COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0521

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES E. STERLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

BROWN, J. James E. Sterling appeals an adverse finding from a refusal hearing arising from his arrest for intoxicated driving. Sterling observes that, under one provision of our statutes, a person who has more than two suspensions, revocations or convictions within ten years may have his or her motor vehicle immobilized, seized and forfeited or equipped with an ignition interlock device. He complains, however, that other statutes give a reasonable

person the impression that a person only faces these sanctions if there are two or more revocations or the like within five years. Sterling argues that since the statutes are confusing in this area, he must be held to have reasonably refused as a matter of law because of his due process right to adequate notice of the penalties he might face upon refusal. But the issue he raises is irrelevant to whether he reasonably refused. Also, he lacks standing to even raise the issue because the trial court never entered any of the sanctions he complains he was unjustifiably exposed to. We affirm.

A police officer stopped Sterling's vehicle after observing him speeding and driving erratically. The officer suspected that Sterling was intoxicated and had him perform several field sobriety tests. Sterling failed the tests and he was placed under arrest for driving while under the influence of intoxicants. The officer took Sterling to police headquarters for further chemical testing. As required by § 343.305(4), STATS., the officer read Sterling the provisions of the Informing the Accused form. After being read the form, Sterling refused to take the test. Sterling provided the officer with no explanation for his refusal.

At the refusal hearing, Sterling challenged the constitutional validity of § 343.305(4)(b), STATS, which is the provision relating to the restraints on his motor vehicle that we described above. The trial court dismissed this claim, holding that the argument made at the hearing had nothing to do with why Sterling refused to take the test. The trial court then suspended Sterling's driving privileges for one year.

Sterling argues that when §§ 343.305(4)(b), 343.307(1) and 343.23(2)(b), STATS., are read together, they create contradictory interpretations of

how and when the penalties of § 343.305(10m) apply and thereby violate his due process rights.[1]

But a refusal hearing is limited in scope to determining whether the officer had probable cause and complied with § 343.305(4), STATS., and whether the driver justifiably refused to submit to the test. *See* § 343.305(9)(a)5. It is a factfinding process that determines whether the driver had a legitimate reason to refuse the test. At the refusal hearing, Sterling gave no legitimate reason for his refusal to take the test. Sterling did not claim that the officer lacked probable cause or that the officer failed to comply with § 343.305(4). He pointed to no physical disability or disease that caused him to refuse the test, *see* § 343.305(9)(a)5.c, nor did he claim that the officer failed to comply with § 343.305(4), thereby causing him to refuse the test. *See* ***County of Ozaukee v. Quelle,*** 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995). Instead, Sterling's lone argument is that because the statute is ambiguous as to how and when the penalties in § 343.305(10m) apply, he is now, in hindsight, justified in refusing the test. However, this argument does not address any of the issues germane to a refusal hearing. Therefore, we affirm the trial court's finding that Sterling unreasonably refused the test.

[1] Section 343.305(4)(b), STATS., states that a police officer must inform the driver that if he or she refuses the test, and the driver has "2 or more prior suspensions, revocations or convictions within a *10-year period* that would be counted under s. 343.307(1)," the motor vehicle owned by the driver may be "immobilized, seized and forfeited or equipped with an ignition interlock device." (Emphasis added.) Section 343.305(10m) grants the trial court the authority to impose this sanction. Sterling argues that because § 343.23(2)(b), STATS., does not specifically state that the records of prior suspensions, revocations or convictions listed in § 343.307(1), STATS., are retained for ten years, it is ambiguous whether the State retains those records for ten years. Therefore, Sterling argues a due process violation occurs because at the time of his refusal he could not have ascertained whether the State retained these records for ten years and, therefore, whether the court could sanction him under § 343.305(10m).

Moreover, we note that Sterling lacks standing to pursue his due process claim. When a defendant raises a constitutional challenge to a legislative, executive or administrative act, the initial inquiry is whether the defendant has standing to raise the challenge. The standing inquiry is divided into two parts. First, defendants must allege that they have "'suffered "some threatened or actual injury resulting from the putatively illegal action."'" *See* ***State ex rel. First Nat'l Bank v. M & I People's Bank,*** 95 Wis.2d 303, 308, 290 N.W.2d 321, 325 (1980) (quoted sources omitted). To meet this injury requirement, the defendant must demonstrate a "'personal stake in the outcome of the controversy.'" *See* ***id.*** at 308-09, 290 N.W.2d at 325 (quoted source omitted). Only after the injury requirement is satisfied does the court ask "'whether the constitutional ... provision on which the claim rests properly can be understood as granting persons in the [defendant's] position a right to judicial relief.'" *See* ***id.*** at 308, 290 N.W.2d at 325 (quoted source omitted).

Sterling has failed to show that he was injured by the alleged statutory inconsistency. The premise of Sterling's due process claim is that the alleged statutory inconsistency did not give him sufficient notice as to whether his refusal would result in his vehicle being immobilized, seized and forfeited, or fitted with an ignition interlock device under § 343.305(10m), STATS. However, Sterling's argument fails to recognize that the trial court did not sanction him under § 343.305(10m), but simply revoked his driving privileges for one year under § 343.305(10). Moreover, Sterling points to nothing in the record indicating that he was ever at risk of being sanctioned under § 343.305(10m), and the record does not disclose whether Sterling had two prior offenses within a ten-year period that would be counted under § 343.307(1), STATS. Therefore, even if we accepted Sterling's due process claim, the sanction imposed on him by the trial court would

not change; Sterling has no personal stake in the outcome of this controversy. Because Sterling has suffered no injury, we reject his constitutional challenge for lack of standing.

By the Court.—Judgment affirmed.

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