COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1188 **Cir. Ct. No. 01-TR-5873**

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

IN THE MATTER OF THE REFUSAL OF KIMBERLY A. TOMARAS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY A. TOMARAS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Kimberly Tomaras appeals an order which revoked her motor vehicle operating privilege on account of her refusal to submit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

to chemical testing for alcohol concentration pursuant to WIS. STAT. § 343.305. She claims the revocation order must be set aside because the imposition of statutory penalties for refusing to submit to chemical testing is a "facial violation of the Fourth and Fourteenth Amendments." We disagree and affirm.

BACKGROUND

¶2 A City of Janesville police officer arrested Tomaras for operating a motor vehicle while under the influence of an intoxicant. Tomaras refused to submit to a breath test for alcohol concentration and the officer issued a notice of intent to revoke her[2] operating privilege. *See* WIS. STAT. § 343.305(9). Tomaras filed a "Demand for Hearing on Refusal" with the circuit court and then moved to dismiss the refusal proceeding.

¶3 Tomaras's motion did not allege that the officer lacked probable cause to arrest her or that the officer failed to comply with the "informing the accused" requirements. *See* WIS. STAT. § 343.305(4). Rather, Tomaras maintained that her operating privilege should not be revoked notwithstanding her refusal to submit to a breath test because the State may not constitutionally punish her for exercising her Fourth Amendment right to not submit to a breath test. The court concluded, however, that § 343.305 is constitutional, and accordingly, denied Tomaras's motion.

[2] In Tomaras's statement of the case and facts, she occasionally refers to herself as "he." The record indicates that the defendant-appellant is a female.

¶4 Following a refusal hearing, the court entered an order revoking Tomaras's motor vehicle operating privilege for one year. Tomaras appeals, renewing her constitutional challenge to the implied consent statute.[3]

ANALYSIS

¶5 Tomaras summarizes her challenge to WIS. STAT. § 343.305 by asserting that, under the statute:

> [A] driver ends up "refusing" in order to avoid the coercion of the "implied consent" law. The driver is placed in a position in which his or her Fourth Amendment right against unreasonable searches and seizures is violated no matter which 'choice' is made: the driver is either successfully coerced into an involuntary consent or is punished for asserting his or her Fourth Amendment right to refuse consent.

We have previously rejected the constitutional challenge Tomaras raises here. *See* ***State v. Wintlend***, 2002 WI App 314, __ Wis. 2d __, 655 N.W.2d 745.

¶6 We concluded in ***Wintlend*** that the provisions of WIS. STAT. § 343.305 which condition a driver's privilege to operate a motor vehicle on Wisconsin highways on the surrender of his or her right to refuse a chemical test for alcohol concentration do not violate the Fourth Amendment. We relied in part on the supreme court's observation in ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289

[3] The record contains a letter from an assistant attorney general noting that he had received a copy of "certain pleadings" in this case. The letter notes that the attorney general had decided not to appear in the circuit court proceedings, but "may seek to appear if the issue of the constitutionality of a statute or ordinance is raised on appeal." The letter concludes with a request that "the parties inform our office if the matter is appealed and the appeal raises the issue of constitutionality." We have been unable to locate anything in the record or in our correspondence file showing that Tomaras notified the attorney general that she is attacking the constitutionality of WIS. STAT. § 343.305 in this appeal. Nonetheless, because the issue has been conclusively decided by a published opinion of this court, we dispose of this appeal on its merits.

N.W.2d 828 (1980), that one who applies for and accepts a license to drive does so on "'the condition that a failure to submit to the chemical tests will result in the ... revocation of his license unless the refusal was reasonable.'" ***Wintlend***, 2002 WI App 314 at ¶12. We concluded that, to the extent that this condition constitutes "coercion," it is nonetheless not unreasonable under the Fourth Amendment, given the minimal intrusion at issue balanced against the State's compelling interest in detecting and deterring drunk driving. ***Id***. at ¶18.

¶7 Our analysis and holding in ***Wintlend*** disposes of the arguments Tomaras makes in this appeal, and there is no need for us to discuss them at length here. Although Tomaras does not expressly concede the foregoing, she impliedly does so by her letter to the court informing us that she would not be filing a brief in reply to the State's argument, in which it cited and relied on ***Wintlend***.[4] Inasmuch as ***Wintlend*** is a published opinion of this court, its holding is binding on us, and we must apply it here. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).[5]

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[4] In her letter to us, Tomaras cites as her reason for not filing a reply brief the issuance of our decision in ***State v. Riedel***, 2003 WI App 18, No. 02-1772-CR. However, ***Riedel*** had little or nothing to do with the issue in this case. We decided in ***Riedel*** that police did not need to obtain a search warrant in order to analyze blood which they had legitimately seized from a person arrested for operating a motor vehicle while under the influence of an intoxicant. ***Id***. at ¶16.

[5] As is his frequent custom, counsel for Tomaras requested us to defer the deadline for filing an opening brief. Counsel asserted in his motion that he wished to defer filing a brief until after this court's publication committee had decided whether to publish our opinion in ***Village of Little Chute v. Walitalo***, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891, *review denied*, 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 892 (Wis. Sep. 26, 2002) (No. 01-3060). He further asserted that the "issue decided in ***Walitalo*** is related to [the] issue presented by the present appeal," and that counsel "desires … to address the impact of that opinion in the arguments presented in the initial brief in this appeal, and cite to it in the context of its role as precedent." We agreed to the request. Having thus obtained a delay in the briefing and disposition of this appeal, however, Tomaras's opening brief makes no mention whatsoever of the ***Walitalo*** opinion.

(continued)

CONCLUSION

¶8 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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

We caution counsel that we do not look kindly upon such tactics for delaying the disposition of an appeal, and we will view his deferral requests more skeptically in the future. Either the ***Walitalo*** opinion has little bearing on the issues and arguments in this appeal, and counsel's request to delay briefing was thus ill-founded; or the opinion represents an adverse precedent of which counsel was obviously aware, and which he was ethically bound to bring to our attention when briefing this appeal, distinguishing its holding if he could. *See* SCR 20:3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); SCR 20:3.3(a) ("A lawyer shall not knowingly: … (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel ….").