COURT OF APPEALS
DECISION
DATED AND RELEASED

December 19, 1995

No. 95-2213

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

CITY OF STURGEON BAY,

Plaintiff-Respondent,

v.

GREGORY M. EBEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed.*

MYSE, J. Gregory M. Ebel appeals a judgment of conviction for operating a motor vehicle while intoxicated contrary to a municipal ordinance adopting § 346.63(1)(a), STATS. Ebel claims that his conviction should be reversed because the informing the accused form read to him was defective. Because this court concludes that Ebel was not prejudiced by the defect in the warning given to him, the judgment of conviction is affirmed.

The relevant facts are undisputed. At approximately 2:20 a.m., officer Wendy Allen observed Ebel operating his motor vehicle over the centerline and weaving within his lane of traffic. After stopping Ebel, Allen noticed that Ebel's eyes were bloodshot, his speech was slurred, and an odor of

intoxicants emitted from the vehicle. Allen subsequently conducted several field sobriety tests and concluded that Ebel failed to perform them properly. Based upon her observations, Allen placed Ebel under arrest for operating a motor vehicle while under the influence of an intoxicant. Allen then informed Ebel of his rights under Wisconsin's Implied Consent Law and requested that Ebel submit to an evidentiary chemical test of his breath. *See* § 343.305(4), STATS. Ebel submitted to the test which showed a result of .16 grams of alcohol in 210 liters of breath.

In a pretrial motion, Ebel moved to deprive the City of the statutory presumption of admissibility of the chemical test because the informing the accused form read to him was defective. The trial court denied the motion. It is undisputed that the warning given by the officer was correct and conformed to the requirements of § 343.305(4), except that the time period for determining whether he had two or more prior suspensions, revocations or convictions for penalty enhancement purposes was misstated. The actual advice given by the officer was that a motor vehicle Ebel owned could be equipped with an ignition interlock device, immobilized, seized or forfeited if he had two or more prior convictions, suspensions or revocations within a five-year period that would be counted under § 343.307(1), STATS. The correct advice is that if the driver has two or more prior suspensions, revocations or convictions within a ten-year period that would be counted under § 343.307(1), STATS., a motor vehicle owned by the driver may be equipped with an ignition interlock device, immobilized, seized or forfeited. The parties agree that this was a first offense and the advice concerning consequences after two or more prior suspensions, revocations or convictions was not applicable to Ebel. Ebel was convicted of the offense after a jury trial and now appeals.

This case presents an undisputed set of facts to which this court must apply a statute, thereby presenting a question of law to be reviewed de novo. ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994).

There is no question that there was an error in the advice given Ebel at the time he was asked to submit to the chemical test. The only issue raised is the consequence of the erroneous advice. While we acknowledge the mandatory nature of the requirement that the advice be given, the consequences

of failing to follow exactly the statutory directive is a matter for judicial determination.

In ***State v. Piskula***, 168 Wis.2d 135, 140, 483 N.W.2d 250, 252 (Ct. App. 1992), we concluded that errors in informing the accused that were technical in nature and did not prejudice the accused would not result in a reversal. The reasonable objective of the implied consent statute is to inform drivers of their rights and penalties for either refusing to submit to a chemical test or submitting to a chemical test that results in a prohibited alcohol concentration. ***Id.*** at 140-41, 483 N.W.2d at 252. In ***Piskula***, we concluded that substantial compliance with the implied consent statute will suffice if it is actual compliance with every reasonable objective of the statute. ***Id.*** Informing a drunk driving suspect of all the rights and penalties relating to him or her is "actual compliance with respect to the substance essential to every reasonable objective of the statute." ***Id.*** at 141, 483 N.W.2d at 252. In ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 687 n.5, 524 N.W.2d 635, 638 n.5 (1994), our supreme court concluded that ***Piskula*** was and is correct.

The holding in ***Piskula*** is applicable to this case even though the factual predicate is different. In this case the error in the advice concerned the time period for determining whether a defendant had two or more prior suspensions, revocations or convictions for authorizing action to be taken against the vehicle. The error did not prejudice Ebel because it neither related to nor affected Ebel's rights. Ebel was not concerned with whether these penalties occurred after two convictions within a five-year period or a ten-year period because he had no prior convictions. Because Ebel was actually informed of all rights and penalties relevant to him, he was not prejudiced by the error. The error does not require reversal of the conviction because the warning given was in substantial compliance with the statutory requirements.

Ebel argues that a contrary result is required by ***State v. Geraldson***, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993). This court does not agree. In ***Geraldson***, the driver possessed a commercial operator's license even though he was not at the time operating a commercial vehicle. The officer did not advise Geraldson of additional warnings applicable to commercial operators. The driver's rights could have been affected because of possible consequences applying to his commercial license. He was entitled to know this information which could have been both relevant and significant to him. The

failure to properly advise him was therefore prejudicial to the defendant and renders the consent imperfect.

Ebel further argues that the presumption of admissibility provided by § 343.305(5)(d), STATS., does not apply and the test result could not be admissible at trial because one who refuses should not be afforded greater protection than one who submits to a defective request for a breath sample. While there is much wrong with this analysis, it is sufficient to say that when the defect is not prejudicial to the defendant it is not a basis upon which the admissibility of the test result will be changed.

Based on the foregoing, this court concludes that the defendant's judgment of conviction should be sustained notwithstanding the failure to strictly comply with the statutory requirement regarding informing the accused.

By the Court.—Judgment affirmed.

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