COURT OF APPEALS
DECISION
DATED AND RELEASED

July 16, 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. 97-0433-FT

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKI D. BUNNELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

NETTESHEIM, J. Ricki D. Bunnell appeals from an order revoking his driving privileges based on the circuit court's determination that he

improperly refused to submit to a chemical test.[1] Bunnell contends that because he already had submitted to an intoxilyzer test, the officer's request that he submit to a further test was improper. Based upon the plain language of § 343.305(3)(a), STATS., we hold that the request for the further test was proper. We affirm the trial court's order.

The facts relative to the appellate issue are straightforward and uncontested. Bunnell was arrested for operating while intoxicated (OWI). The arresting officer asked Bunnell to submit to an intoxilyzer test. Bunnell agreed. The test produced a result above the prohibited alcohol concentration. The officer then asked Bunnell to submit to a second test. Bunnell refused. The State then commenced this refusal action pursuant to § 343.305(9), STATS. The trial court held that Bunnell had improperly refused to submit to the second test. Bunnell appeals.

> Section 343.305(3)(a), STATS., provides in relevant part:
>
> Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith … a law enforcement officer may request the person to provide *one or more samples* of his or her breath, blood or urine for the purpose specified under sub. (2). *Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.* [Emphasis added.]

The clear language of this statute allows the law enforcement officer to request more than one test. Bunnell argues, however, that the legislature

[1] The order recites that Bunnell's refusal was unreasonable. However, reasonableness is no longer a factor in a refusal proceeding under the implied consent law. Under current law, in addition to other factors, the inquiry is whether the suspect refused the test. If so, the refusal is excused only if it was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs. *See* § 343.305(9)(a)5.c, STATS.

intended to permit a further test only if the initial test result was below the prohibited alcohol concentration. But that is not what the statute says.

Bunnell concedes that in ***State v. Donner***, 192 Wis.2d 305, 312, 531 N.W.2d 369, 372 (Ct. App. 1995), this court held that a second request for a chemical test was proper.[2] Bunnell argues, however, that ***Donner*** should not govern this case because there the defendant's intoxilyzer test produced a .09% blood alcohol concentration. Bunnell reasons that we approved the second test request because the result from the first test was under the prohibited blood alcohol concentration. However, our decision did not use this rationale as a basis for the holding. Instead, we simply looked to the statute, observing that it permitted the law enforcement officer to request *one or more* samples and that the suspect's compliance with the initial test request did not bar a subsequent request for a different test. *See* ***id***.

We conclude that ***Donner*** and the plain language of § 343.305(3)(a), STATS., controls this case. We affirm the order revoking Bunnell's driving privileges.

By the Court.—Order affirmed.

[2] Our holding in ***State v. Donner***, 192 Wis.2d 305, 531 N.W.2d 369 (Ct. App. 1995), was made in the context of an appeal from an OWI conviction, not an appeal from a revocation order in a refusal hearing which is the situation here. Nonetheless, we conclude that the holding applies with equal force in this case.

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