**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

April 13, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2706**

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

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**IN THE MATTER OF THE REFUSAL OF MICHAEL A. OLDS:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL A. OLDS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Michael Olds appeals an order of the circuit court revoking his operating privileges for a period of one year based upon his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98).

refusal to submit to a blood test under WIS. STAT. § 343.305 (1997-98).[2] Olds makes two arguments on appeal: (1) He was not lawfully arrested for a violation of driving while under the influence of an intoxicant (OWI) in violation of WIS. STAT. § 346.63(1)(a) because the initial stop that led to the arrest was based on an ordinance that is unconstitutionally vague; and (2) the circuit court erroneously determined that he refused to submit to a blood test because the State failed to prove that the supplemental information in the hospital consent form did not act to discourage him from submitting to the test. We reject both arguments and affirm.

## BACKGROUND

¶2 The State presented two witnesses at the hearing, Deputy Shawn Becker of the Wood County Sheriff's Department and Deanna Ward, a lab technician at Riverview Hospital. The testimony was as follows. At approximately 1:50 a.m. Deputy Becker observed the car Olds was driving turn into a tavern parking lot, and the car "began to spin tires and spin some gravel up." There were other vehicles in the parking lot at the time, probably fifty to seventy-five feet away, and Deputy Becker did not believe that any of the vehicles were hit by the gravel. As Olds' car left the parking lot and continued onto Highway 73, Deputy Becker observed the tires spinning on the pavement and making a squealing noise. The car stopped at the intersection of Highways 73 and 13 and, as the vehicle turned north onto Highway 13, the tires squealed again.

¶3 Deputy Becker activated the emergency lights on his squad car and followed Olds' car, which did not stop but continued driving, turning eastbound

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

onto Church Avenue and then proceeding into a driveway. After the car stopped in the driveway, Olds got out and Deputy Becker asked him for his driver's license. Deputy Becker explained that he stopped him because of the way in which he had been driving, and Olds admitted to squealing his tires. Olds told Deputy Becker that he was upset over losing a girlfriend. Deputy Becker noticed an odor of alcoholic beverage coming from Olds, that his eyes were glassy and red, and his speech was slurred. While talking, Olds placed his hand on his car to help maintain his balance. Deputy Becker asked if he had been drinking. Olds answered that he had been drinking that evening, he couldn't remember how much he had been drinking, and he had just finished his last beer at a tavern.

¶4 After performing field sobriety tests and administering a preliminary breath test which showed a result of .15, Deputy Becker arrested Olds for OWI. He placed handcuffs on Olds, put him in the squad car, and took him to Riverview Hospital for a blood test. At the hospital parking lot, Deputy Becker issued a citation for OWI and warned Olds about the way he had been driving. Deputy Becker read Olds Sections A and B of the Informing the Accused form, checking each paragraph as he read it to Olds. Olds did not have any questions. In response to the officer's question whether Olds would submit to a blood test, Olds stated that he would answer once they were inside the hospital.

¶5 When they arrived at the lab in the hospital, Olds asked that a lab technician be present before he answered, and Deputy Becker had Ward join them. After Ward was present, Deputy Becker asked Olds again whether he would submit to the test and Olds answered that he would. Ward opened up a blood evidence kit, then asked Olds to sign the hospital's consent form, giving him the form. Olds looked at the form with his pen in his hand and stated that he was not going to do it. When Deputy Becker asked what he meant, Olds stated he was

refusing the test. Deputy Becker asked him why, and Olds responded that his job was too important. Olds asked to talk to a lawyer. Deputy Becker asked if he would like to talk to a lawyer right now from the lab and he said "no." At that point, Deputy Becker handcuffed Olds and transported him to the Wood County Jail. Deputy Becker changed the "yes" he had already marked on the form next to the question "Will you submit to an evidentiary chemical test of your blood?" to "no" and noted "change [sic] mind in lab" on the form.

