

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOVEMBER 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-1852-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TODD J. SOMMERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

CANE, P.J. Todd Sommers appeals his convictions for operating a motor vehicle while under the influence of an intoxicant, third offense, and operating a motor vehicle with a prohibited alcohol concentration. Sommers contends the trial court erred when it concluded that his equal protection and due process rights were not violated. The convictions are affirmed.

Sommers does not challenge his arrest for OWI or his submission to a chemical test of his blood which revealed an alcohol concentration of .246%. Sommers also took an alternate intoxilyzer test which resulted in a reading of .20 grams per 210 liters in his breath. Both test results show that Sommers had an alcohol concentration in his system at least twice the legal rate of .08% for third time offenders. There is no dispute that Sommers has two prior convictions for OWI.

The sole basis of Sommers's appeal is that the two-tiered prohibited alcohol concentration standard in Wisconsin violates the equal protection and due process rights of individuals based on the number of prior convictions that the person has accumulated. Currently, an OWI third and subsequent offender is presumed to be under the influence of an intoxicant at .08%, whereas the first and second OWI offenders are presumed to be under the influence of an intoxicant at .10%.

This court need not reach these constitutional issues because, as the State correctly argues, Sommers has no standing to raise either of these alleged constitutional infirmities. Appellate courts will not reach constitutional issues where the resolution of other issues disposes of an appeal. *Grogan v. PSC*, 109 Wis.2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982). Whether a person has standing to make a constitutional challenge is a question of law which this court reviews independently. *Mogilka v. Jeka*, 131 Wis.2d 459, 467, 389 N.W.2d 359, 362 (Ct. App. 1986). When determining whether a defendant has standing to raise a constitutional challenge, this court must determine if the defendant was injured in fact, and whether the interest allegedly injured is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question. *Id.*

Sommers fails in both determinations. He had a breath test which resulted in a .20 grams per 210 liters reading and a blood test which resulted in a .246% reading. Consequently, Sommers could not have been harmed with a level of intoxication presumed at .08%. Nor does his alleged injury fall within a zone of interest to be protected by a constitutional guarantee. Even if this court were to apply the presumed intoxication level at a blood alcohol concentration of .10%, Sommers had a blood alcohol concentration of at least twice that level. Thus, Sommers has no standing to raise these alleged equal protection and due process violations. Therefore, the convictions are affirmed.

By the Court.—Judgment affirmed.

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

