COURT OF APPEALS
DECISION
DATED AND RELEASED

October 8, 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. 95-2713

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

CITY OF WEST ALLIS,

Plaintiff-Respondent,

v.

C. SCOTT RADTKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

CURLEY, J. C. Scott Radtke appeals from a judgment of conviction, on a no contest plea, for operating a motor vehicle while under the influence of an intoxicant. He argues that § 343.12(2)(d), STATS., which will require the Department of Transportation to suspend his school bus operator's license upon his conviction for operating a motor vehicle while under the influence of an intoxicant, violates the equal protection, cruel and unusual punishment, and due process provisions of the federal and Wisconsin

Constitutions.[1] This court rejects his arguments and affirms the judgment of conviction.[2]

[1] Section 342.12(2)(d), STATS., provides:

> **(2)** The department shall issue a school bus endorsement to a person only if such person meets all of the following requirements:
>
> ....
>
> (d) Notwithstanding ss. 111.321, 111.322 and 111.335, has not been convicted of reckless driving under s. 346.62 or a local ordinance in conformity with s. 346.62(2) or a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.62(2), operating a motor vehicle while operating privileges are suspended or revoked under s. 343.44(1) or a local ordinance in conformity therewith or a law of a federally recognized American Indian tribe or band in this state in conformity with s. 343.44(1) with respect to operation of a motor vehicle while operating privileges are suspended or revoked, any of the offenses enumerated under s. 343.31(1) or (2), or 2 or more offenses under s. 346.63(7) or a local ordinance in conformity therewith or a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.63(7), or a conviction under the law of another jurisdiction, as those terms are defined in s. 340.01(9r) and (41m), respectively, prohibiting reckless or careless driving, as those or substantially similar terms are used in that jurisdiction's laws, or a conviction, suspension or revocation that would be counted under s. 343.307(2), within the 2-year period immediately preceding the date of application. Upon request of the operator or school, the department shall certify whether the operator meets this requirement.

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

I. BACKGROUND.

City of West Allis police arrested Radtke for operating his motor vehicle while under the influence of an intoxicant. Subsequent to the arrest, Police Officer David Hoffman asked Radtke to submit to a chemical breath test. Radtke took the test, with the result being above the legal limit. Prior to asking Radtke to submit to the test, Officer Hoffman read the information in Section A of the "Informing the Accused" form to Radtke. He did not read the commercial license Section B of the form, although Radtke was licensed as a commercial school bus driver.

Radtke moved the trial court to suppress the breath test results, raising several constitutional challenges, and challenging Officer Hoffman's failure to read the entire "Informing the Accused" form to him. The trial court rejected Radtke's arguments to declare § 343.12(2)(d), STATS., unconstitutional, and further denied the motion to suppress the chemical test results. Radtke then pleaded no contest to the offense of operating a motor vehicle while under the influence of an intoxicant. The trial court then entered the judgment of conviction and this appeal follows.

II. ANALYSIS.

Radtke first argues that § 343.12(2)(d), STATS., violates the equal protection provisions of the federal and state constitutions because it discriminates "between those individuals who hold passenger endorsements to their Commercial Driver's License ... and those individuals who do not hold such a designation." Radtke is incorrect.

This court's analysis begins with the presumption that § 343.12(2)(d), STATS., is constitutional and that it must be upheld unless it is proven unconstitutional beyond a reasonable doubt. *See* ***Libertarian Party of Wisconsin v. State,*** 199 Wis.2d 791, 802, 546 N.W.2d 424, 430 (1996) (constitutionality of statutes). The Wisconsin Supreme Court has held that Article I, Section 1 of the Wisconsin Constitution is substantially equivalent to the equal protection provisions of the Fourteenth Amendment. ***GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.,*** 155 Wis.2d 184, 193, 454 N.W.2d 797, 801 (1990) (stating the equal protection clauses of the Wisconsin and United States Constitutions are substantially similar).

Unless a challenge to a statute affects a person's fundamental right or creates a classification based on a suspect class, this court uses the "rational basis test" in determining whether the regulation withstands an equal protection challenge. *See* ***Szarzynski v. YMCA, Camp Minikani***, 184 Wis.2d 875, 886, 517 N.W.2d 135, 139 (1994). Radtke agrees that the "rational basis test" is the appropriate standard to use in this case. Under the "rational basis test," this court must uphold a legislative classification if any reasonable basis exists to justify that classification. To decide if there is any reasonable basis, the court is obligated to find or construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds legislative determinations. ***K.C. v. DHSS***, 142 Wis.2d 906, 916, 420 N.W.2d 37, 40 (1988).

The trial court concluded that the legislature, in barring school bus drivers convicted of operating a motor vehicle while under the influence of an intoxicant from being issued a commercial driver's license, was "expressing a public policy that school children and the public at large should be protected from drivers who have abused their driving privileges. The trial court is correct—the legislature could rationally distinguish between school bus drivers

and other drivers based on a legitimate interest in protecting children from harm while being transported on school buses. There is no equal protection violation here.

Radtke next argues that § 343.12(2)(d), STATS., violates the federal and state constitutions' prohibition against cruel and unusual punishment. He contends that the statute "[e]ffectively eliminat[es] an individual's employment, and thus, means of support, when all other classes of individuals are not subject to the same harsh treatment." His argument is specious.

This court's standard for determining whether a punishment constitutes cruel and unusual punishment is whether the punishment is "`so excessive and usual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Steeno v. State,*** 85 Wis.2d 663, 669, 271 N.W.2d 396, 399 (1978) (citation omitted). The trial court concluded that the license suspension under § 343.12(2)(d), STATS., is an administrative sanction rather than a criminal sentence. Hence, the granting of a commercial license is a privilege, not an inherent right. *See, e.g.,* ***State v. Seraphine,*** 266 Wis. 118, 123, 62 N.W.2d 403, 406 (1954). The trial court was correct—there is no cruel and unusual punishment here.

Finally, Radtke raises several hypothetical due process claims, arguing that the police officer's failure to read him the entire "Informing the Accused" form requires, at a minimum, the suppression of the chemical breath test results. He is incorrect.

In ***State v. Geraldson,*** 176 Wis.2d 487, 491-95, 500 N.W.2d 415, 418-19 (Ct. App. 1993), we concluded that a commercial driver was entitled to receive the implied consent law's commercial vehicle warnings. In ***State v. Zielke,*** 137 Wis.2d 39, 41, 403 N.W.2d 427, 428 (1987), the supreme court concluded that the police's failure to comply with the informed consent procedure does not require suppression of constitutionally obtained chemical test evidence. The informed consent law creates a separate offense "`that is triggered upon a driver's refusal to submit to a chemical test.'" ***County of Eau Claire v. Resler***, 151 Wis.2d 645, 652, 446 N.W.2d 72, 74 (Ct. App. 1989). Therefore, while the failure to properly inform a suspect under the informed

consent provisions may prevent the fact of the suspect's refusal being introduced at a refusal hearing, it does not prevent the use of the chemical test results at a trial on a separate charge of operating a motor vehicle while under the influence of an intoxicant. ***Zielke***, 137 Wis.2d at 51, 403 N.W.2d at 432. Following the conclusions of these cases, the trial court rejected Radtke's due process arguments. The trial court was correct—there was no due process violation here. Further, Radtke's remaining due process claims, based on *ex post facto* considerations, are merely hypothetical situations which never came to pass. Thus, they are moot.

In sum, this court rejects all of Radtke's arguments. The judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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