

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 15, 1995

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(1), 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. 95-1615-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

COUNTY OF WINNEBAGO,

Plaintiff-Respondent,

v.

THOMAS E. EAKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago county: WILLIAM E. CRANE, Judge. *Affirmed.*

ANDERSON, P.J. Thomas E. Eake contends on appeal that the trial court erred in refusing to suppress the results of his Intoxilyzer breath test because of the prosecution's failure to comply with a timely discovery demand. We affirm because Eake failed to secure a court order for inspection.

On March 26, 1995, Eake was charged with operating a motor vehicle while intoxicated, § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration, § 346.63(1)(b). He retained

counsel on March 30, 1995. On March 30, counsel signed a motion for discovery and inspection of the Intoxilyzer pursuant to § 345.421, STATS., which was filed on April 12, 1995, by the Traffic & Criminal Division of the Winnebago County Clerk of Courts.

At the start of the trial on June 1, 1995, Eake's counsel moved to suppress the results of the Intoxilyzer on the grounds that Winnebago County had failed to comply with his motion for discovery and inspection of the Intoxilyzer. Counsel argued that the motion was made within ten days of Eake's arrest and was timely. In opposing the motion, the prosecutor confirmed that he had never received the motion for discovery and inspection. The trial court denied the motion to suppress reasoning that Eake's counsel had received equivalent information from the Department of Motor Vehicles in relation to his request for a judicial review of the administrative hearing decision to suspend Eake's driving privileges. Eake appeals challenging the trial court's decision denying his motion to suppress the results of the Intoxilyzer.

We do not have to consider whether Eake's motion was timely because he failed to actively seek a court order for inspection. The relevant

portion of § 345.421, STATS., provides:

Neither party is entitled to pretrial discovery except that if the *defendant moves* within 10 days after the alleged violation *and shows cause therefor, the court may order* that the defendant be allowed to inspect and test under s. 804.09 and under such conditions as the court prescribes, any devices used ... and may inspect under s. 804.09 the reports of experts relating to those devices. [Emphasis added.]

The statute does not allow discovery. The statute does not require the prosecuting agency to voluntarily comply with a motion for inspection. The statute does not permit a defendant to do nothing after the filing of the motion for inspection. The statute does require a defendant who seeks to inspect the Intoxilyzer to secure a court order of inspection.

We hold that a defendant must secure a court order to obtain relief under § 345.421, STATS. Failure to do so forfeits the defendant's entitlement to discovery. Only if such an order is violated may suppression be an appropriate sanction. See *State v. Walstad*, 119 Wis.2d 483, 503-04, 351 N.W.2d 469, 479-80 (1984). Eake waited until the day of trial and then moved, not for a discovery order, but to suppress. The trial court did not abuse its discretion in denying Eake's motion.

By the Court. – Judgment affirmed.

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