COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3245-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS M. STANTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

BROWN, J. The law is clear that physical inability to perform a blood alcohol test is a defense to refusing to consent to the test. *See* § 343.305(9)(a)5.c, STATS. The sole issue is whether the trial court imposed, as a condition precedent to raising this affirmative defense, an obligation to show that the defendant informed the officer that physical inability was the basis for refusing to submit to the test. We hold that the trial court did not do so and affirm.

Dennis M. Stanton was involved in an accident and, after investigation, was cited for driving while intoxicated. The officer noted that Stanton had sustained a head injury and was bleeding from that injury. Medical personnel arrived at the scene and assisted Stanton by giving him gauze to stop the bleeding. Stanton was then transported to the police station and was asked to consent to a breath test. He refused to submit and gave no reason for his refusal.

At the refusal hearing, Stanton testified that he was dazed and nauseous from the accident. He stated that he did not know if he was going to pass out and "didn't want to lose nothing." The trial court ruled that Stanton had not borne his burden of proving his affirmative defense. The court said, "I think I need more than that." The court gave several different reasons for this determination. It opined that Stanton's subjective reason failed to rise to the kind of physical inability which would prevent him from taking the test. The court commented that Stanton did not tell the officer that he had any difficulty or feared for his potential safety—that he would pass out if he gave a breath sample. The court also opined that the circumstances of the accident did not show that Stanton was injured that severely; rather, that Stanton knew who he was and where he was, that he knew he was under arrest and that he went through the procedures without any showing that his injury was significantly affecting him. In other words, the court doubted Stanton's credibility when he testified that his injury was severe enough to cause him concern about passing out if he took the test.

Stanton complains that, in reality, the court established a prerequisite that a defendant must first iterate to the officer that physical inability is the reason for refusing. We disagree. All the court was doing was providing various reasons why it did not believe Stanton's explanation to be credible. Certainly if a defendant *were* to tell a police officer that some physical inability was preventing

him or her from taking the test, that defendant's credibility would be enhanced in the eyes of the fact finder. The trial court quite obviously felt this to be the case. But that does not mean that the trial court believed it to be a prerequisite. The trial court's opinion in no way can be construed as a position that it would never find a reasonable refusal absent the officer being given a reason for the refusal. We affirm.

By the Court.—Order affirmed.

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