COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 6, 1995

No. 95-1920-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM BACKHAUS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Affirmed.*

ANDERSON, P.J. William Backhaus seeks reversal of his conviction for drunk driving on the grounds that the trial court erred when it permitted the State to introduce evidence that he refused to submit to a test of the alcohol concentration in his blood. We affirm his conviction because we conclude that even if the trial court did commit error, there is no reasonable possibility that the error contributed to the conviction.

City of West Bend police officer Travis Vickney was dispatched to a report of a vehicle honking its horn in a public parking lot in the early morning hours. As the officer approached the parking lot, he saw a vehicle leave the lot, and shortly thereafter, it rolled through a stop sign and in making a turn, it swung into the lane for opposing traffic and then returned to its lane. As the vehicle continued, it swerved within its lane of travel and crossed the center line twice. Vickney pursued and stopped the vehicle. When Vickney walked up to the driver's side, the window was down and he detected the odor of alcohol coming from the vehicle and saw a can of beer lying on the back floor of the passenger compartment.

Vickney asked the driver for his license. After fumbling several times through his wallet, the driver produced his license and Vickney identified him as Backhaus. At the officer's request, Backhaus exited the car and agreed to perform field sobriety tests. Vickney testified that Backhaus failed the field sobriety tests that he administered. After Backhaus's performance on the field sobriety tests, Vickney concluded that Backhaus was intoxicated to the point that his driving was impaired and he placed him under arrest. Vickney then read column A of the Informing the Accused form to Backhaus, omitting information in column B of the form for holders of commercial operators' licenses. Backhaus refused to submit to a chemical test.

Vickney took Backhaus to a local hospital pursuant to his department's designation of the blood test as the primary test it gives under the implied consent law. At the hospital, the officer provided a medical technician

with a state blood alcohol concentration test kit, and despite Backhaus's refusal to submit to the test, the medical technician drew the necessary blood. The blood was sent to the state hygiene lab for analysis and the lab later reported that Backhaus's blood alcohol concentration was 0.171%.

Backhaus filed a motion challenging the consequences of his refusal to submit to the primary test on the grounds that Vickney failed to fully inform him of his rights under the implied consent law. He argued to the trial court that Vickney did not have the discretion to omit the information from the form designated for holders of commercial licenses and that the failure to fully inform him required dismissal of the refusal prosecution. The trial court, relying upon a series of decisions from this court, held that the officer was required to read all of the warnings on the Informing the Accused form, and because the officer failed to do so, the State could not visit consequences upon Backhaus for his refusal.[1]

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[1] Although the trial court's ruling that Vickney failed to substantially comply with § 343.305(4), STATS., has not been challenged, we believe it is critical that we comment briefly on the three cases Backhaus and the trial court considered. First, in ***State v. Piskula,*** 168 Wis.2d 135, 140-41, 483 N.W.2d 250, 252 (Ct. App. 1992), we held, based on substantially similar facts, that although the arresting officer did not fully comply with § 343.305(4) and read only column A to the defendant, it constituted substantial compliance with the statute. In the second case, ***State v. Geraldson,*** 176 Wis.2d 487, 494-95, 500 N.W.2d 415, 418 (Ct. App. 1993), we held that even if the holder of a commercial operator's license was arrested for drunk driving while operating in a noncommercial setting, he or she had to be read all of the information on the Informing the Accused form. Finally, in ***Village of Elm Grove v. Landowski,*** 181 Wis.2d 137, 144-45, 510 N.W.2d 752, 755 (Ct. App. 1993), we held that it was not a violation of public policy and the objectives underpinning the implied consent law to deliver the commercial operators warnings to holders of noncommercial operators' licenses.

We are concerned that Backhaus and the trial court have misinterpreted these cases. ***Landowski*** and ***Geraldson*** do not overrule ***Piskula***. *See* ***In re Court of Appeals***, 82 Wis.2d 369, 263 N.W.2d 149 (1978). Nor do ***Landowski*** and ***Geraldson*** restrict the limited exception created in ***Piskula***.

During the jury trial, the State introduced the results of the involuntary blood test without objection from Backhaus. Backhaus did raise an objection on relevancy grounds when Vickney was asked if Backhaus agreed to submit to the blood test. The trial court overruled Backhaus's objection and the officer testified that Backhaus refused to submit to a blood test.[2] As a result of the trial court's ruling, Backhaus secured permission from the trial court to introduce evidence that he did submit to a PBT at the scene of his arrest; however, the court refused to permit testimony concerning the results of the PBT. The jury found Backhaus guilty, and he limits his appeal to the narrow issue of whether the trial court erred when it permitted evidence of Backhaus's refusal to be presented to the jury.

Even if we were to hold that the trial court abused its discretion in overruling Backhaus's objection, we would nonetheless conclude that the admission of evidence of Backhaus's refusal was harmless error.[3] The test for determining whether an error is harmless or prejudicial, whether of

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Landowski and ***Geraldson*** do express our preference that arresting officers take the time to advise a defendant of all the statutory warnings, but this preference for strict compliance with the implied consent law does not make the ***Piskula*** exception any less viable.

[2] The questions and answers after the trial court overruled the objection are understated:

Q:Did you ask him if he would submit to a chemical test to his blood?
A:Yes, I did.
Q:What did he say?
A:No.

[3] In ***State v. Algaier,*** 165 Wis.2d 515, 520, 478 N.W.2d 292, 293-94 (Ct. App. 1991), we reiterated the Wisconsin Supreme Court's holding that when police fail to comply with the implied consent law, evidence of a defendant's refusal to submit to a chemical test is not admissible in the drunk-driving trial.

constitutional proportion or not, is whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here, the State. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985). The State's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction. ***Id.***

In the instant case, there is overwhelming evidence to support the conviction. We have previously detailed Backhaus's driving, failure of the field sobriety tests and blood test results of 0.171%. Thus, the evidence at trial was sufficient to convict Backhaus. In addition, neither counsel mentioned Backhaus's refusal during closing arguments to the jury and the trial court did not instruct the jury that the refusal could be considered consciousness of guilt. *See* WIS J I—CRIMINAL 235. We conclude that if it was error to admit evidence of Backhaus's refusal, it was harmless error as there is no reasonable possibility that this error contributed to Backhaus's conviction.

By the Court.—Judgment affirmed.

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