COURT OF APPEALS
DECISION
DATED AND RELEASED

July 26, 1995

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. 95-0321

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL S. KREUTZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

SNYDER, J. Michael S. Kreutz appeals from an order denying his motions to suppress breath alcohol test evidence and to deprive the State of the statutory presumption of admissibility of the blood alcohol content (BAC) test results during his trial. We are unpersuaded by Kreutz's arguments and affirm the order and subsequent judgment of conviction.

The facts are undisputed. On April 17, 1994, Wisconsin State Trooper Roger Jones arrested Kreutz in Sheboygan Falls for operating a motor vehicle while intoxicated (OWI) in violation of § 346.63(1)(a), STATS., and transported him to the Sheboygan Falls police station to obtain a BAC test.[1]

Section 343.305(4), STATS.,[2] requires a test subject be informed of his or her rights and the penalties under the implied consent law prior to

[1] Kreutz was arrested thirteen days prior to the effective date of 1993 WIS. ACT 315, which amended § 343.305, STATS., limiting the need to inform drivers of consequences faced by those who held commercial operator's licenses.

[2] Section 343.305(4), STATS., 1991-92, states:

> 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:
>
> (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 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.

administering a BAC test. The Informing the Accused form used for that purpose contains information applicable to all drivers (Section A)[3] and to commercial drivers (Section B).

Jones concedes that he did not read Section B to Kreutz and provided the reason at Kreutz's trial:

Q.And when you say "read" it, how much of that, if you recall, did you read to Mr. Kreutz?

A.There are two parts to the form. One is Section A, and that is for someone that is operating on a regular driver's

---

[3] Section A requires the following five provisions be read to the test subject:

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 of 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.

3. After submitting to chemical testing, you may request the alternative test that this law enforcement agency is prepared to administer at its expense or you may request a reasonable opportunity to have any qualified person of your choice administer a chemical test at your expense.

4. If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.

5. 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 five year period 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.

> license. That's a D or an M classification, motorcycle or regular driver's license. Anything after that, if they are on a commercial license, you would read side A and side B. He was only on a D license; therefore I only read half of it. The first five.

Q.The Section A?

A.Section A.

Kreutz submitted to an evidentiary breath test and a .21% BAC test result was obtained. He was then charged with operating a motor vehicle with a prohibited BAC contrary to § 346.63(1)(b), STATS.

The trial court denied a pretrial motion to suppress the BAC test result and received it into evidence at trial under the § 885.235(1), STATS.,[4] presumption of admissibility. Kreutz was found guilty of both charges and judgment was entered against him for violating § 346.63(1)(a), STATS.

MOTION TO SUPPRESS

Kreutz first contends that the BAC test result must be suppressed because the failure to read Section B of the Informing the Accused form violates § 343.305(4), STATS., and our holding in ***Village of Elm Grove v. Landowski,*** 181 Wis.2d 137, 510 N.W.2d 752 (Ct. App. 1993).[5] Whether Kreutz was properly

[4] In an OWI or BAC trial, § 885.235 (1), STATS., provides that a chemical test analysis shall be given effect without requiring expert testimony if the sample was taken within three hours of the event to be proved.

[5] ***Village of Elm Grove v. Landowski*** and ***State v. Robbins*** were consolidated and both cases were decided under the same case citation. *See* ***Village of Elm Grove v. Landowski***, 181 Wis.2d 137, 510 N.W.2d 752 (Ct. App. 1993). ***Landowski*** refers to both cases in this opinion.

informed of his § 343.305(4) rights prior to taking the BAC test requires the construction and application of the statute to undisputed facts and our review is de novo. *See* ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990).

Although we are not bound by the trial court's legal conclusions, we note that the court determined that ***State v. Piskula,*** 168 Wis.2d 135, 483 N.W.2d 250 (Ct. App. 1992), a case preceding ***Landowski***, controlled and found that the § 343.305(4), STATS., requirements were satisfied. We agree.

