COURT OF APPEALS
DECISION
DATED AND RELEASED

January 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1602

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN R. NACKER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*.

GARTZKE, P.J.[1] Brian Nacker appeals from an order revoking his operating privileges for refusing to submit to chemical testing. The issue is whether a person has refused to take a test under § 343.305(3)(a), STATS., when the person initially said, "No" to taking the test, then changed his mind, and the officer declined to give the test when the officer could conveniently have done so. We hold that the person has refused to take the test and we therefore affirm the order.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Because the facts are undisputed, the issue is one of law. ***State v. Williams***, 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 604-05 (1981). We resolve such issues without deference to the trial court's opinion. ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Nacker's car was stopped. After administering field sobriety tests, the officer read to Nacker the Informing the Accused form, and asked him to submit to an intoxilyzer test. He said "yes." A few minutes later he said he did not want a test. After the intoxilyzer machine was ready to operate, Nacker was again asked to take the test. He refused a second time. The officer then filled out the Notice of Intent to Revoke Operating Privilege form, explained it to Nacker and gave him a copy. Nacker said that he did not know his operating privileges would be revoked for refusing to take the test. The officer said she had told him about that when she read the Informing the Accused form to him. He said he forgot and asked to take the test. The officer told him he was not entitled to another chance and she declined to give him the test. The intoxilyzer equipment had not yet been put away, and we infer that the officer could easily have acceded to Nacker's belated request to take the test. We conclude that because Nacker had refused to take the test, the trial court properly revoked his operating privilege.

Refusal hearings are conducted under § 343.305(9), STATS. Subsection (9)(a) provides that if a person refuses to take a test under sub. (3)(a) the law enforcement officer "shall immediately take possession of the person's license and prepare a notice of intent to revoke ... the person's operating privilege." The issues at the refusal hearing are limited. One issue is "whether the person refused to permit the test." Section 343.305(9)(am)5.c.

It is well-established that where there has been a refusal to permit the test,

> [t]here is no obligation upon the law enforcement authorities to renew the offer to take the test, even though the time within which the test may be admissible--the two hour period after the arrest--has not yet expired. The obligation of the accused is to take the test promptly

> or to refuse it promptly. If he refuses, the consequences flow from the implied consent statute.

State v. Neitzel, 95 Wis.2d 191, 205, 289 N.W.2d 828, 835 (1980). "[T]he officer is not under a continuing obligation to remain available to accommodate future requests." ***State v. Stary***, 187 Wis.2d 266, 271, 522 N.W.2d 32, 35 (Ct. App. 1994). If error occurred, it was when the officer failed to "immediately take possession" of his license and prepare a Notice of Intent to Revoke his operating privilege, as required by § 343.305(9)(a), STATS., when Nacker first refused.

Nacker contends that the purpose of the refusal statute is to encourage testing to make available scientific evidence of an alcohol concentration so as to facilitate conviction of the guilty. Nacker contends the officer therefore should have permitted him to take the test when he finally asked for it. It is not accurate, however, to say that the purpose of the law is to "encourage" testing. The purpose of the law, insofar as it pertains to refusal hearings, is "to induce persons to submit" to testing to expedite securing evidence to determine whether or not a suspected person is intoxicated to a degree warranting a charge of operating a motor vehicle while under the influence of an intoxicant. ***State v. Brooks***, 113 Wis.2d 347, 348, 335 N.W.2d 354, 354-55 (1983). The inducement is to suffer revocation as the alternative to taking the test. The person who improperly refuses to take the test loses operating privileges for one to three years, regardless whether he or she has operated a motor vehicle while under the influence. Section 343.305(10)(b)2 and 4, STATS.

The officer has no duty to administer the test after the person has refused it. Whether the officer could reasonably have acceded to the person's change of mind and given the test after a refusal is irrelevant at a refusal hearing. The issues at the hearing are specified in § 343.305(9)(am)5, STATS., and the reasonableness of the officer's conduct after a refusal is not one of them.

By the Court.—Order affirmed.

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