

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2003

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 Nos. 02-0104
02-2086-CR**

Cir. Ct. No. 00-CT-1523

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**02-0104
IN THE MATTER OF THE REFUSAL OF KORY J.
MALCHESKI:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KORY J. MALCHESKI,

DEFENDANT-APPELLANT.

**02-2086-CR
STATE OF WISCONSIN,**

PLAINTIFF-RESPONDENT,

v.

KORY J. MALCHESKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ Kory Malcheski appeals the judgment of conviction for driving while intoxicated in violation of WIS. STAT. § 346.63(1)(a), third offense, and the court order suspending his license on the ground that he had refused to submit to a chemical test pursuant to WIS. STAT. § 343.305, the implied consent statute. We reject his challenges to the admissibility of the results of the chemical test performed on his blood and his constitutional challenge to the implied consent statute. We affirm the judgment and order.

¶2 Malcheski was arrested for driving while intoxicated and was read the “Informing the Accused” form in compliance with WIS. STAT. § 343.305(4). When asked if he would submit to an evidentiary chemical test of his blood, he answered no. Blood was ultimately drawn from him, but not with his consent. Malcheski moved to suppress those results as violations of his Fourth Amendment right against unreasonable searches and seizures. He also argued, in the context of the refusal hearing, that the implied consent statute was unconstitutional because it compels a person to choose between abandoning the Fourth Amendment protection against unreasonable searches and seizures on the one hand, and

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

suffering the sanctions of lost driving privileges on the other.² The trial court denied the motion to suppress and concluded that the statute was constitutional.

¶3 Because the facts are undisputed, the application of constitutional principles to those facts presents questions of law, which we review de novo. *State v. VanLaarhoven*, 2001 WI App. 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411. Challenges to the constitutionality of a statute also present a question of law. *State v. Smith*, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997).

¶4 Malcheski concedes that under *State v. Thorstad*, 238 Wis. 2d 666, 618 N.W.2d 240 (Ct. App. 2000), and *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, the warrantless seizure of his blood did not violate the Fourth Amendment because it comes within the exception to the warrant requirement for exigent circumstances.³ However, he contends, the analysis of his blood is a separate search that must be justified by an exception separate from that for the seizure of his blood, and exigent circumstances do not justify the analysis of his blood once it has been drawn. We have recently rejected this very argument in *State v. Riedel*, 2003 WI App 18, ___ Wis. 2d ___, ___ N.W. 2d ___ (2002), ordered published January 29, 2003, as Malcheski acknowledges in his letter explaining he will not be submitting a reply brief.

² Under WIS. STAT. § 343.305(2), any person operating a motor vehicle is deemed to have given consent to tests to determine the presence or quantity of alcohol in the person's breath or blood when the person is arrested for a violation of WIS. STAT. § 346.63(1); license revocation is the penalty if a person refuses to submit to the tests after certain statutory conditions and procedures are complied with. Section 343.305(3)-(10).

³ Malcheski explains that he raised this issue in spite of the binding precedent resolving it in order to preserve it for possible review by the United States Supreme Court.

¶5 As Malcheski also recognizes in that letter, we have also recently rejected the argument that the implied consent law is unconstitutional because it compels drivers to consent to submitting to a chemical test by threatening loss of driving privileges. *State v. Wintlend*, 2002 WI App. 314, ___ Wis. 2d ___, 655 N.W.2d 745. It follows that there is no constitutional impediment to sanctioning Malcheski's refusal by suspending his license.

¶6 Accordingly, we hold the trial court properly denied Malcheski's motion to suppress the results of the chemical test of his blood and correctly concluded the implied consent statute was not unconstitutional.

By the Court.—Judgment and order affirmed.

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

