

**COURT OF APPEALS
DECISION
DATED AND FILED**

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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.

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3191

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL
OF RALPH D. SMYTHE:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RALPH D. SMYTHE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County:
PATRICK TAGGART, Judge. *Affirmed.*

EICH, J.¹ Ralph D. Smythe appeals from an order revoking his driving privileges based upon a determination that he improperly refused to submit

¹ This appeal is decided by a single judge pursuant to § 732.31(2)(c), STATS.

to a breath test under Wisconsin's implied consent statute, § 343.305, STATS. The sole issue on appeal is whether the "Informing the Accused" form, which was read to Smythe by a sheriff's deputy prior to requesting that Smythe submit to a chemical test of his breath, adequately informed Smythe of his rights and responsibilities under the law. We conclude that it did, and therefore affirm the order.

After Smythe had been arrested for driving while intoxicated, Sauk County Sheriff's Deputy Terry Shifflet read the form to him. When asked whether he would submit to a chemical test of his breath, Smythe responded, "I'll give you a blood test, but I'm not going to blow into the machine." Shifflet explained that the breath test is the State's primary test and that if Smythe didn't take it, he would be considered to have refused to be tested. Smythe said he would not, and Shifflet entered "refused" on the form.

A refusal hearing was held on stipulated facts, and the case was submitted to the court on the following stipulated facts: that Shifflet had probable cause to believe that Smythe was driving while intoxicated and read Smythe a true and correct copy of the standard "Informing the Accused" form;² and that, if called to testify, Smythe would state that he understands the language in the form to permit *him*, not the officer, to select which of the three tests to take (breath, blood or urine).

The circuit court, in a written decision, held that Smythe improperly refused to submit to the test—that he "knowingly refused the State's primary

² A video cassette was admitted into evidence showing the actual breathalyzer-room conversation between Smythe and Shifflet, including the reading of the form and Smythe's refusal to take the breath test.

testing being the breathalyzer”—and revoked his driving privileges for one year. The court rejected Smythe’s contention that the language used in the form was “misleading and confusing,” concluding that the form was “clear on its face.”

On appeal, Smythe renews his argument that he shouldn’t be considered to have refused a test because he was misled and confused by the form’s language. It is, in essence, a challenge to the legal sufficiency of the form under the implied consent law and, as such, the issues raised are questions of law, which we review de novo. *State v. Sutton*, 177 Wis.2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993).

Smythe focuses his challenge on two paragraphs in the form:

1. You are deemed under Wisconsin’s Implied Consent Law to have consented to chemical testing of your breath, blood or urine at this Law Enforcement Agency’s expense. The purpose of testing is to determine the presence or quantity of alcohol or other drugs in your blood or breath.
2. If you refuse to submit to any such tests, your operating privilege will be revoked.

He claims the language is subject to two equally reasonable interpretations. In his view the language—particularly the phrase “if you refuse to submit to any such tests”—tells an accused that he or she is required to submit to one of three tests—breath, blood or urine—and it is only “[i]f you won’t take any of them” that you can be considered to have refused. In other words, Smythe reads the form as allowing him to select which of the three tests he will take. He contrasts his view with that of the State, which he characterizes as follows: “You are required to submit to all tests which the officer requests. If you refuse to take any test requested by the officer, then you are refusing to submit to testing and your operating privileges will be revoked.” The fact that the form can be

understood to mean two very different things, Smythe argues, underscores the fact that it is “ambiguous and confusing.” And the result, according to Smythe, is a violation of his due process rights—that the State is now attempting to penalize him for a decision he made in reliance on misleading information given to him by a police officer.

We are not persuaded. We agree with the circuit court that the form adequately informed Smythe of his rights and responsibilities under the implied consent law. In *State v. Tuckwab*, 98 Wis.2d 182, 295 N.W.2d 795 (1980), we considered essentially the same arguments Smythe has put before us here. Tuckwab, appealing a finding that he had improperly refused a test, was convicted of violating the implied consent law by refusing to submit to a breath test. On appeal, he challenged the legal sufficiency of the “Informing the Accused” form that was being used at the time, which was, in all essential points, identical to that used in this case. Paragraph one of the form in *Tuckwab* read: “You are deemed under Wisconsin’s Implied Consent Law, s. 343.305, to have consented to tests of your breath, blood or urine for the purpose of determining the presence or quantity of alcohol or controlled substances in your blood”; and the second paragraph read, in part: “If you refuse to submit to any such tests, your operating privilege will be revoked” *Id.* at 185, 295 N.W.2d at 797. Tuckwab, like Smythe, argued that the language was “misleading and confusing” because it implied that an individual’s license could be revoked only where he or she refuses to submit to all of the tests mentioned in that paragraph. *Id.* at 186, 295 N.W.2d. at 797-98. We rejected the argument, explaining that the paragraph, “when read in light of the entire form,” sufficiently informs the accused that “tests” refers to one or more of the enumerated tests, and that if the accused refuses to submit to the test selected by the officer, he or she is in violation of the implied consent law. *Id.* at 186, 295

N.W.2d at 798. We thus concluded that “the form ... which was read to [Tuckwab] did adequately inform [him] of his rights and responsibilities under Wisconsin’s implied consent law.” *Id.* at 187, 295 N.W.2d. at 798. As indicated, the form used to inform Smythe contained substantially similar language to that used to inform Tuckwab of his rights under the informed consent law. The supreme court has agreed with this conclusion. See *State v. Reitter*, No. 98-0915, slip op. (Wis. June 29, 1999), where the court, citing our decision in *Village of Oregon v. Bryant*, 188 Wis.2d 680, 524 N.W.2d 635 (1994), for the propositions that: (1) the provisions of the implied consent law “are neither confusing nor contradictory,” *Reitter*, slip op. at 14, citing *Bryant*, 188 Wis.2d at 693-94, 524 N.W.2d at 640; and (2) that “because the ‘Informing the Accused’ Form adequately alerts accused drivers to the testing process and the consequences of refusal, the provisions of the implied consent statute do not violate due process.” *Reitter*, slip op. at 26, citing *Bryant*, 188 Wis.2d at 692, 524 N.W.2d at 640.³

By the Court.—Order affirmed.

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

³ In a more recent case, *County of Ozaukee v. Quelle*, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995), we held—citing *Village of Oregon v. Bryant*, 188 Wis.2d 680, 524 N.W.2d 635 (1994)—that an accused’s subjective confusion concerning the meaning of the information in the “Informing the Accused” form does not render a refusal reasonable. *Quelle*, 198 Wis.2d at 280, 542 N.W.2d at 200. We emphasized in *Quelle* that an accused’s “subjective confusion” as to his or her rights under the law was not a defense in a refusal hearing. We said that the form was not confusing, that the officer’s duty was only to accurately deliver the information contained in it to the accused, and that his or her own “inability to digest and interpret the words and phrases of the form” did not invalidate the process. *Id.* at 283, 542 N.W.2d at 201.

