COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 25, 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. 95-0392

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS SPARKS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

LaROCQUE, J. Thomas Sparks appeals an order revoking his driving privileges for refusal to take a chemical test following his OWI arrest. Sparks contends that his statement that he would not take the test "without my attorney" should not be construed as a refusal because the police officer had a duty to inform him that he had no right to counsel prior to chemical testing. Because Wisconsin law does not compel the officer to so inform an accused, and because Sparks refused repeated requests to take the test, this court affirms the order.

The relevant facts are undisputed. Following the OWI arrest, a deputy sheriff asked Sparks on four occasions to submit to a breath test. On

each occasion, Sparks replied, "Not without my attorney." The officer then construed Sparks' response as a refusal.

Sparks concedes that under Wisconsin law an accused drunk driver has no right to counsel prior to chemical testing, ***State v. Neitzel***, 95 Wis.2d 191, 289 N.W.2d 828 (1980), and that it is not necessary for the police to give the accused ***Miranda*** warnings before requesting that he or she submit to a chemical test under our implied consent law. ***State v. Bunders***, 68 Wis.2d 129, 133, 227 N.W.2d 727, 730 (1975). Sparks contends, however, that "fundamental fairness as well as common sense and courtesy" require the police to inform the accused who requests an attorney that he is not entitled to counsel prior to deciding whether to take the test.

This court disagrees. ***Neitzel*** states: "Because the clear policy of the statute is to facilitate the identification of drunken drivers and their removal from the highways, the statute must be construed to further the legislative purpose." ***Id.*** at 193, 289 N.W.2d at 830. Thus, ***Neitzel*** concluded, "it was for the legislature, not the court, to balance the purpose of the statute against a possible statutory right to counsel prior to testing." ***Id.*** at 204, 289 N.W.2d at 835. The statute has been consistently construed to require only that the police officer inform the accused of his or her rights and responsibilities therein described. The statute does not include the right to be informed that a person accused of OWI has no right to counsel prior to testing.

Sparks cites a Pennsylvania Supreme Court decision, ***DOT v. O'Connell***, 555 A.2d 873 (Pa. 1989), holding after an OWI accused has been given ***Miranda*** warnings and then asks to contact an attorney, fairness dictates that the police advise the accused that ***Miranda*** warnings have no application to chemical testing, and that a test refusal will result in the applicable penalties. The court reasoned that the advice is necessary to avoid confusing the accused, who is first told of a right to counsel, and, after attempting to exercise the right, is told he has refused the test without further explanation. ***O'Connell***, 555 A.2d at 878. There is no need to decide whether to apply ***O'Connell*** in Wisconsin because the record fails to demonstrate that Sparks was given ***Miranda*** warnings.

Sparks also cites a decision of the Commonwealth Court of Pennsylvania, ***Kheyfets v. Commonwealth***, 654 A.2d 102 (Pa. 1995), extending the requirement of an ***O'Connell*** warning where the accused asked to speak to her husband before submission to a test, and where no ***Miranda*** warnings had been given. This court rejects ***Kheyfets*** for several reasons. First, the case offers no rationale for its holding, whether it is founded upon constitutional principles of due process or a public policy decision of the court. If Sparks is suggesting a new judicial policy, that pronouncement should come from our supreme court. Further, the ***Kheyfets*** decision appears to be inconsistent with the declared legislative policy of this state to strictly enforce the provisions of the implied consent law in order to remove drunk drivers from the public highways. Finally, ***Kheyfets*** and Sparks cite no authority whatsoever for the proposition that the absence of an ***O'Connell*** warning reaches the level of a constitutional right. The request for this court to impose the warning as a condition of finding a refusal to take a chemical test unjustified is therefore rejected.

By the Court. – Order affirmed.

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