

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 1999

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. 99-1268-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY L. LOPPNOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

¶1 NETTESHEIM, J. Gary L. Loppnow appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to § 346.63(1)(a), STATS. Loppnow was convicted as a third-time offender. On appeal, Loppnow claims that the trial court should have suppressed evidence of a chemical test because the Informing the Accused form used by the police when advising him under the implied consent law was ambiguous and did not fairly

advise him of the length of Wisconsin's penalty enhancement counting period. As such, Loppnow contends that his due process rights were violated. *See Raley v. Ohio*, 360 U.S. 423, 438-39 (1959). We disagree. We affirm the judgment of conviction.

¶2 Loppnow was arrested for OWI on February 8, 1998. At that time, § 343.305(4)(c), STATS., 1995-96, provided that if the suspect submitted to a chemical test and the result was a prohibited alcohol concentration, certain penalties would result “if the person has 2 or more prior convictions, suspensions or revocations within a 10-year period.”¹ However, the Informing the Accused form read to Loppnow following his arrest did not precisely track this statutory language. The form read:

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. [Emphasis added.]

¶3 Loppnow submitted to the test. He later moved to suppress the test results, contending that the Informing the Accused information did not comport with the ten-year period recited in the statute. Loppnow argued that the information was ambiguous and that one reasonable reading is that it encompassed

¹ The statute provided similar penalties if the suspect refused the test.

The current version of § 343.305(4), STATS., eliminates this language and simplifies the penalty information that must be delivered to an OWI suspect. The current statute requires that an OWI suspect be informed that if a test reveals a prohibited alcohol concentration, “your operating privilege will be suspended.” If the suspect refuses the test, the statute requires that the suspect be informed that “your operating privilege will be revoked and you will be subject to other penalties.”

all convictions since January 1, 1988, thereby extending the statutory period to ten years and thirty-nine days as measured from the date of the arrest in this case.² The trial court denied the motion. Following a trial to the court, Loppnow was convicted. He renews his trial court argument on appeal.

¶4 We reject Loppnow's contention that the language in the form is ambiguous. The form uses the conjunction "and" when advising that the prior suspensions, revocations or convictions must satisfy two time period conditions: the prior events must have occurred within a ten-year period *and* they must have occurred after January 1, 1988. Loppnow would have us read the form to use the word "or." But that is not what the form says.

By the Court.—Judgment affirmed.

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

² The State advises that the "January 1, 1988" language was included in the Informing the Accused form because of concerns regarding the accuracy of Department of Transportation conviction records prior to that date.