Like Kreutz, Piskula was a noncommercial operator arrested for OWI who complained that he had not been fully advised of the rights and penalties under § 343.305(4), STATS., because he was read only Section A and not the commercial operator information in Section B. ***Piskula,*** 168 Wis.2d at 140, 483 N.W.2d at 252. The ***Piskula*** court held that reading only Section A to a noncommercial operator constituted substantial compliance with the statute. ***Id.*** at 141, 483 N.W.2d at 252. Therefore, we conclude that Kreutz presents the exact issue as decided in ***Piskula*** and that ***Piskula*** controls.[6]

Kreutz contends that ***Piskula*** was overruled by ***Landowski*** and that ***Landowski*** now requires that law enforcement officers read all of the warning and penalty information to every accused all of the time, and that

[6] In ***State v. Piskula,*** 168 Wis.2d 135, 483 N.W.2d 250 (Ct. App. 1992), Piskula appealed from an order of revocation for refusing to submit to a BAC test and sought vacation of the revocation. Kreutz appeals from the evidentiary use of the BAC test results against him at trial and seeks a new trial without the BAC test evidence. Because both rely upon a failure to comply with the same alleged requirements of § 343.305(4), STATS., we believe that this procedural distinction is irrelevant.

applying ***Piskula*** eviscerates the ***Landowski*** "full warning" requirement. We cannot agree.

Kreutz begins his argument by highlighting the following advisory dicta in ***State v. Geraldson,*** 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993), which he maintains became the ***Landowski*** controlling law overturning the ***Piskula*** substantial compliance rule:

> Despite the court-made law which has permitted deviations from the implied consent law in certain situations, we think the safest and surest method is for law enforcement officers to advise OWI suspects of *all* warnings, whether or not they apply to the particular suspect, and to do so in the very words of the implied consent law. This suggestion is nothing more than what the statute requires on its face.

Geraldson, 176 Wis.2d at 496-97, 500 N.W.2d at 419. The crux of Kreutz's argument is that this dicta became controlling law when ***Landowski*** repeated it and stated:

> Although the arrests in these cases occurred before our decision in ***Geraldson***, the arresting officers here performed in full accord with our suggestion. As such, our dicta in ***Geraldson*** becomes the controlling principle in these cases.

Landowski, 181 Wis.2d at 143, 510 N.W.2d at 755.

Kreutz urges us to read the phrase "in these cases" to mean all implied consent cases, including a ***Piskula*** case where only Section A has been read to a noncommercial test subject. ***Landowski***, however, disposed of two consolidated cases where both Section A and Section B had been read to

noncommercial operators, Landowski and Robbins. We held in each case that where the arresting officer advises an operator of all the required warnings, the officer is simply following the mandate of the implied consent law. ***Landowski,*** 181 Wis.2d at 141, 510 N.W.2d at 754.

Contrary to Kreutz, we read "in these cases" to mean only the two consolidated cases disposed of by ***Landowski*** and not the broad proposed judicial fiat promoted by Kreutz. The trial court was correct in concluding that ***Piskula*** is on point and controls.[7]

Kreutz's argument must also fail because the ***Landowski*** court was powerless to overrule a previous published opinion of the court of appeals:

> The Court of Appeals is treated as a single court administered by a single chief judge. The Court of Appeals has one administrative headquarters, namely Madison, although panels of the Court sit in numerous locations in the state. *The published decision of any one of the panels has binding effect on all panels of the Court.* [Emphasis added.]

In re Court of Appeals of Wis., 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978).

DUE PROCESS

Kreutz also contends that the failure of the arresting officer to advise him that the BAC evidence could be obtained through a warrantless

[7] Because we conclude that the BAC test result was obtained in compliance with the requirements of the implied consent law, Kreutz's argument that the trial court erred in allowing the test result evidence under the § 885.235(1), STATS., presumption of admissibility also fails.

blood draw if he refused the breath alcohol test violates due process. He relies on the supreme court holding in ***State v. Bohling,*** 173 Wis.2d 529, 494 N.W.2d 399, *cert. denied*, 114 S. Ct. 112 (1993), to support his contention.

