COURT OF APPEALS
DECISION
DATED AND RELEASED

February 6, 1997

NOTICE

No. 96-1938

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

COUNTY OF ROCK,

Plaintiff-Respondent,

v.

CAROL L. POFF-MILLS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

DEININGER, J.[1] Carol Poff-Mills appeals a judgment convicting her of first-offense operating a motor vehicle while intoxicated (OMVWI), in violation of 346.63(1)(a), STATS. Poff-Mills raises two challenges. First, she contends that the arresting officer's failure to properly give the Informing the Accused warnings required by § 343.305, STATS., requires suppression or loss of the automatic admissibility of her breath test results. Second, she argues that her prosecution for violating § 346.63, subsequent to an administrative

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

suspension of her driving privileges under § 343.305(7) & (8), violates the Double Jeopardy Clause. We reject both arguments and affirm.

BACKGROUND

On February 22, 1996, Rock County Deputy Sheriff Bambi Tomas stopped Poff-Mills for speeding. After Poff-Mills failed several field sobriety tests, Tomas arrested her for OMVWI and took her to the police station for a breath test.

At the station, Tomas read the "Informing the Accused" form containing the warning required by § 343.305(4)(b), STATS., to Poff-Mills. The form read by Tomas stated:

> 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.

(Emphasis added). Effective April 30, 1994, the legislature amended § 343.305(4)(b) to require that prior convictions, suspensions or revocations for the prior *ten* years be counted in determining potential sanctions for a new offense.

After Tomas read her the form, Poff-Mills agreed to take a breath test, which registered a prohibited alcohol concentration. Tomas issued a citation for operating a motor vehicle with a prohibited alcohol concentration.[2] The trial court denied Poff-Mills' motions to dismiss and to suppress the breath test results. The parties entered into a stipulated trial, reserving the right to

[2] This count was later dismissed by the trial court.

appeal the denial of both motions, and the trial court found Poff-Mills guilty of OMVWI. This is Poff-Mills' first OMVWI conviction.

ANALYSIS

Informing the Accused Form

Poff-Mills, relying on ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), argues that by reading the outdated Informing the Accused form, Tomas failed to comply with the provisions of the implied consent law and thus the breath tests should have been suppressed, or in the alternative, that the test result should not be accorded automatic admissibility under § 343.305(5)(d), STATS. In ***Zielke***, the Wisconsin Supreme Court stated:

> This statutory scheme [§ 343.305, STATS.] provides incentive for the police to comply with the procedures of the implied consent law. If the procedures set forth in sec. 343.305, Stats., are not followed the State not only forfeits its opportunity to revoke a driver's license for refusing to submit to a chemical test, it also loses its right to rely on the automatic admissibility provisions of the law.

Id. at 49, 403 N.W.2d at 431. We reject Poff-Mills' argument.

In ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995), we held that a three-part standard applies to the adequacy of the warning process under the implied consent law:

> (1) Has the law enforcement officer not met, or exceeded his or her duty under 343.305(4) and 343.305(4m) to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading; and

(3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

Id. at 280, 542 N.W.2d at 200.

The provision of the implied consent law which was misstated by Tomas concerned individuals with prior convictions for driving while intoxicated. However, this was Poff-Mills' first offense. Poff-Mills failed to present any evidence showing that the officer's misstatement prejudiced her decision whether to submit to the breath test. She thus failed to meet the third part of the ***Ozaukee*** standard. We conclude that the trial court properly denied the motion to suppress the breath test results.

We also reject Poff-Mills' alternative argument that even if the trial court properly denied suppression, the county should still have lost the automatic admissibility of the test results under § 343.305(5)(d), STATS.[3] She contends that while prejudice is required to mandate suppression as a remedy, all that need be shown to lose automatic admissibility is that the officer did not strictly comply with the implied consent law.

Poff-Mills cites no authority for the proposition that strict compliance with the implied consent law is required. We have held that "compliance with respect to the substance essential to every reasonable objective of the [implied consent law]" is sufficient to invoke the revocation for refusal provisions of the implied consent law. ***State v. Piskula***, 168 Wis.2d 135, 141, 483 N.W.2d 250, 252 (Ct. App. 1992). If substantial compliance is sufficient for

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[3] Section 343.305(5)(d), STATS., states:

> At the trial of any civil or criminal action ... arising out of the acts committed by a person alleged to have been ... operating a motor vehicle while under the influence of an intoxicant ... the results of a test administered in accordance with this section *are admissible on the issue of whether the person was under the influence of an intoxicant* ....

(Emphasis added).

revocation under the statute, we see no reason why substantial compliance should not be sufficient to invoke the automatic admissibility provision of the implied consent law.[4]

Double Jeopardy

Poff-Mills also argues that her criminal prosecution for violating § 346.63, STATS., subsequent to an administrative suspension of her driving privileges under § 343.305(7) & (8), STATS., violates the Double Jeopardy Clause.

The Wisconsin Supreme Court's recent decision in ***State v. McMaster***, ___ Wis.2d ___, 556 N.W.2d 673 (1996), controls this issue. Civil sanctions imposed in separate proceedings from a criminal prosecution resulting from the same incident do not violate the Double Jeopardy Clause where the civil sanctions are remedial, rather than punitive, in nature. ***Id.*** at ___, 556 N.W.2d at 676, 678. In ***McMaster***, the supreme court determined that the primary purpose of § 343.305, STATS., is to "protect the safety of all who travel on Wisconsin's public streets and highways" and concluded that the statute is remedial in nature. ***Id.*** at ___, 556 N.W.2d at 680. Accordingly, we hold that Poff-Mills' prosecution subsequent to her administrative suspension did not violate the Double Jeopardy Clause.

By the Court.—Judgment affirmed.

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[4] Poff-Mills, citing ***State v. Geraldson***, 176 Wis.2d 487, 500 N.W.2d 415 (Ct. App. 1993) and ***Village of Elm Grove v. Landowski***, 181 Wis.2d 137, 510 N.W.2d 752 (Ct. App. 1993), contends we have held that the facts in ***Piskula*** are the only exception to the requirements of the implied consent law. In ***Piskula***, we held that officers are not required to give warnings relevant to commercial vehicle drivers to noncommercial drivers. ***State v. Piskula***, 168 Wis.2d 135, 141, 483 N.W.2d 250, 252 (Ct. App. 1992). In ***Landowski***, we stated that ***Piskula*** was the only exception "regarding the statute's commercial motor vehicle provisions." ***Landowski***, 181 Wis.2d at 142, 510 N.W.2d at 754. In ***Geraldson***, we stated that the "safest and surest method is for law enforcement officers to advise OWI suspects of all warnings ... and to do so in the very words of the implied consent law." ***Geraldson***, 176 Wis.2d at 496-97, 500 N.W.2d at 419. Neither case requires, as Poff-Mills would have us conclude, strict compliance with the statute as a prerequisite to automatic admissibility.

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