

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-3633

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF ANDREW J.
ZASTROW:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. ZASTROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

DYKMAN, P.J.¹ Andrew Zastrow appeals from an order revoking his operating privileges for refusing to submit to a test of his breath pursuant to

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

§ 343.305, STATS. He asserts that the trial court erred in revoking his operating privileges because the State failed to prove that the City of Watertown Police Department was prepared to administer a breath test. We conclude that the City of Watertown was not required to prove that it was prepared to administer a breath test. Accordingly, we affirm the trial court's order.

The facts leading up to Zastrow's refusal to submit to a breath test are not relevant, and we need not discuss them. The issue is one of law, which we review *de novo*. See ***State v. Vincent***, 171 Wis.2d 124, 127, 490 N.W.2d 761, 763 (Ct. App. 1992). Zastrow argues that § 343.305, STATS., must be read in its entirety. Specifically, Zastrow points to the last sentence of § 343.305(2), which reads: "The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first."

Zastrow assumes that because the legislature has required law enforcement agencies to be prepared to administer blood alcohol tests, the agencies must prove that they were so prepared before a person charged with operating a motor vehicle while intoxicated may have his or her license revoked. That is an incorrect assumption. Section 343.305(2), STATS., does not state that a person's operating privileges may not be revoked unless the agency is prepared to administer blood alcohol tests. The statute carries its own penalty. An agency not prepared to administer blood alcohol tests will be unable to convict persons arrested for operating a motor vehicle with a prohibited blood alcohol content.

The legislature is quite capable of providing penalties for failures to abide with mandatory statutes. Had it wanted to do so in § 343.305(2), STATS., it

could have. And it could have included the issue of whether the agency was prepared to administer blood alcohol tests as one of the issues to be determined at a refusal hearing. *See* § 343.305(9)(a)5. But the legislature did not do that.

In *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (1986), the supreme court held that the issues to be addressed at a revocation hearing are strictly limited to those issues enumerated in the statute. *Id.* at 19, 381 N.W.2d at 301. The court stated:

[T]he issues in that hearing are specifically limited to (1) whether the officer had probable cause to believe the person was driving under the influence of alcohol; (2) whether the officer complied with the informational provisions of Sec. 343.305(3)(a) [now § 343.305(4) and (4m)]; (3) whether the person refused to permit the test; and (4) whether the refusal to submit to the test was due to a physical inability. Section 343.305(3)(b)(5) [now § 343.305(9)(a)5].

Id. at 28, 381 N.W.2d at 305.

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). The court of appeals is bound by prior decisions of the Wisconsin Supreme Court. *State v. Olsen*, 99 Wis.2d 572, 583, 299 N.W.2d 632, 638 (Ct. App. 1980). We are not free to add to the issues in a refusal hearing when the supreme court has specifically listed the issues to which that hearing is limited.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

