

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 16, 2002**

Cornelia G. Clark  
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. 02-0611  
STATE OF WISCONSIN**

Cir. Ct. No. 01-TR-2871

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOHN M. LIGON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Door County:  
D. TODD EHLERS, Judge. *Affirmed.*

¶1 CANE, C.J.<sup>1</sup> John Ligon appeals from an order revoking his motor vehicle operating privileges. The circuit court revoked Ligon's privileges after it

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<sup>1</sup> This is a one-judge appeal 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.

concluded he had no basis to refuse to consent to a chemical test of his blood alcohol content. Ligon challenged the constitutionality of the implied consent law, WIS. STAT. § 343.305, arguing its provision mandating revocation for an improper refusal to submit to testing punishes him for exercising his Fourth Amendment right to refuse to consent to searches and seizures. The trial court rejected this argument and revoked Ligon's driver's license for one year. On appeal, Ligon makes the same challenges to § 343.305. We determine this statute does not punish Ligon for exercising his constitutional rights and, therefore, affirm the trial court's order.

### **BACKGROUND**

¶2 The facts are undisputed. In July 2001, a Sturgeon Bay police officer arrested Ligon for operating while intoxicated. The officer took Ligon to the police department and read him the Informing the Accused form, as required by WIS. STAT. § 343.305(4). Ligon refused to take a chemical test. The officer issued Ligon the Notice of Intent to Revoke Operating Privileges under § 343.305(9) and did not obtain a chemical test.

¶3 Ligon requested a refusal hearing and moved to dismiss the proceeding. He argued WIS. STAT. § 343.305 punished him for exercising his right not to consent to searches and seizures under the Fourth Amendment. The court denied his motion and revoked his driving privileges for one year. He now appeals.

### **DISCUSSION**

¶4 Normally, the issues at a refusal hearing are limited to (1) whether the arresting officer had probable cause; (2) whether the officer complied with the

informational provisions of WIS. STAT. § 343.305(4); (3) whether the person refused to submit to a chemical test; and (4) whether the refusal was due to a physical inability unrelated to the person's use of alcohol. *State v. Wille*, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994).

¶5 Ligon does not make any of these challenges. Rather, he contends the implied consent statute unconstitutionally punishes him for exercising his Fourth Amendment rights. Whether a statute is constitutional is a question of law we review de novo. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Statutes are presumed to be constitutional. *State v. Hezzie R.*, 219 Wis. 2d 848, 862-63, 580 N.W.2d 660 (1998). The heavy burden of overcoming this presumption is on the challenging party and to succeed, the party must show the statute is unconstitutional beyond a reasonable doubt. *Id.*

¶6 WISCONSIN STAT. § 343.305(2) provides in part:

IMPLIED CONSENT. Any person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer ....

¶7 If a person refuses to submit to the testing, his or her operating privileges are revoked. WIS. STAT. § 343.305(10). The requesting officer must inform the person of the consequences of refusing the test. WIS. STAT. § 343.305(4). If the person refuses, the officer must then take possession of the person's license and prepare a notice of intent to revoke the person's driving privileges. WIS. STAT. § 343.305(9).

¶8 Ligon argues the implied consent law, to the extent it punishes him for refusing to submit to a chemical test, is unconstitutional because it violates his right to refuse to consent to searches and seizures. Essentially, Ligon contends because the State does not have the legal right to force a person to consent to a chemical test, it cannot punish that person for exercising that right not to consent.<sup>2</sup> Although Ligon acknowledges the implied consent law states that by driving in Wisconsin, a person waives his or her right not to consent to chemical testing, he contends the State has no power to make driving a waiver of a constitutional right.

¶9 We understand Ligon's argument to say the State may not require a person to give up his or her rights in order to operate a motor vehicle. He offers no authority for this proposition. Driving upon a public highway is a privilege granted by the State, not an inherent right. *Kopf v. State*, 158 Wis. 2d 208, 214, 461 N.W.2d 813 (Ct. App. 1990). As such, the grant of this privilege is subject to reasonable regulation pursuant to the State's police powers. See *Milwaukee v. Kilgore*, 185 Wis. 2d 499, 520-21, 517 N.W.2d 689 (Ct. App. 1994). One of these regulations is consenting to submit to chemical tests at a police officer's request.

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<sup>2</sup> We do not agree with Ligon's premise that punishing persons for exercising their rights under the Fourth Amendment violates that amendment. The Fourth Amendment to the United States Constitution and its counterpart under the Wisconsin Constitution, article I, section 11, establish a person's right to be free from unreasonable searches and seizures. *State v. McCray*, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). The remedy for a violation of this right is typically suppressing the fruits of the search or seizure. See *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961).

Here, Ligon was never subjected to a search or seizure, unreasonable or otherwise. Therefore, we do not believe his Fourth Amendment rights were violated. Nonetheless, we will address his argument that the implied consent law is unconstitutional because it punishes him for exercising his Fourth Amendment right not to consent to a search or seizure, although it appears to us this claim is perhaps more properly addressed according to some other constitutional right.

Upon refusing to submit, the person effectively withdraws his or her consent and cannot expect to retain his or her privilege.

¶10 Ligon argues it is irrelevant whether driving is a privilege or a right because the State may not punish a person for exercising a constitutional right. This argument, however, ignores the consent given by the driver either by applying for and receiving a driver's license or by operating a vehicle on Wisconsin's highways.<sup>3</sup> It is assumed applicants for driver's licenses are fully cognizant of their rights and are also deemed to know that in the event they are later stopped for drunk driving, they have consented, by their application, to the chemical testing in WIS. STAT. § 343.305. *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980). We do not see why this proposition should not apply to those who have not applied for a driver's license in Wisconsin or have chosen to drive without a license. *See Hurd v. Hall*, 12 Wis. 125, 137-38 (1860) (every person is presumed to know the law). The State is not punishing Ligon for exercising his constitutional right. Any punishment Ligon suffered arose because he revoked his consent to be tested.

¶11 Further, there is no coercion in giving this consent. Ligon seems to suggest he must choose between his Fourth Amendment rights and driving an automobile. Although there is a constitutional right to travel, there is no constitutional right to operate a motor vehicle. *County of Fond du Lac v. Derksen*, 2002 WI App 160, ¶7, 647 N.W.2d 922. A person can avoid consenting

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<sup>3</sup> We note Wisconsin courts usually determine the "consenting" act is applying for and receiving a driver's license. *See, e.g., State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980). WISCONSIN STAT. § 343.305(2), however, says a "person who ... drives or operates a motor vehicle ... is deemed to have given consent."

to chemical testing by not operating a motor vehicle. Further, Ligon does not contend the State in any way forced him to drive on Wisconsin's roads or obtain a driver's license. We cannot say Ligon was coerced into consenting to submit to chemical testing or that he was unfairly punished for withdrawing that consent.

*By the Court.*—Order affirmed.

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