COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1483

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

COUNTY OF ONEIDA,

PLAINTIFF-RESPONDENT,

V.

DONALD L. CLARKSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Donald Clarksen appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant. Clarksen claims that information in the Informing the Accused form derived from

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

WIS. STAT. § 343.305(4) deprives suspected drunk drivers of their due process rights and misled him into consenting to the requested chemical test. This court rejects Clarksen's claim and affirms the circuit court's judgment.

¶2 On August 27, 1998, while operating his motor vehicle, Clarksen was stopped, detained and arrested for operating a motor vehicle while under the influence of an intoxicant. He was transported to the Oneida County Sheriff's Department where the Informing the Accused form was read to him and he was asked to submit to a chemical test of his breath for purposes of determining the alcohol concentration. Clarksen consented to the request and tested above the prohibited limit resulting in the charges of OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC). Prior to trial, the trial court rejected Clarksen's challenge to the constitutionality of WIS. STAT. § 343.305(4). Clarksen then consented to a pro forma trial at which he was found guilty of OWI and the PAC charge was dismissed.

¶3 Clarksen's sole contention on appeal is that Wisconsin's implied consent law is unconstitutional on its face and its application in that it under-informs accused individuals about the consequences of submitting to a chemical test while erroneously over-informing them of consequences for refusing a chemical test. Thus, Clarksen claims that the statute deprives a test subject of the constitutional right to make an "informed choice" to either take or refuse the test.

¶4 The focus of Clarksen's appeal is the required warning language in WIS. STAT. § 343.305(4), which provides, in part:

> 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:

> "You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.
>
> 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.)

¶5 Relying on ***South Dakota v. Neville***, 459 U.S. 553 (1983), in which the United States Supreme Court recognized that a chemical test subject must be correctly apprised of the consequences of refusing to submit to chemical testing. Clarksen contends that because the highlighted language understates the consequences of submitting to the test and overstates the consequences of refusing to submit to a chemical test, the statute unconstitutionally violates ***Neville's*** directive. He reasons that the form understates the consequences of taking the test when it fails to inform the subject that a test result above the legal limit could result in a second, potentially criminal, charge being issued against him. He claims the form overstates the consequences of refusing a chemical test when it states there will be license revocation for refusing in addition to other penalties. He concludes that the above is patently false because the only penalty for refusing to submit to a chemical test is license revocation. This court is not persuaded.

¶6 First, contrary to Clarksen'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 conferring constitutional stature to the analysis of a state's refusal statute 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 (1986).

¶7 Second, the due process issue Clarksen presents here has already been addressed in ***Crandall***, where our supreme court held that the information required by subsec. (4) is all that is needed to meet due process requirements. *See* ***id***. at 259-60; *see also* ***State v. Reitter***, 227 Wis. 2d 213, 225, 595 N.W.2d 646 (1999) ("Section 343.305(4) requires officers to advise the accused about the nature of the driver's implied consent, and the 'Informing the Accused' Form meets the statutory mandate of alerting defendants of the law and their rights under it. … The law requires no more than what the implied consent statute sets forth."). This court notes that other constitutional challenges to Wisconsin's implied consent law have also failed. *See* ***Crandall***, 133 Wis. 2d at 255-57 (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); *see also* ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 621-22, 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 license can be revoked upon a plea of guilty does not violate due process); ***State v. Nordness***, 128 Wis. 2d 15, 26-27, 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). Supreme court precedent binds this court. *See* ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979).

¶8 Finally, this court rejects Clarksen's contention that WIS. STAT. § 343.305(4) fails to adequately inform drivers and thereby misleads them into

making an uninformed choice whether to submit to the chemical test. Pursuant to our statutes, 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 (1980). Consequently, a motor vehicle operator is deemed by law to have already consented to submitting to a test upon applying for and receiving a driver's license. *See* ***id***. Informing a driver that he or she may lose his or her driving privilege 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; *accord* ***Reitter***, 227 Wis. 2d at 225, 243.

By the Court.—Judgment affirmed.

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