¶6 Olds moved to dismiss the refusal proceeding on the two grounds that concern us here. First, Olds contended Deputy Becker initially stopped him for a violation of an ordinance prohibiting disorderly conduct with a motor vehicle, which is unconstitutionally vague. That makes the initial stop unlawful according to Olds, and the resulting arrest for OWI unlawful as well. Second, Olds contended the hospital consent form constituted supplemental information, and, since the State did not prove that its contents did not misinform or mislead him, the court could not, as a matter of law, determine that a refusal occurred. The trial court ruled against Olds on these and other issues, and entered an order revoking his operating privileges for a period of one year.

## DISCUSSION

¶7 The issues addressed at a revocation hearing under the implied consent law, WIS. STAT. § 343.305, are whether: (1) the officer had probable cause to arrest the defendant; (2) the officer correctly informed the defendant under the implied consent law; and (3) the suspect refused the test. *See* ***State v. Spring***, 204 Wis. 2d 343, 350, 555 N.W.2d 384 (Ct. App. 1996).

¶8 We first address Olds' challenge to his arrest, which rests on his challenge to the constitutionality of Wood County Ordinance 222.03. That provides:

> MISCELLANEOUS TRAFFIC REGULATIONS — DISORDERLY CONDUCT WITH A MOTOR VEHICLE
>
> (1) Conduct Prohibited. No person shall, within the County of Wood, by or through the use of any motor vehicle, including but not limited to an automobile, truck, motorcycle, minibike, or snowmobile, cause or provide disorderly conduct with a motor vehicle.
>
> (2) Definition. Disorderly conduct with a motor vehicle shall mean, while operating or in control of a motor vehicle to engage in conduct or activities which are violent, unreasonably loud, dangerous to persons or property, or otherwise against the public peace, welfare, and safety, including but not limited to unnecessary, deliberate or intentional spinning of the wheels, squealing of the tires, revving or racing of the engine, blowing of the horn, causing the engine to backfire, or causing the vehicle, while commencing to move or while in motion, to raise one or more wheels off the ground. Specifically excluded from this definition are legitimate, scheduled racing events.

¶9 Olds contends that this ordinance violates the due process clause because it is vague. This presents a question of law, which we review de novo. *See* ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 433, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds,* 231 Wis. 2d 293, 603 N.W.2d 541 (1999). The presumption is that the ordinance is constitutional and Olds has the burden of showing beyond a reasonable doubt that it is not. *See* ***id.*** at 433-34. The ordinance is unconstitutionally vague if, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited, persons of ordinary intelligence do not have fair notice of the prohibition, and those who enforce the laws lack objective standards and may operate arbitrarily. *See* ***id.*** at 434. Olds contends this

ordinance uses subjective terms and does not provide an objective standard for law enforcement.

¶10 We conclude the ordinance is not unconstitutionally vague. The common meanings of "violent" and "dangerous to persons or property" are not ambiguous. The term "unreasonably loud" is not unconstitutionally vague if the ordinance also sufficiently spells out the circumstances. *See* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 677-79, 470 N.W.2d 296 (1991). In ***City of Madison*** the court held that an ordinance prohibiting a person from "making any noise tending to unreasonably disturb the peace and quiet of persons in the vicinity thereof" sufficiently spells out the circumstances, because it means that which a reasonable person would conclude would disturb the peace and quiet of the vicinity. ***Id.*** at 678. We conclude here that the term "unreasonably loud" is limited by the phrase "or otherwise against the public peace, welfare, and safety," and meets the standard established in ***City of Madison***.

¶11 The Wood County ordinance provides further specificity by giving examples of violent, unreasonably loud or dangerous conduct in the operation or control of a motor vehicle. Two of these examples, "spinning of the wheels" and "squealing of the tires" are what Deputy Becker observed. In particular, Deputy Becker observed the tires of Olds' car spinning gravel up in a parking lot with other cars. Although his testimony was that none of the other cars were hit by the gravel, his observation provided a basis for him to have a reasonable suspicion that Olds was unnecessarily spinning the tires and that this conduct could be dangerous to persons or property. Thus the initial stop was lawful. *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996) (traffic stop is constitutionally permissible if officer has grounds to reasonably suspect traffic violation has been or will be committed); *see also* ***State v. Krier***, 165 Wis. 2d 673,

678, 478 N.W.2d 63 (Ct. App. 1991) (investigatory stop constitutionally permissible when conduct may constitute only a civil forfeiture).