In ***Bohling***, the supreme court held that a warrantless blood draw from Bohling after his OWI arrest and breath intoxilyzer test refusal was constitutionally permissible. ***Id.*** at 533-34, 494 N.W.2d at 400. Bohling's test result was .205% BAC. ***Id.*** at 535, 494 N.W.2d at 400. The test result was used as prosecution evidence to charge a BAC violation as well as OWI. ***Id.*** Kreutz argues that this is contrary to the § 343.305(4)(b), STATS., warning that only a revocation will occur.

Kreutz argues that if the ***Bohling*** warrantless blood draw consequence is not presented to a test subject, an informed implied consent decision is not possible. Therefore, Kreutz argues that ***Bohling*** should be incorporated into the implied consent warnings, and Section A, paragraph 2 of the Informing the Accused form would then read: "If you refuse to submit to any such tests, your operating privilege will be revoked [and the Law Enforcement Agency may obtain a warrantless blood draw which may result in a prohibited blood alcohol charge being filed against you and this refusal may be used against you at trial as being evidence of consciousness of guilt]." (Bracketed language added.)

Kreutz wrongly attempts to marry the standard of review applicable in the ***Bohling*** constitutional search case[8] to the due process

[8] A warrantless drawing of blood is a seizure that must comply with the Fourth Amendment of

requirements applicable under the implied consent law. It is axiomatic that a ***Bohling*** warrantless blood draw to obtain BAC evidence is available to law enforcement agencies regardless of the existence of the implied consent law if the officer meets the ***Bohling*** criteria.[9] ***Bohling*** has no impact on Kreutz's consent to submit to an implied consent test.

In addition, we conclude that where blood is obtained within the auspices of § 343.305(4), STATS., the evidentiary consequences of a ***Bohling*** blood draw are moot. An appellate issue is moot when resolving that issue will have no potential effect upon an existing controversy. ***State ex rel. La Crosse Tribune v. Circuit Court,*** 115 Wis.2d 220, 228, 340 N.W.2d 460, 464 (1983).

Finally, we agree with the State that the implied consent due process issue has been adequately addressed in ***State v. Crandall,*** 133 Wis.2d 251, 394 N.W.2d 905 (1986), where the supreme court held that the information required by § 343.305(4), STATS., is all that is required to meet due process requirements. ***Id.*** at 259-60, 394 N.W.2d at 908. Kreutz was provided all the information that was required under the implied consent law and ***Piskula*** prior

(..continued)
the United States Constitution. ***Schmerber v. California,*** 384 U.S. 757 (1966).

[9] ***State v. Bohling***, 173 Wis.2d 529, 494 N.W.2d 399, *cert. denied*, 114 S. Ct. 112 (1993), held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a permissible warrantless blood draw at the direction of a law enforcement officer under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. ***Id.*** at 533-34, 494 N.W.2d at 400.

to consenting to take the breath intoxilyzer test. We conclude that Kreutz's due process rights were not violated.[10]

By the Court.—Judgment and order affirmed.

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

[10] Kreutz also maintains that an implied consent refusal subject would be additionally harmed because where a ***Bohling*** blood result is obtained, the refusal can still be presented at trial to reflect consciousness of guilt. He cites to no authority for that argument. While a refusal to take the BAC test under the implied consent law may be used in that fashion, *see* ***State v. Crandall***, 133 Wis.2d 251, 257, 394 N.W.2d 905, 907 (1986), Kreutz merely speculates that the same opportunity is present where a warrantless blood draw follows a refusal and a prohibited result is placed into evidence. Neither ***Bohling*** nor the Kreutz trial court addressed this issue. We deem the issue inadequately briefed and decline to address it. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).