COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3642-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH L. O'DAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

SNYDER, P.J. Joseph L. O'Day appeals from his conviction of operating a motor vehicle while intoxicated (OWI) contrary to § 346.63(1)(a), STATS., and from an order denying his motion to suppress a blood alcohol test result obtained under § 343.305, STATS., Wisconsin's Implied Consent Law. He challenges the application of § 343.305(4) on a constitutional due process basis by contending that the statute deprives a test subject of the right to make an informed

choice to either take or refuse the test. We conclude that O'Day's appeal does not raise an issue of constitutional stature, and we affirm the judgment and the order.

After being charged with OWI, O'Day filed a motion to suppress the chemical test result obtained following his arrest. In his motion, he claimed that the test result violated his constitutional due process right to make an informed choice to either take or refuse the chemical test. His motion was denied. During a pro forma bench trial, O'Day stipulated that he was arrested in the city of Oshkosh for OWI on April 7, 1998, escorted to Mercy Medical Center, issued a citation for OWI and read the Informing the Accused form. O'Day then consented to a chemical test of his blood that reported a blood alcohol content of 0.236%. After unsuccessfully renewing his constitutional due process challenge to the chemical test at his pro forma trial, he was convicted of OWI.

The focus of O'Day's appeal is the required warning language in § 343.305(4), STATS., which reads:

> INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:
>
> ....
>
> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. *If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties.* The test results or the fact that you refused testing can be used against you in court. [Emphasis added.]

O'Day contends that his suppression motion presents an appellate issue of constitutional magnitude as to whether the above-highlighted

§ 343.305(4), STATS., warning language unconstitutionally denies a test subject a due process right to make an informed choice to take or refuse a chemical blood test. Whether a given statute is compatible with constitutional mandates is a question we review independently of the determination of the circuit court. *See* ***State v. Dennis***, 138 Wis.2d 99, 103, 405 N.W.2d 711, 713 (Ct. App. 1987). A challenger to the constitutionality of a statute has the burden of proof beyond a reasonable doubt. *See* ***id.***

O'Day premises his constitutional argument upon the United States Supreme Court's decision in ***South Dakota v. Neville***, 459 U.S. 553 (1983), recognizing that a chemical test subject must be correctly apprised of the consequences of refusing to submit to chemical testing. *See* ***id.*** at 565. O'Day contends that because the § 343.305(4), STATS., language understates the consequences of submitting to the chemical test and overstates the consequences of refusing to submit to a chemical test, the statute unconstitutionally violates ***Neville***'s directive.[1] We cannot agree for several reasons.

First, contrary to O'Day's premise, ***Neville*** does not support a constitutional due process challenge to Wisconsin's Implied Consent Law. After analyzing the ***Neville*** decision, our supreme court held that the United States Supreme Court rejected applying the rule of constitutional stature to a chemical test refusal and then concluded that in Wisconsin, "[t]he right to refuse a blood alcohol test is simply a matter of statutory privilege." ***State v. Crandall***, 133 Wis.2d 251, 255, 394 N.W.2d 905, 906 (1986).

[1] O'Day does not contend that the arresting officer failed to read him all of his rights and the potential penalties as required by § 343.305(4), STATS.

Second, the § 343.305, STATS., due process issue raised by O'Day has been addressed in ***Crandall***, where our supreme court held that the information required by § 343.305(4) is all that is needed to meet due process requirements.[2] *See* ***Crandall***, 133 Wis.2d at 259-60, 394 N.W.2d at 908. This court is bound by the prior decisions of the Wisconsin Supreme Court. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

Third, contending that the § 343.305(4), STATS., warning language understates the consequences of failing a chemical test, O'Day argues that he was constitutionally misled in making an informed choice to submit to the chemical test. However, a Wisconsin driver has no choice with respect to granting his or her consent to take the chemical test. *See* ***State v. Neitzel***, 95 Wis.2d 191, 201, 289 N.W.2d 828, 833 (1980). He or she is deemed by law to have already consented to submit to a test upon applying for and accepting a driver's license. *See* ***id.*** Informing a Wisconsin driver that he or she may lose his or her driving privileges by *refusing* a chemical test is sufficient to satisfy the Due Process Clauses of the United States and Wisconsin Constitutions. *See* ***Crandall***, 133 Wis.2d at 256, 394 N.W.2d at 907. While Wisconsin recognizes a statutory right to refuse a blood test when there has not been substantial compliance with the requirements in § 343.305(4), *see* ***State v. Schirmang***, 210 Wis.2d 324, 332, 565

[2] Other constitutional challenges to Wisconsin's Implied Consent Law have been raised in the past and failed. *See* ***State v. Crandall***, 133 Wis.2d 251, 394 N.W.2d 905 (1986) (holding that the Due Process Clause of the Wisconsin Constitution does not require that a suspect be forewarned that a refusal to submit to a chemical test could be used as evidence against him or her); ***County of Milwaukee v. Proegler***, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980) (the failure to inform a suspect at the time of arrest that his or her operator's privilege can be revoked upon a plea of guilty does not violate due process); ***State v. Nordness***, 128 Wis.2d 15, 381 N.W.2d 300 (1986) (procedural due process does not require a determination at a refusal hearing that the defendant was the driver of the vehicle).

N.W.2d 225, 229 (Ct. App. 1997), O'Day does not present that issue in this appeal.

In sum, contrary to O'Day's contention, ***Neville*** does not support his constitutional due process claim concerning the application of § 343.305(4), STATS. Besides ***Neville***, O'Day cites to no other cases or authorities pertinent to his constitutional due process challenge to § 343.305(4). "To simply label an alleged procedural error as a constitutional want of due process does not make it so." ***State v. Schlise***, 86 Wis.2d 26, 29, 271 N.W.2d 619, 620 (1978). In light of our supreme court's pronouncement in ***Crandall*** that ***Neville*** does not support a chemical test claim sounding in constitutional due process, we must conclude that this appeal fails to present an appellate issue of constitutional proportion.

By the Court.—Judgment and order affirmed.

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