COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 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. 95-2082

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICKOLAS G. CARLSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marathon county: VINCENT K. HOWARD, Judge. *Affirmed.*

LaROCQUE, J. Nickolas Carlson, arrested for OWI, contends that the court erred by concluding that Carlson failed to consent to a blood test under Wisconsin's implied consent law, § 343.305, STATS. Carlson refused the hospital's demand that he sign a written authorization for the withdrawal of blood but was otherwise willing to submit to the medical procedure. This court affirms.

A Wausau police officer arrested Carlson for OWI, took him to the police station and read him the standard form informing him of the consequences of refusal. Carlson then agreed to furnish a breath sample.

Apparently because Carlson is a heavy smoker, he could not provide an adequate breath sample. He therefore consented to the officer's request for a blood sample. Taken to the Wausau Hospital, Carlson presented his extended arm to the nurse so that blood could be withdrawn. He refused several times, however, to accede to the nurse's request that he first sign a hospital authorization. Carlson offered no physical resistance, but indicated he would not sign an authorization without speaking to his attorney. Because hospital policy required its employees to obtain a written consent unless the officer ordered the nurse to withdraw the blood "involuntarily," the parties reached an impasse. The officer did not order the nurse to proceed, and Carlson did not sign the form. The officer then treated Carlson's refusal to sign the consent as a refusal to take the test under § 343.305, STATS.

Carlson points to the language of § 343.305(5)(a), STATS., providing: "If the person submits to a test under this section, the officer shall direct the administering of the test." He suggests that when Carlson held out his arm to allow blood to be withdrawn, the officer was thereby compelled to direct the hospital technician to proceed with the taking of a blood sample. The essence of Carlson's claim that he did not refuse the test is the absence of a statutory requirement directing the subject to give a *written* consent to the proffered test.

Our supreme court held in a seminal case interpreting the implied consent law:

> The defendant relies upon sec. 343.305, STATS., and argues that the procedure set forth therein was not followed by the police in this case. ... [T]he implied consent law ... was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway. *In light of that purpose, it must be liberally construed to effectuate its policies.*

Scales v. State, 64 Wis.2d 485, 493-94, 219 N.W.2d 286, 291-92 (1974) (emphasis added).

In furtherance of this policy of liberal construction, the cases have held that even the accused's statutory right to counsel when in custody give way to this liberal construction of the implied consent law. Thus, an accused has no right to prior counseling on the question whether a person in custody should give his consent to testing or refuse to submit to testing. ***State v. Neitzel***, 95 Wis.2d 191, 205, 289 N.W.2d 828, 835 (1980).

We have also noted in context of examining whether an accused has refused to take an OWI test:

> A refusal results because "[i]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal.

Village of Elkhart Lake v. Borzyskowski, 123 Wis.2d 185, 192, 366 N.W.2d 506, 509 (Ct. App. 1985) (quoting ***Beck v. Cox***, 597 P.2d 1335, 1338 (Utah 1979)).

When comparing the hospital's legitimate concern for documentary proof that its physical intrusion into the subject's body was consensual is compared with the minimal imposition upon the accused to provide that proof by signing a consent, this court concludes that the legislature intended that a person "submit" to providing his signature. To construe the statute otherwise would be inconsistent with the purpose of the legislation as established by ***Scales*** and many subsequent decisions. *By the Court.*– Judgment affirmed.

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