

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2331

Cir. Ct. No. 2005TR4910

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE REFUSAL OF DOUGLAS E. NACKERS:

VILLAGE OF TIGERTON,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS E. NACKERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Douglas Nackers appeals an order finding his refusal to submit to chemical testing unreasonable. He contends the officer violated Wisconsin's implied consent law by failing to inform him that as a holder of a commercial driver's license he would be placed out-of-service for refusing to submit to testing and then later failing to issue an out of service order. The officer properly read Nackers the Informing the Accused form in its entirety, including the portion detailing the possibility of the issuance of an out-of-service order. In addition, whether the officer was required to issue an out-of-service order² is not an issue for the refusal hearing. Therefore, we affirm the order.

BACKGROUND

¶2 On November 27, 2005 officers Jamie Krause and Michael Weatherwax stopped Nackers for failing to stop at a stop sign and speeding. After he failed the field sobriety tests, the officers placed Nackers under arrest for operating while intoxicated, first offense.

¶3 Nackers was driving his personal vehicle at the time of the stop, but held a commercial driver's license. Weatherwax asked Nackers to submit to an evidentiary test of his blood and read Nackers the entire Informing the Accused form. Part of the form pertains to a person who has a commercial driver's license and reads, "If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² An out-of-service order is "a temporary prohibition against operating a commercial motor vehicle." WIS. STAT. § 340.01 (41r).

results or from refusing testing, such as being placed out-of-service or disqualified.”

¶4 Nackers refused to submit to an evidentiary test. Weatherwax then issued Nackers a Notice of Intent to Revoke Operating Privileges, but did not issue an out-of-service notice. Nackers moved to dismiss the refusal charge stating the officer failed to comply with the implied consent law. At the refusal hearing, the circuit court rejected Nackers’ contention.

DISCUSSION

¶5 Nackers argues the circuit court erred in its finding that he improperly refused to submit to an evidentiary test of his blood because the arresting officer violated the implied consent law by failing to inform him that he would be placed out-of-service. WISCONSIN STAT. § 343.305(1), “provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver’s blood alcohol content.” *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). “Any failure to submit to such a test, other than because of physical inability, is an improper refusal” which invokes the penalties of the statute. *Id.*

¶6 The application of the implied consent law to a set of facts is a question of law we review without deference. *Id.* When determining whether an officer satisfied the statutory requirements, we use a three-part test. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995). First, we inquire whether the officer failed to meet or exceeded his or her duty to provide information to the accused driver pursuant to WIS. STAT. § 343.305(4). *Id.* If so, we determine whether the lack or oversupply of information misled the accused driver. *Id.* Finally, we determine whether the officer’s failure to properly

inform the accused affected the accused's ability to make a choice about whether to submit to chemical testing. *Id.*

¶7 In this case, Weatherwax properly read Nackers the Informing the Accused form in its entirety, including the portion that informed him of the potential penalties he faced as the holder of a commercial driver's license. Thus, Weatherwax met his duty to provide information to Nackers pursuant to WIS. STAT. § 343.305(4) and Nackers cannot complain he was under informed.

¶8 Nackers also argues the circuit court erred by concluding that he improperly refused to submit to an evidentiary test of his blood because Weatherwax failed to issue an out-of-service notice. Under Wisconsin's implied consent law, when a driver is alleged to have improperly refused an evidentiary test under WIS. STAT. § 343.305, the issues at the refusal hearing are limited to: (1) whether the officer that stopped the driver had probable cause to believe the driver was operating while intoxicated; (2) whether the officer properly informed the driver of his or her rights and responsibilities under the implied consent law; and (3) whether the driver improperly refused the test. WIS. STAT. § 343.305(9)(a).

¶9 Thus, whether Weatherwax improperly failed to issue an out-of-service notice is not an issue for a refusal hearing. In addition, an officer is only required to issue an out-of-service notice *after* the driver has refused evidentiary testing; therefore, the failure to issue a notice has no bearing on a driver's refusal.³

³ An out-of-service notice only needs to be issued if:

If a person driving or operating or on duty time with respect to a commercial motor vehicle refuses a test under sub. (3)(am), the

(continued)

By the Court.—Order affirmed.

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

law enforcement officer shall immediately take possession of the person's license, issue an out-of-service order to the person for the 24 hours after the refusal and notify the department in the manner prescribed by the department, and prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.

WIS. STAT. § 343.305(9)(am). Nackers was not driving a commercial vehicle when he was arrested. Additionally, the time marked on his refusal form is 2:08 a.m., November 27. By Nackers' own testimony, he was not scheduled to work until the afternoon of that same day. Therefore, it is not clear whether he was even on "duty time" at the time of the refusal.

