The specific section of the statute at issue in this case states:

> If testing is refused, a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior suspensions, revocations or convictions within a 10-year period that would be counted under s. 343.307(1) and the person's operating privilege will be revoked under this section.

Section 343.305(4)(b).

The State contends that Witkowski had no prior convictions that would place him in danger of losing the use of his vehicle and, as read, the form did advise Witkowski of all rights and penalties relating to him. The State argues that the requirements of § 343.305(4), STATS., were substantially complied with and Witkowski's refusal to submit to a chemical test was unreasonable.

In determining whether substantial compliance occurred, this court construes § 343.305(4), STATS., to give effect to the legislature's intent. ***State v. Wilke***, 152 Wis.2d 243, 247, 448 N.W.2d 13, 14 (Ct. App. 1989). The intent in implementing the implied consent law is, in part, to "quash the effects of drunk driving." ***State v. Nordness,*** 128 Wis.2d 15, 34, 381 N.W.2d 300, 307-08 (1986). To that end, the courts generally give considerable weight to the state's

interest as long as the means it employs to effect its interests are within statutory bounds. ***Id.*** at 34, 381 N.W.2d at 308.

In ***State v. Piskula***, 168 Wis.2d 135, 137-38, 483 N.W.2d 250, 251 (Ct. App. 1992), an officer failed to deliver the commercial operator's license warnings to a noncommercial operator. Based on this failure, the operator argued that the revocation order for refusing to take the test was improper. This court disagreed, holding that the officer's warnings, although not in full compliance with the statute, constituted substantial compliance. ***Id.*** at 140-41, 483 N.W.2d at 252. The court concluded that substantial compliance with the implied consent statute will suffice if it is actual compliance with every reasonable objective of the statute. ***Id.***

The reasonable objective of the implied consent statute is to inform drivers of their rights and penalties for either refusing to submit to a chemical test or for submitting to a chemical test which results in a prohibited alcohol concentration. ***Id***. The court also said that informing a drunk driving suspect of all the rights and penalties relating to him or her was "actual compliance with respect to the substance essential to every reasonable objective of the statute." ***Id.*** at 141, 483 N.W.2d at 252.

In the instant case, the arresting officer informed Witkowski of his rights and penalties by reading from an informing the accused form. This form incorporated all of the language of § 343.305(4), STATS., including the language that "a motor vehicle owned by [Witkowski] may be immobilized, seized and forfeited or equipped with an ignition interlock device" if Witkowski had two

or more prior convictions within a ten-year period of the incident. This is the language that Witkowski claims is confusing. The language only applies to individuals with two or more prior drunk driving convictions. At the time of the incident in this case, Witkowski had never been convicted of drunk driving. Therefore, Witkowski was actually informed about the rights and penalties relating to him. Whether the language warning of the consequences detailed in § 343.305(4)(b), STATS., is confusing and violates due process does not have to be addressed because the warning given to Witkowski fulfilled the reasonable objective of the statute.

Therefore, this court concludes that the claimed ambiguities of the language of the informing the accused form, mirroring § 343.305(4)(b), STATS., did not thwart the purpose of the implied consent law. Since Witkowski was properly informed of the rights and penalties appropriate to him pursuant to § 343.305(4), there was actual compliance with respect to the substance essential to every reasonable objective of the statute. As a result, substantial compliance was achieved.

By the Court.—Order affirmed.

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