COURT OF APPEALS
DECISION
DATED AND RELEASED

March 14, 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, 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. 95-2348-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES W. PUSEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Juneau County: PATRICK TAGGART, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. James W. Pusel appeals from a judgment convicting him of one count of operating a motor vehicle while under the influence of an intoxicant, contrary to § 346.63(1)(a), STATS., and one count of operating a motor vehicle with a prohibited alcohol concentration, contrary to § 346.63(1)(b). Pusel raises the following issues on appeal: (1) whether the trial court erred when it automatically admitted the intoxilyzer test result because the arresting officer did not read to Pusel the portion of the Informing the Accused form relating to commercial drivers as required by § 343.305(4m), STATS.; and (2) whether WIS

J I—CRIMINAL 2669 creates an unconstitutional presumption. We conclude that: (1) the intoxilyzer test result was automatically admissible because § 343.305(4m) was not in effect when Pusel was arrested; and (2) the jury instruction does not create an unconstitutional presumption. Accordingly, we affirm.

BACKGROUND

On March 27, 1993, Juneau County Deputy Sheriff Timothy T. Andres stopped James W. Pusel after he observed Pusel driving erratically. Deputy Andres smelled a moderate odor of intoxicants on Pusel's breath and noticed that Pusel's speech was slurred, his eyes were bloodshot and that he appeared to be sleepy. He asked Pusel to perform several field sobriety tests and upon completing the tests, Deputy Andres arrested Pusel.

At the police station, Deputy Andres read to Pusel the Informing the Accused form which advises persons of their rights and obligations under Wisconsin's Implied Consent Law. However, Deputy Andres read only the section pertaining to persons who possess a regular driver's license because Pusel was neither operating a commercial vehicle nor was he on duty time. Pusel subsequently took an intoxilyzer test of his breath which produced a reported value of .18 grams of alcohol in 210 liters of breath.

At trial, Pusel objected to the admission of the intoxilyzer test result because Deputy Andres did not read the commercial driver's license section of the Informing the Accused form. The trial court admitted the test result into evidence because it found that Deputy Andres took all reasonable steps necessary to determine whether Pusel was operating as a commercially licensed driver and that the notice given on the form adequately advised Pusel of his rights.

Pusel subsequently objected to WIS J I-CRIMINAL 2669. Pusel argued that because the jury was instructed that the intoxilyzer test result was automatically admissible, the jury had to find that he had a prohibited alcohol concentration and was under the influence of an intoxicant at the time he

operated his vehicle. After the trial court denied Pusel's objection, the jury found him guilty of both charges. Pusel appeals.

AUTOMATIC ADMISSIBILITY

Pusel challenges the trial court's determination that the intoxilyzer test result was automatically admissible. Pusel asserts that Deputy Andres's failure to read the commercially licensed driver section of the Informing the Accused form violated § 343.305(4m), STATS. But subsection (4m) was enacted by the legislature on April 15, 1994, by 1993 Wis. Act 315, and became effective April 30, 1994. Pusel was arrested on March 27, 1993—one year prior to the subsection's effective date. Therefore, subsection (4m) was not in existence when Pusel was arrested and, instead, his arrest is governed by § 343.305(4), STATS., 1991-92.[1]

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[1] Section 343.305(4), STATS., 1991-92, provided:

> At the time a chemical test specimen is requested under sub. (3)(a) or (am), the person shall be orally informed by the law enforcement officer that:
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> (a) He or she is deemed to have consented to tests under sub. (2);
>
> (b) If testing is refused ... the person's operating privilege will be revoked under this section and, if the person was driving or operating or on duty time with respect to a commercial motor vehicle, the person will be issued an out-of-service order for the 24 hours following the refusal;
>
> (c) If one or more tests are taken and the results of any test indicate that the person:
>
> 1. Has a prohibited alcohol concentration and was driving or operating a motor vehicle, the person will be subject to penalties, the person's operating privilege will be suspended under this section ... ;
>
> 2. Has an alcohol concentration of 0.04 or more and was driving or operating a commercial motor vehicle, the person will, upon conviction of such offense, be subject to penalties and

In 1993, § 343.305(4), STATS., 1991-92, required a police officer to advise a driver of all statutory warnings regardless of the operator's status, except the officer was not required to read the commercial warnings to a driver who the officer had no basis for believing was operating a commercial vehicle or on duty time at the time of arrest. ***State v. Piskula,*** 168 Wis.2d 135, 140-41, 483 N.W.2d 250, 252 (Ct. App. 1992). In ***Piskula***, we upheld a conviction of a driver who was only informed of his rights as a regularly licensed driver because the driver never asserted that he was driving a commercial vehicle or was on duty time, and the officer had no reason to believe otherwise. ***Id.*** We said:

> Piskula was actually informed of all rights and penalties relating to him. He was not informed about the rights and penalties relating to drivers of commercial vehicles, but Piskula was not driving a commercial vehicle and he does not assert that he was driving or on duty time with respect to a commercial vehicle .... It would be unreasonable to require officers to inform persons who are clearly noncommercial drivers about the rights and penalties applicable only to commercial drivers. We conclude that Piskula was properly informed of his rights pursuant to sec. 343.305(4) because there was actual compliance with respect to the substance essential to every reasonable objective of the statute.

