COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 28, 1996

No. 95-2063

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK J. MODORY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

ANDERSON, P.J. Mark J. Modory appeals from an order of the trial court where he was adjudicated as unreasonably refusing to submit to a chemical test of his breath, contrary to § 343.305, STATS. We conclude that paragraph five of the Informing the Accused form is not misleading. Accordingly, we affirm the order of the trial court.

Modory was stopped and arrested for allegedly operating a motor vehicle while under the influence of an intoxicant. A police officer transported him to the public safety building where he was read the Informing the Accused form. Modory refused to take a breath test and subsequently requested a hearing on the refusal charge. A hearing was held, and the trial court concluded that Modory's refusal to submit to chemical testing was unreasonable. Modory appeals.

Modory argues that "The information contained in paragraph 5[1] of the informing the accused form fails to adequately put [him] on notice of which previous convictions, if any, will be counted against him." He contends that the language in § 343.23(2), STATS., provides that the record of suspensions, revocations and convictions that would be counted under § 343.307(2), STATS., shall be maintained for at least ten years, in contrast to records under § 343.307(1) which he claims are maintained by the Department of Transportation for five years.

Whether paragraph five of the Informing the Accused form is inadequate is a question of law that we review de novo. *See* ***Pulsfus Poultry***

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[1] Paragraph five of the Informing the Accused form provides:

> If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations or convictions within a 10 year period and after January 1, 1988, which would be counted under s. 343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

Farms, Inc. v. Town of Leeds, 149 Wis.2d 797, 803-04, 440 N.W.2d 329, 332 (1989).

We conclude that paragraph five of the form is not misleading or inadequate. The form clearly indicates that an accused who has prior suspensions, revocations or convictions within *ten years* and after January 1, 1988, which would be counted under § 343.307(1), STATS., may have his or her vehicle equipped with an ignition interlock device, immobilized, or seized and forfeited. The length of time that the Department of Transportation maintains driving records goes to an element which the State must prove in order to invoke the enhanced penalty. Whether the State can meet its burden of proof has nothing to do with whether Modory was correctly informed of his rights under the implied consent law.[2] Because the form clearly informs an accused of his or her rights under the law, no due process violations occurred.

By the Court.—Order affirmed.

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

[2] The State relies on ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524 N.W.2d 635 (1994), for the proposition that the form is not misleading. We do not use ***Village of Oregon*** for support in this opinion because the Informing the Accused form used in ***Village of Oregon*** is significantly different than the form read to Modory. *See* ***id.*** at 684-85, 524 N.W.2d at 636-37.