COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0689-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM L. TINDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] William L. Tinder appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant. He suggests that the circuit court erred in denying his motions to

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

suppress evidence of his blood alcohol content. For the following reasons, we affirm.

¶2 On February 1, 2000, Tinder was arrested for operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). Tinder was read an "Informing the Accused" form in compliance with WIS. STAT. § 343.305(4). Among other things, the form explained that Tinder could refuse to submit to chemical testing of his breath, blood or urine, and that, if he refused, his driving privileges would be revoked and he could be subjected to other penalties. *See* § 343.305(4). Tinder submitted to a blood draw, and the sample was sent to the Wisconsin State Laboratory of Hygiene.

¶3 Tinder filed four motions to suppress evidence of his blood alcohol content. When the circuit court denied those motions, Tinder pled no contest to a charge of operating a motor vehicle while under the influence of an intoxicant.

¶4 On appeal, Tinder does not challenge his arrest. Rather, he argues that the circuit court erred in dismissing his motions to suppress evidence of his blood alcohol content. Tinder suggests that the seizure of his blood was unconstitutional because WIS. STAT. § 343.305[2] violates the Fourth Amendment to the United States Constitution. More specifically, Tinder argues that "implied consent" under the statute is coerced consent and is, therefore, invalid. Alternatively, Tinder argues that the analysis of his blood was a separate constitutional event from the draw of his blood which cannot be justified on the

[2] WISCONSIN STAT. § 343.305(2) provides that "[a]ny person who … drives or 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 … of alcohol …."

basis of the "exigent circumstances" exception to the warrant requirement. This is because once the blood was removed from his body, there was no longer a threat of the alcohol's dissipation.

¶5 Because we conclude that Tinder failed to properly notify the attorney general of his constitutional challenge to WIS. STAT. § 343.305, we do not consider his arguments on appeal.

¶6 When a constitutional challenge to a statute is made, the attorney general must "be served with a copy of the proceeding and be entitled to be heard." WIS. STAT. § 806.04(11); *see* ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979) (holding that § 806.04(11) applies to all constitutional challenges to laws, and not just to declaratory judgments). Under ***Kurtz***, a party will be "foreclosed from challenging the validity of a statute unless the attorney general is given an opportunity to appear before the court and defend the law as constitutionally proper." ***State v. Mark A.***, 177 Wis. 2d 551, 561 n.8, 503 N.W.2d 275 (Ct. App. 1993).

¶7 On appeal, Tinder included a copy of a letter addressed to the attorney general in the appendix to his reply brief which indicates that Tinder mailed copies of his four motions to suppress to the attorney general at the time those motions were made. Apparently recognizing that this court is not to consider documents not appearing in the record, *see* ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977), Tinder subsequently made a motion to supplement the record with a copy of that letter. Tinder's motion is hereby denied.

¶8 Even if we were to grant Tinder's motion to supplement the record with a copy of the letter to the attorney general, we would consider his

constitutional challenge waived because none of the four motions to suppress would have notified the attorney general that Tinder was asserting that WIS. STAT. § 343.305 is itself unconstitutional. Indeed, Tinder argued within the motions that (1) the seizure of his blood was unreasonable because the police could have taken a breath analysis; (2) the seizure of his blood violated the Warrant Clause of the Fourth Amendment to the United States Constitution because no exigency existed allowing for the seizure of the blood without a warrant; and (3) the analysis of his blood was a separate search requiring a warrant. Nowhere within any of the four motions did Tinder argue, as he does on appeal, that "implied consent" under the statute is coerced consent and, therefore, § 343.305 is unconstitutional. Accordingly, we see no reason to grant Tinder's motion to supplement the record.

¶9 Consequently, we do not consider Tinder's constitutional challenge to WIS. STAT. § 343.305. Because Tinder's implied consent to the blood draw for purposes of discovering his blood alcohol content, pursuant to § 343.305, is by itself an independent basis upon which this court may affirm Tinder's conviction, we need not consider his alternative argument that no other exceptions to the warrant requirement exist which would support the admission of evidence of his blood alcohol content. Therefore, we affirm.

By the Court.—Judgment affirmed.

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