COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1260 **Cir. Ct. No. 00-TR-7153**

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

IN THE MATTER OF THE REFUSAL OF ROBERT P. DOLAN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT P. DOLAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Robert Dolan appeals an order which revoked his motor vehicle operating privilege on account of his refusal to submit to chemical testing for alcohol concentration pursuant to WIS. STAT. § 343.305. He 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 Beaver Dam police officer arrested Dolan for operating a motor vehicle while under the influence of an intoxicant. Dolan refused to submit to a chemical test of his blood and the officer issued Dolan a notice of intent to revoke operating privilege. *See* WIS. STAT. § 343.305(9). Dolan filed a "Demand for Hearing on Refusal" with the circuit court, and then moved to dismiss the refusal proceeding on various grounds.

¶3 At the refusal hearing, Dolan stipulated that the officer had probable cause to arrest him and that the officer complied with the "informing the accused" requirements. *See* WIS. STAT. § 343.305(4). Dolan argued that his operating privilege should not be revoked notwithstanding his refusal to submit to a test because the State may not constitutionally punish him for exercising his Fourth Amendment right to not submit to a blood test. The court concluded, however, that § 343.305 is constitutional, and accordingly, denied Dolan's motion. The court entered an order revoking Dolan's motor vehicle operating privilege for

[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.

twelve months. Dolan appeals, renewing his constitutional challenge to the implied consent statute.[2]

ANALYSIS

¶4 Dolan summarizes his challenge to WIS. STAT. § 343.305 as follows: "[T]he 'refusal' statute, at least to the extent that it imposes penalties for refusing to submit to testing, violates the Constitution because an individual has an absolute right to refuse to consent to a search and seizure." After Dolan filed his opening brief, and the State had responded, Dolan asked us to suspend the briefing until this court decided whether to publish our opinion in ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶11, __ Wis. 2d __, 650 N.W.2d 891 (concluding that reading a defendant the "informing the accused" form, which threatens the loss of driving privileges if a test is refused, is not "coercion" that invalidates consent under the Fourth Amendment).

¶5 In support of his request, Dolan told us that the "issue decided in ***Walitalo*** is related to [the] issue presented by the present appeal." We agreed to the request. Having thus obtained a delay in the submission and disposition of this appeal, however, Dolan devotes little more than a page of his reply brief to telling us that our opinion in ***Walitalo*** in fact has no bearing on the issue he raises in this

[2] 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 to be informed "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 Dolan notified the attorney general that he is attacking the constitutionality of WIS. STAT. § 343.305 in this appeal. Nonetheless, because the issue has been conclusively decided by an opinion of this court recommended for publication, we dispose of this appeal on its merits.

appeal. This is so, according to Dolan, because we did not address in ***Walitalo*** the constitutionality of the implied consent and refusal sanction provisions of WIS. STAT. § 343.305.

¶6 We have since done so, however. We concluded in ***State v. Wintlend***, No. 02-0965-CR (Wis. Ct. App. Nov. 6, 2002, recommended for publication), 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 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***, No. 02-0965-CR, 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 We conclude that our analysis and holding in ***Wintlend*** disposes of the arguments Dolan makes in this appeal, and there is thus no need for us to discuss them again at length here.[3] Should our opinion in ***Wintlend*** be published, its holding is binding on us, and we must apply it here. *See* ***Cook v. Cook***, 208

[3] We noted in ***Wintlend*** that Wintlend's counsel, who also represents Dolan in this appeal, "has raised this same issue, even after ***Walitalo***, in numerous appeals across the state. If, for no other reason than to finally put an end to the constant barrage of appeals all raising this same issue, we will indulge Wintlend and answer the issue he now raises post-***Walitalo***." ***State v. Wintlend***, No. 02-0965-CR, at ¶7 (Wis. Ct. App. Nov. 6, 2002, recommended for publication).

Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Should ***Wintlend*** not be published, however, we find its reasoning persuasive and we adopt its reasoning by reference.

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.