COURT OF APPEALS DECISION DATED AND FILED

May 23, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2006AP2916-CR

Cir. Ct. No. 2004CT678

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. FRIEDMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT A. KENNEDY, Judge. *Reversed and cause remanded with directions.*

¶1 SNYDER, P.J.[1] Michael E. Friedman appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI) and for operating a motor vehicle with a prohibited alcohol concentration (PAC), both fourth offenses. He contends the circuit court erred in several respects. He argues that the results of the chemical test of his blood should have been suppressed, that evidence relating to his refusal to take a preliminary breath test (PBT) was improperly admitted, and that certain testimony from a witness for the State should have resulted in a mistrial. Because we conclude that the preliminary breath test refusal evidence was improperly admitted and there is a substantial likelihood that it affected the outcome of the trial, we remand the matter for a new trial.

BACKGROUND

¶2 On August 14, 2004, Officer Daniel Lauderdale of the Williams Bay Police Department was on patrol working the stationary radar. At approximately 1:00 a.m., Lauderdale observed a black convertible with its top down approaching at a high rate of speed. As the vehicle passed by, the radar indicated it was going thirty-seven miles per hour in a zone with a posted limit of twenty-five miles per hour. Lauderdale continued to track the vehicle with his radar and observed that it reached speeds as high as forty miles per hour, though the speed limit had not changed. Lauderdale then pursued the vehicle through the downtown area and noted that he reached speeds of fifty-five and seventy miles an hour while trying to catch up.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

¶3 Lauderdale eventually caught up to the convertible and activated the red lights on his squad car. The car pulled over at approximately the same location where Lauderdale's partner, Officer Borgan, was waiting. Lauderdale approached the convertible and the driver was already searching through a stack of plastic cards, which Lauderdale assumed meant the driver was looking for his license. Lauderdale noticed an odor of intoxicants as he waited. After approximately ninety seconds, Lauderdale noticed what appeared to be an Illinois traffic citation fall into the driver's lap. Using the information on the citation, Lauderdale identified the driver of the convertible as Friedman.

¶4 In light of the odor of intoxicants and Friedman's fumbling with the plastic cards and traffic citation, which demonstrated problems with dexterity and physical motor skills, Lauderdale suspected Friedman had been drinking. Friedman denied having consumed any alcohol. Lauderdale informed Friedman that he had clocked him speeding and Friedman denied that he had been going over thirty miles per hour. Then Friedman stated, "This night can't get any worse for me. Go ahead and ruin my life. And you might as well just put a gun to my head."

¶5 Lauderdale then ran a driver's license check and learned that Friedman did not have a valid Wisconsin license, but did have an Illinois license that had been suspended. Lauderdale returned to Friedman's vehicle and asked Friedman to step out of the car. The odor of intoxicants followed Friedman who then admitted he had been drinking about an hour and a half earlier.

¶6 Lauderdale asked Friedman to perform field sobriety tests, beginning with the Horizontal Gaze Nystagmus test. Friedman indicated he would cooperate, but failed to follow Lauderdale's instructions and eventually refused to

continue. Next, Lauderdale asked Friedman to perform a one-leg stand test but Friedman refused, citing a prior surgery on his left hip that affected his balance. Lauderdale then requested that Friedman perform the heel-to-toe walking test and again Friedman refused. Friedman then proceeded to do his own version of heel-to-toe walking by stomping away from Lauderdale, raising his arms for balance, and then turning around and returning to Lauderdale with the same stomping steps. Lauderdale then asked Friedman to submit to a preliminary breath test. Friedman refused, stating that "his attorney friends had told him never to do that."

¶7 Lauderdale then placed Friedman under arrest for OWI and took him to the police station. Lauderdale read the Informing the Accused form to Friedman and then asked him to submit to an evidentiary chemical test of his breath. Friedman refused. Lauderdale read the form in its entirety once more to Friedman, this time requesting that Friedman submit to an evidentiary chemical test of his blood. Friedman refused. Lauderdale told Friedman that he could forcibly take the sample and then proceeded to Mercy Walworth Medical Center for an involuntary blood draw. Friedman's blood samples were packaged and sealed at the medical center and Lauderdale took them back to the police department for storage in a department refrigerator. The samples were tested at the Wisconsin State Laboratory of Hygiene and the results showed .191 grams of ethanol per 100 milliliters of Friedman's blood.

¶8 The State charged Friedman with OWI and operating a motor vehicle with a prohibited alcohol content, contrary to WIS. STAT. §§ 346.63(1)(a) and (b). Following a jury trial, Friedman was convicted on both counts, ultimately designated as fourth offenses. He now appeals.

DISCUSSION

¶9 Friedman raises multiple issues on appeal. He first argues that the circuit court erred in failing to suppress the results of the blood test for a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* Pub. L. No. 104-191, 110 Stat. 1936; 42 U.S.C. § 1320d-6 (2006). He further contends that the court erred on several evidentiary rulings during the trial. He contends that the court should have excluded evidence of his refusal to take the PBT, should not have allowed the State to introduce the results of the blood test without establishing a chain of custody, and improperly prevented the defense from eliciting evidence and arguing its theory that Friedman's blood samples were contaminated. Finally, he argues that the court should have granted a mistrial when Lauderdale's testimony tipped the jury to the fact that Friedman had prior OWI convictions.

¶10 We disagree with Friedman's argument that HIPAA requires suppression of Friedman's blood test results. We agree, however, that Friedman's refusal to submit to the PBT should not have been presented to the jury and that the State's heavy reliance on this inadmissible evidence was harmful. Accordingly, we remand the case for a new trial. Friedman's other claims of evidentiary error are resolved by our order for a new trial; therefore, we need not address them individually.

