COURT OF APPEALS
DECISION
DATED AND RELEASED

March 14, 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. 95-1996

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODNEY C. BURKINS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

SUNDBY, J. Rodney C. Burkins appeals from an order revoking his operating privileges for refusing to consent to a chemical test to determine his blood alcohol content, as required by § 343.305(2), STATS.[1] He claims that the arresting officer failed to give him notice of the consequences of his failure to consent because he did not inform him that he could lose his commercial operating license if he did not consent. We reject his claim because he has not

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. "We" and "our" refer to the court.

shown that he was injured by that failure. We conclude that proof that Burkins had a commercial operator's license at the time of his arrest was a defensive matter which he had to show.

Burkins relies on ***Ozaukee County v. Quelle***, 542 N.W.2d 196 (Wis. Ct. App. 1995). However, the court there held that an operator attacking a law enforcement officer's failure-to-inform had to show: (1) that the officer misstated the warnings, and, (2) that the officer's failure "impacted his or her ability to make the choice available under the law." ***Id***. at 199. Burkins has not made the latter showing.

Burkins also claims that the arresting officer misinformed him as to what would happen if he refused to submit to a breath or blood test. The officer told him that if he refused, "he would be revoked, that ... if they take the test and whether they pass or fail it, they are given a 30-day temporary driving receipt. If he did not take it, he would be given the notice of intent to revoke operating privileges." Burkins does not argue that this was a misstatement of the law, but he contends that the officer confused him because he thereupon gave him the administrative suspension form which is only given to an operator who takes a breath or blood test and fails. In context, Burkins could not have been confused as to the consequences of his failure to submit to a chemical test by being informed as to the consequences if he did take the test. Burkins cannot complain that he was given too much information unless he showed that he thereby became confused. He has not made that showing.

Burkins complains, however, that the trial court denied him the opportunity to show that he was confused when it cut off his cross-examination of the arresting officer. Burkins did not make an offer of proof and thus we cannot conclude that Burkins would have elicited testimony relevant to the question of his understanding of the consequences of refusal. He now tells us that he would have shown "that no refusal can exist under the law where there is an Implied Consent test warranting an administrative suspension of operating privileges." This, however, is a question of law which Burkins could not have answered. His counsel presented that argument to the trial court and has presented the same argument to us. While we agree that a refusal cannot exist if the operator submits to a chemical test, Burkins had already been informed that he would suffer consequences if he did not submit to a chemical test. He was informed that his operating privileges would be administratively

suspended. We conclude that Burkins was properly informed as to his responsibilities under the Implied Consent Law and the consequences if he chose not to fulfill those responsibilities.

By the Court.—Order affirmed.

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