COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2041 **Cir. Ct. No. 99-CT-450**

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

IN THE MATTER OF THE REFUSAL OF LEON R. MCQUEEN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON R. MCQUEEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Leon R. McQueen appeals the trial court's order revoking his operating privilege because he refused to submit to a chemical

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

test to determine his blood alcohol concentration as required by WIS. STAT. § 343.305. He contends the trial court erred in denying, at the conclusion of the refusal hearing, his motion to dismiss the proceeding on the ground that § 343.305 is unconstitutional. We affirm because McQueen has failed to notify the attorney general as required by WIS. STAT. § 806.04(11).[2]

¶2 McQueen was arrested for driving while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). Pursuant to WIS. STAT. § 343.305(4), the officer read him an "Informing the Accused" form, which informed McQueen that his driver's license would be revoked if he refused to allow the officer to take a blood, breath, or urine sample for the purpose of detecting the amount of alcohol in his blood. McQueen refused and subsequently requested a hearing under § 343.305(9). At the hearing, McQueen asserted he had a constitutional right to ask for an alternate form of chemical testing. The court found McQueen had refused the blood test and ordered his operating privilege revoked. The court ruled there was no merit to McQueen's position.

¶3 On appeal McQueen argues that WIS. STAT. § 343.305 is unconstitutional because it imposes penalties for the refusal to submit to testing, in violation of his rights under the Fourth and Fourteenth Amendments not to consent to a search or a seizure.[3] The State by the Columbia County district attorney responds that a challenge to the constitutionality of a statute requires McQueen to

[2] WISCONSIN STAT. § 806.04(11) provides in part: "If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."

[3] This does not appear to be the constitutional argument McQueen made to the trial court.

first serve the attorney general with a copy of the proceeding, which McQueen has failed to do. WIS. STAT. § 806.04(11). McQueen replies that § 806.04(11) does not apply because his counsel only challenged the statute's constitutionality orally as part of his argument opposing the refusal penalty. Therefore, according to McQueen, there was no "copy of the proceeding" to serve upon the attorney general. Our review of questions of statutory interpretation is de novo. ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997).

¶4 McQueen's interpretation of WIS. STAT. § 806.04(11) is not reasonable. The supreme court has concluded that the notice requirement of § 806.04(11) applies to all constitutional challenges of laws and not just declaratory judgments. ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979). The supreme court later stated that a failure to notify under § 806.04(11) is curable while the case is pending before the court of appeals. ***William B. Tanner Co., Inc. v. Estate of Fessler***, 100 Wis. 2d 437, 442-44, 302 N.W.2d 414 (1981). McQueen cites no authority for his argument that by orally challenging a statute's constitutionality in the trial court he may avoid the notice requirement under § 806.04(11), and he does not mention ***Estate of Fessler***. Accordingly, because the State, through the attorney general, has not been given the opportunity to defend the validity of the statute in question, we decline to take up McQueen's constitutional challenge to the implied consent law.

By the Court.—Order affirmed.

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