

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 23, 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(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. 95-2674

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JESSE E. VOSS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Brown County:
PETER NAZE, Judge. *Affirmed.*

CANE, P.J. On June 25, 1995, Jesse Voss was arrested for operating a motor vehicle while intoxicated and then transported to the Brown County Sheriff's Department where the "Informing the Accused" form was read to him. Voss refused to submit to a chemical test of his breath and requested a hearing on the reasonableness of his refusal by letter mailed on July 5, 1995. For some unknown reason, the clerk did not receive Voss's letter until July 11, beyond the ten-day period for requesting a refusal hearing.

The trial court did however schedule a refusal hearing where Voss argued solely, as he does on appeal, that the informing the accused form is defective in that it fails to inform an accused driver that the person must have

been "driving or operating a motor vehicle" as prescribed in § 343.305(4)(c), STATS. The trial court rejected Voss's argument and found that the request for the refusal hearing was untimely and that the legal argument was unpersuasive. It found Voss's refusal to submit to the requested chemical test unreasonable and ordered his license revoked for one year. The order is affirmed.

The trial court correctly found that Voss failed to make a timely request for a refusal hearing. Section 343.305(9)(a)4, STATS., provides that a person may request a refusal hearing within ten days by mailing or delivering a written request to the court. However, the statute specifically goes on to state, "If no request for a hearing is *received* within the 10-day period, the revocation period commences 30 days after the notice [notice to Voss] is issued." *Id.* (emphasis added). Here, it is undisputed that Voss's request for a refusal hearing was not received at the clerk's office until July 11, well beyond the ten-day period. The statute is unambiguous and requires Voss to make a timely request for a refusal hearing by making sure the clerk receives his request within the ten-day period, which he failed to do in this case.

This court also agrees with the trial court that even if the request was timely, the informing the accused form was not defective, especially in light of the fact that Voss was orally advised that he was arrested for operating a motor vehicle while under the influence of an intoxicant.

Section 343.305(4)(c), STATS., provides in relevant part:

At the time a chemical test specimen is requested ... the person shall be orally informed that:

....

- (c) If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration and was *driving or operating a motor vehicle*, the person will be subject to penalties (Emphasis added).

It is undisputed that the informing the accused form read to Voss does not include any notice as to the "driving or operating a motor vehicle" language. The form provides in part:

If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.

Voss reasons that the failure of this form to recite the "driving or operating a motor vehicle" language is akin to *State v. Wilke*, 152 Wis.2d 243, 448 N.W.2d 13 (Ct. App. 1989), and *County of Eau Claire v. Resler*, 151 Wis.2d 645, 446 N.W.2d 72 (Ct. App. 1989), which found the informing the accused form defective because certain language in § 343.305(4)(c), STATS., was entirely absent from the form. This court is not persuaded.

The State correctly cites a series of cases for the proposition that the informing the accused form must be assessed against its substantial compliance with the reasonable objectives of the statute. See *State v. Sutton*, 177 Wis.2d 709, 715, 503 N.W.2d 326, 328 (Ct. App. 1993); *State v. Riley*, 172 Wis.2d 452, 457-58, 493 N.W.2d 401, 403 (Ct. App. 1992); *State v. Piskula*, 168 Wis.2d 135, 140-41, 483 N.W.2d 250, 252 (Ct. App. 1992); *State v. Munte*, 159 Wis.2d 279, 280-81, 464 N.W.2d 230, 231 (Ct. App. 1990). The form used by the arresting officer fully advises Voss of his rights and the potential consequences of his refusal to submit to a requested chemical test. Voss does not dispute that. The omission of the words "driving or operating a motor vehicle" does not affect Voss being properly advised of his rights and penalties as recited in the form. Also, it is important to note that Voss fails to demonstrate how he was prejudiced or misled by the absence of this language as to his rights and penalties for refusing to submit to the requested chemical test.

This court is satisfied that the omission of the words "driving or operating a motor vehicle" does not render the notice defective. This is especially so when the officer read this form to Voss after informing him that he was under arrest for suspicion of operating a motor vehicle while under the influence of an intoxicant.

The trial court's order finding Voss's refusal to submit to the requested chemical test was unreasonable is therefore affirmed.

By the Court. — Order affirmed.

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