Id. (citation omitted).

(..continued)

> disqualified from operating a commercial motor vehicle; and
>
> 3. Has any measured alcohol concentration above 0.0 and was driving or operating or on duty time with respect to a commercial motor vehicle, the person will be subject to penalties and issuance of an out-of-service order for the 24 hours following the refusal; and
>
> (d) After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

But Pusel also argues that ***State v. Geraldson***, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993), requires police officers to read the commercial driver's section of the Informing the Accused form before the intoxilyzer test is automatically admissible. In that case, the court distinguished ***Piskula*** because the arresting officer knew that Geraldson was licensed as a commercial operator. ***Id.*** at 493-95, 500 N.W.2d at 417-18. In this case, however, there is no evidence that Deputy Andres knew that Pusel held a commercial license. Accordingly, ***Geraldson*** is inapplicable.

There is nothing in the record to indicate that Pusel asserted that he was anything but a regularly licensed driver, that he was driving a commercial vehicle or that he was on duty time. Deputy Andres actually complied with the reasonable objectives of § 343.305(4), STATS., 1991-92, because he informed Pusel of all rights and penalties relating to him as a holder of a regular driver's license. Thus, the intoxilyzer test result was automatically admissible.

JURY INSTRUCTION

Pusel next argues that WIS J I—CRIMINAL 2669 creates the unconstitutional presumption that because the jury is informed that the intoxilyzer test result is automatically admissible, the jury must conclude that he was driving under the influence of an intoxicant or with a prohibited alcohol concentration. He argues that this is an unconstitutional presumption which violates his due process rights.

The burden of demonstrating that an erroneous instruction is so prejudicial that it is unconstitutional is quite onerous. ***State v. Vick***, 104 Wis.2d 678, 691, 312 N.W.2d 489, 496 (1981). To determine whether this burden has been met, it is insufficient for a party to merely demonstrate that "the instruction is undesirable, erroneous, or even `universally condemned.'" ***Id.*** (quoted source omitted). Instead, the party must demonstrate that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." ***Id.*** (quoted source omitted).

The jury was instructed that if it was satisfied that Pusel had a breath alcohol content of .10 grams or more of alcohol in 210 liters of his breath when he took the test, then it *may* find that Pusel was operating a motor vehicle

while under the influence of an intoxicant or with a prohibited alcohol content, or both, but that it was not required to do so. Then the jury was instructed that an intoxilyzer test is scientifically sound and that the State does not have to prove its scientific reliability, but only that it was working properly and administered by a qualified person.[2] Pusel argues that by juxtaposing this language, the jury had to conclude that the test is accurate, without proof of the accuracy of its methodology, and that the intoxilyzer test result, alone, was sufficient to support convictions for both charges. In other words, the permissive inference became an unconstitutional presumption when this language was combined. We disagree.

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[2] The trial court instructed the jury to the following:

> Evidence has been received that, within three hours after the defendant's alleged operating of a motor vehicle, a sample of defendant's breath was taken. An analysis of the sample has also been received.
>
> If you are satisfied beyond a reasonable doubt that there was .10 grams or more of alcohol in 210 liters of defendant's breath at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged operating, or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, but you are not required to do so.
>
> You, the jury, are here to decide these questions on the basis of all the evidence in the case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.
>
> The law recognizes that the Intoxilyzer uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the Intoxilyzer.
>
> The State is required to establish that the Intoxilyzer was in proper working order and that it was correctly operated by a qualified person.

In ***Vick***, the court concluded that a jury instruction which uses the word "may" and which states that the jury should convict only if it is satisfied of guilt beyond a reasonable doubt is permissive and not constitutionally infirm. ***Id.*** at 697, 312 N.W.2d at 498-99. In this case, the jury instruction used the term "may" and the trial court provided the following qualifications:

> You, the jury, are here to decide these questions on the basis of all the evidence in the case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged operating or that the defendant had a prohibited alcohol concentration at the time of the alleged operating, or both, unless you are satisfied of that fact beyond a reasonable doubt.
>
> ....
>
> If you are satisfied beyond a reasonable doubt that the defendant operated a motor vehicle on a highway while under the influence [of] an intoxicant, you should find the defendant guilty of a violation of Section 346.63(1)(a).
>
> If you are not so satisfied, you must find the defendant not guilty of a violation of [§] 346.63(1)(a).
>
> If you are satisfied beyond a reasonable doubt [that] the defendant operated a motor vehicle on a highway with a prohibited alcohol concentration, you should find the defendant guilty of a violation of Section 346.63(1)(b).
>
> If you are not so satisfied, you must find the defendant not guilty of a violation of Section 346.63(1)(b).

The jury was given the option of convicting or acquitting Pusel. We do not believe that the references to the automatic admissibility of the intoxilyzer test result caused the jury to believe that it could not acquit. Moreover, the jury was not told that the permissive presumption could not be

rebutted. We conclude that Pusel has not demonstrated that the instruction "so infected the entire trial that the resulting conviction violates due process." ***Vick***, 104 Wis.2d at 691, 312 N.W.2d at 496. Accordingly, the instruction does not create an unconstitutional presumption.

By the Court.—Judgment affirmed.

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