¶12 Next, we consider Olds' argument that the State did not meet its burden of proving he refused to submit to a test because it did not introduce the hospital consent form, and, therefore, did not demonstrate that the form did not misinform or mislead him as to the implied consent law. Olds correctly points out that a refusal to submit to a chemical test for intoxication cannot result in revocation of operating privileges unless the person has first been adequately informed of his rights under the implied consent law. *See* ***State v. Schirmang***, 210 Wis. 2d 325, 330, 565 N.W.2d 225 (Ct. App. 1997). Olds also relies on ***Spring***, 204 Wis. 2d at 350-52. In ***Spring***, after the suspect agreed to submit to a blood test he was given a hospital form to sign, which he construed as a waiver of liability as to the hospital and its medical personnel; and, for that reason, the suspect refused to sign the consent portion of the form. *See* ***id.*** at 349. The officer considered his refusal to sign that consent form as a refusal under the implied consent law and charged him with illegally refusing to submit to a chemical test. ***Id.*** We held that although WIS. STAT. § 343.305 did not expressly authorize a law enforcement officer or a medical facility to require an OWI suspect to sign a written consent form before a chemical test was administered, if the content of the form does not misinform or mislead the suspect as to the implied consent law, then the use of such a form does not violate the statute and the refusal to sign it may be considered a refusal under the statute. *See* ***id.*** at 350-53.

¶13 The circuit court here found that Olds' stated reason for refusing the blood test was not that he did not want to sign the hospital's consent form; rather, the circuit court found that Olds refused the test because he was afraid of the impact of a blood test result on his job. Therefore, the court apparently did not

view ***Spring*** as controlling, and determined that Olds had refused even though the consent form was not in the record.

¶14 We accept the findings of the circuit court, including the reasonable inferences drawn from the test evidence, unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The circuit court's finding that the request that Olds sign the hospital consent form had nothing to do with his decision to refuse the test is not clearly erroneous, and we agree that ***Spring*** is not controlling because it differs factually from this case in a significant way. In ***Spring*** it was necessary for the court to analyze the contents of the consent form to determine whether it misinformed or misled the suspect, since the suspect refused to sign the form because of his view of its contents. When, as here, there is no evidence that the hospital consent form had anything to do with the suspect's refusal to take a test, it is not necessary for the court to analyze the contents of the consent form in order to determine whether or not the suspect was misinformed or misled.

¶15 Olds argues the State has the burden of proving all the elements of a refusal, including whether the officer correctly informed the suspect under the implied consent law, and cannot meet this burden unless it presents all the information given the suspect—in this case, the hospital consent form. We disagree. Olds relies on ***State v. Wille***, 185 Wis. 2d 673, 518 N.W.2d 325 (Ct. App. 1994). ***Wille*** holds that at a refusal hearing the State's burden of persuasion on the issue of probable cause is less than that at a suppression hearing. *See* ***id.*** at 681. ***Wille*** does not support an argument that the State has the obligation to introduce into evidence the hospital consent form, when there is no evidence that the consent form had anything to do with the suspect's refusal to take the test. Indeed, case law indicates that it is the burden of the suspect to demonstrate that the officer did not properly inform him or her. In ***Shirmang***, 210 Wis. 2d at 330,

we stated, citing ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995): "In order to successfully challenge the sufficiency of the warning given by a law enforcement officer under [WIS. STAT.] § 343.305(4), an accused driver must satisfy a three-pronged test: (1) the requesting officer either failed to meet or exceeded his duty to inform the accused under § 343.305(4); (2) the lack or oversupply of information was misleading; and (3) the driver's ability to make the choice about whether to submit to chemical testing was affected." In ***Quelle***, 198 Wis. 2d at 282-85, we observed that although that suspect met the first part of this standard, "she fail[ed] to provide evidence that the officer gave her false information." ***Id.*** at 285.

¶16 We conclude Olds was properly informed under the informed consent law. We therefore affirm the circuit court's determination that he refused the test, and the order revoking his operating privileges.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.