COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2001

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1765

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

IN THE MATTER OF THE REFUSAL OF
BERNARD W. HARRIS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD W. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] This is an appeal from an order revoking Bernard Harris's operating privilege after he refused to provide a sample of his breath, blood, or urine when arrested for operating a motor vehicle while under the influence of an intoxicant (OMVWI). His brief asserts two issues: "The notice of intent to revoke was defective"[2] and "The State may not coerce consent." He concludes his brief on the first issue by noting that ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, decided the issue adversely to him, and explains that since there is still a possibility of United States Supreme Court review of ***Thorstad***, he makes the argument to avoid a later claim of waiver. The Supreme Court has since declined to review ***Thorstad***, and we therefore do not address this issue. *See* ***Thorstad v. Wisconsin***, 121 S. Ct. 1099 (2001).

¶2 Nor do we address Harris's second issue. Harris has not shown that he raised this issue in the trial court, nor has he shown that he has notified the attorney general of his assertion that the coercion implicit in WIS. STAT. § 343.305(2), (9), and (10) (1999-2000)[3] is a violation of the Fourth Amendment to the United States Constitution.[4]

---

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000).

[2] This issue is broken into four parts, and concludes with a section entitled "Requiring blood testing is unconstitutional in the absence of a warrant."

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[4] Harris notes in his brief that the parties' stipulated facts were not included in the record. He also notes that one of the briefs submitted to the trial court is not included in the record, and that he intended to file a motion to supplement the record, presumably with the stipulation and the brief. But the record does not include such a motion. We have taken our facts from the record submitted, and see no need for further facts. Because the missing brief (or briefs) is not of record, we do not know what it contains, and cannot consider it. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 300 n.3, 594 N.W.2d 821 (Ct. App. 1999).

¶3 The facts necessary to decide this case are not complicated. A Platteville police officer arrested Harris for violating a Platteville ordinance incorporating WIS. STAT. § 346.63(1)(a), OMVWI. Harris refused to submit to a test of his blood, breath, or urine, and as a result, his operating privilege was revoked after a hearing before the circuit court for Grant County. He asserts that WIS. STAT. § 343.305(2), (9), and (10) are unconstitutional because a motor vehicle driver has a constitutional right to refuse consent to a blood draw, and he is being punished for exercising that right.[5]

¶4 The record does not show that Harris raised this issue before the trial court. Harris made a motion to dismiss the refusal hearing, arguing: "The Notice of Intent to Revoke issued to the respondent did not contain this required information and contains nothing even remotely resembling it." This is the issue decided in ***State v. Gautschi***, 2000 WI App 274, 240 Wis. 2d 83, 622 N.W.2d 24. It is not the principal argument Harris makes on appeal. Harris's trial court brief attached to his motion argues only the issue later decided in ***Gautschi***.

¶5 At a hearing on November 23, 1999, the court noted that although the time was scheduled for a refusal hearing, it would hear arguments on Harris's motion to dismiss. Harris told the court that he was relying on his brief. The court inquired about circuit court cases deciding the ***Gautschi*** issue, and Harris answered the court's inquiry. The State argued its view of the ***Gautschi*** issue, and moved to amend the notice of intent to revoke. The court granted the motion, and the State and Harris agreed to prepare a stipulation of facts for the revocation hearing.

[5] We presume that Harris is also asserting that he has a constitutional right to refuse consent to a breath or urine test.

¶6 The court then asked for a preview of the issues which Harris would raise in his motion to dismiss the amended notice of intent to revoke. Harris answered: "[I]t is our view that to the extent that 343.305 is utilized by police to request a test, which the constitution prohibits, that the provisions of 343.305 would to that extent be unconstitutional, and it would be our intent to serve the attorney [general] again with that brief …." This appears to be the issue Harris has raised in this appeal, but which he abandoned in the trial court.

¶7 The parties agreed to a briefing schedule. Harris noted: "But I think it doesn't make a lot of sense to cross-brief this. Because if I go first on the opening brief, I think it defines the issues. I think it makes it easier for the prosecution to respond." The parties agreed to a 30-20 and 10 briefing schedule.

¶8 Unfortunately, Harris has not included in the record a copy of his trial court brief. The State's brief is of record, but Harris's reply brief is also not of record. It is the responsibility of the appellant to make an adequate record on appeal. ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). The only documents of record to determine whether the issue Harris raised in the trial court is the issue he raises on appeal are his motion and brief appended to the motion, the State's brief, and the trial court's decision.

¶9 We have previously addressed Harris's motion and appended brief. The State's brief begins: "The issue that is being presented by the respondent is whether Wisconsin's implied consent statute, Section 343.305(2), Wis. Stats., allows a police officer to request as the primary test a blood test." The trial court's opinion begins: "The issue presented to the Court by the Respondent is whether Wisconsin's implied consent statute, Sec. 343.305(2), Wis. Stats. allows a law enforcement officer to request a blood test as the primary test." The trial court

also noted: "The District Attorney and defense counsel have filed briefs with the Court discussing the constitutional issues of the choice of a blood test in the Wisconsin Statute." This is the issue we later decided in ***Thorstad***, 2000 WI App 199 at ¶¶10-11, not the issue Harris raises here.

¶10 We will not address an issue raised for the first time on appeal. ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990). Harris has not shown that he raised in the trial court the issue he now presents to us. We will therefore not address it now. And we note that despite recognizing the necessity of notifying the attorney general prior to attacking a statute as unconstitutional, and noting that he intended to do so, Harris has not shown in the record that he did this. *See* ***William B. Tanner Co. v. Estate of Fessler***, 100 Wis. 2d 437, 443, 302 N.W.2d 414 (1981). This is another reason we will not address Harris's attack on the constitutionality of WIS. STAT. § 343.305(2), (9), and (10).

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.