COURT OF APPEALS
DECISION
DATED AND RELEASED

January 22, 1997

NOTICE

No. 96-2566

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN F. O'BRIEN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Sheboygan County: JOHN BOLGERT, Judge. *Affirmed*.

BROWN, J. John F. O'Brien appeals from an order finding that he unreasonably refused to consent to taking a blood alcohol test following his arrest for driving while intoxicated. He argues that the statutes must be read to say that the Informing the Accused communication must be given just prior to the time an actual "specimen" is taken. Because O'Brien was being asked to take a blood test, because he was still at the police station when the

Informing the Accused narrative was being read to him and because he would still have to be driven to the hospital to take the actual test, O'Brien thinks the statute was not followed. We reject his construction of the statute and affirm.

O'Brien was brought to the police station following his arrest for driving while intoxicated and the Informing the Accused form was read to him. He refused to take the test. The officer then suggested to him that he contact an attorney to discuss the ramifications of his refusal, and O'Brien then placed a call to a person he identified as a nephew who was a Cook County Circuit Court judge. The officer happened to overhear O'Brien talking on the telephone and heard O'Brien say he had "bad lungs." After the phone call, the officer asked why O'Brien made the statement regarding the "bad lungs" and O'Brien told him that he had emphysema. The officer then advised O'Brien that because of the emphysema, the officer could switch the primary test to a blood test. The officer readvised him of the Informing the Accused, this time inserting the blood test in place of the breath test, and O'Brien again refused. The officer gave him several more chances and was unsuccessful. Finally, the officer programmed the breathalyzer machine and gave O'Brien one last opportunity. O'Brien refused again. The officer marked O'Brien as a refusal. O'Brien contested the refusal in a hearing before the trial court and lost. He now comes here on appeal.

O'Brien raises only one issue on appeal and it involves statutory construction. He cites § 343.305(4), STATS., which says that an accused must be orally informed of his or her rights and obligations under the law "[a]t the time

a chemical test specimen is requested ...." O'Brien places emphasis on the word "specimen" and then argues that the clear, unambiguous meaning of the statute is that the Informing the Accused form be read immediately before the specimen is collected. In other words, the plain wording of the statute is that the legislature meant to create a temporal connection between the reading of the form and the collection of the specimen. O'Brien argues that the construction he proposes is consistent with the legislative desire to facilitate the taking of the test.

We agree with O'Brien that the statute is plain and unambiguous. However, we disagree with his interpretation. The language of the statute reads that the rights and obligations be given to the accused "[a]t the time a chemical test specimen *is requested*." *See* § 343.305(4), STATS. (emphasis added). The emphasis should not be placed upon the word "specimen," as O'Brien has done, but on the words "is requested." An officer "requests" that *consent* be given to take the test. The statute unambiguously says that there must be temporal proximity between the reading of the rights and obligations and the "request" to consent. There is no need to conduct the test immediately, but there is a need to ask for consent right away.

So here, the fact that O'Brien was read his rights and obligations at the police station and would have had to be transported to the hospital for a test is irrelevant. The fact that O'Brien was read the Informing the Accused form and was immediately asked to consent to take the test *is* relevant. The record

shows compliance with the statute and O'Brien loses on his statutory construction claim.

In our view, O'Brien's interpretation would work absurd and unreasonable results. If O'Brien's construction were the law, officers would have to *first* transport the accused to the hospital and *then* read the form. That would make for lost time if the accused then refused to take the test. The officers, who could have been back on the street patrolling the neighborhoods, would instead be faced with "dead time" in transporting an accused to the hospital and back, all for nothing. We doubt that the legislature contemplated such result.

By the Court. – Order affirmed.

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