¶11 We turn first to Friedman's claim that the circuit court erred when it did not suppress the blood test results. In a very fact-driven argument that navigates the HIPAA law and its many exceptions, Friedman asserts that HIPAA prevents the disclosure of his blood test results. He correctly observes that HIPAA has established standards for privacy in medical care and specifically limits the

dissemination of an individual's health information. Friedman argues that because he did not consent to the blood draw or release of the results, because the blood was taken in a hospital setting where other medical services were provided, and because he paid the bill for the blood draw, the results constitute health information protected by HIPAA's privacy provisions.

¶12 We disagree. First, Friedman's attempt to wedge the evidentiary chemical blood test under the caption of "health care" fails. The purpose of the blood test under Wisconsin's implied consent law is to determine "the presence or quantity" of alcohol in the blood. *See* WIS. STAT. § 343.305(2). It does not, as HIPAA requires, address "care, services, or supplies related to the health of an individual." *See* 45 C.F.R. § 160.103 (2006).[2] HIPAA's privacy protection extends to "health information," which is defined as information that is related to the "past, present, or future physical or mental health or condition of an individual," the provision of health services, or payment for health care services. *See* 45 C.F.R. § 160.103.[3]

¶13 Furthermore, a statutory blood draw for evidentiary purposes does not fall under the definition of health care and the results do not constitute health information as contemplated by Wisconsin law. WISCONSIN STAT. § 146.81,

[2] Health care means care, services, or supplies related to the health of an individual. Health care includes, but is not limited to, the following: "(1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body." *See* 45 C.F.R. § 160.103 (2006). All references to the code of Federal Regulations are to the 2006 version.

[3] "Health information means any information, that … [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." 45 C.F.R. § 160.103.

defining health care records, explicitly excludes tests administered under WIS. STAT. § 343.305 from the definition of "patient health care records." WIS. STAT. § 146.81(4). We are not persuaded that what amounts to a billing error brings the blood draw within the bounds of protected health care information. Further, the fact that the blood draw was performed at a medical center by medical personnel is not controlling. Friedman's attempt to distinguish the blood draw that was done in the context of his arrest from a § 343.305(2) blood draw generally fails.

¶14 Finally, even if we concluded that the blood draw and results constituted protected health care information, HIPAA allows disclosure of such information to law enforcement officers "[a]s required by law." *See* 45 C.F.R. § 164.512(f)(1)(i). Under Wisconsin law, patient health care records "shall remain confidential"; however, a health care provider may report a physical condition that "affects the patient's ability to exercise reasonable and ordinary control over a motor vehicle … without the informed consent of the patient." *See* WIS. STAT. § 146.82(1) and (3)(a). For all of the reasons stated, we reject Friedman's attempt to invoke HIPAA to exclude the results of the evidentiary chemical test of his blood.

¶15 We move to Friedman's next argument. He contends that the court improperly allowed the jury to hear evidence of his refusal to take a PBT during the traffic stop. The State responds that the refusal evidence was not elicited for the purpose of proving Friedman was intoxicated, but rather to show consciousness of guilt. The State argues that a driver's refusal to submit to field sobriety tests is admissible for this purpose and therefore refusal to submit to the PBT is admissible as well. The State first directs us to ***State v. Babbitt***, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994), and ***State v. Mallick***, 210 Wis. 2d 427, 434-35, 565 N.W.2d 245 (Ct. App. 1997), for the proposition that a

driver's refusal to perform field sobriety tests is admissible to show consciousness of guilt. The State concludes that a PBT should be treated like any other field sobriety test and the refusal to perform one is properly admitted when offered to show consciousness of guilt as part of the State's case in chief.

¶16 We are not persuaded. The PBT is not the same as any other field sobriety test. Unlike a standard field sobriety test such as the one-leg stand or walk-and-turn tests, the PBT is not based on the officer's own observations and assessments. It is akin to a polygraph test in the sense that it involves technology that lends scientific credibility to the evidence where such credibility is unwarranted. As we have stated before, "The PBT device has not been approved by the DOT and does not receive a prima facie presumption of accuracy to establish a defendant's blood alcohol level." ***State v. Doerr***, 229 Wis. 2d 616, 624-25, 599 N.W.2d 897 (Ct. App. 1999). When the State offers PBT results into evidence, it must present evidence related to scientific accuracy and it must prove compliance with accepted scientific methods as a foundation for admission. ***Id.*** The concern here is that a jury is generally unaware of the scientific imperfection of the PBT device, and that it might well be more influenced by proof of a driver's refusal to take the test than by the evidence of adverse results coupled with proof of its scientific imperfection or inaccuracy.

¶17 The State then offers ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 443, 588 N.W.2d 267 (Ct. App. 1998), *reversed on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), which states that the refusal to submit to a PBT "may be considered evidence of consciousness of guilt for purposes of establishing probable cause to arrest." In a similar case, we decided that a refusal to submit to a PBT may be used "for purposes of determining whether [a defendant's] blood draw was supported by reasonable suspicion." ***State v.***

Repenshek, 2004 WI App 229, ¶26, 277 Wis. 2d 780, 691 N.W.2d 369. Again, these analogies fail. The refusal evidence against Friedman was not offered to demonstrate reasonable suspicion to proceed with an evidentiary blood draw or to establish probable cause to arrest. The evidence was offered to persuade the jury that Friedman refused to take the PBT because he feared it would incriminate him. By statute, the PBT result "shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under [the implied consent statute]." WIS. STAT. § 343.303. The State concedes that the results of the PBT "clearly would not have been admissible" at trial. That which may not be accomplished directly by evidence of test results may not be accomplished indirectly by references to whether a defendant declined or was asked to submit to the test in the first place. *Cf.* ***People v. Eickhoff***, 471 N.E.2d 1066, 1069 (Ill. App. Ct. 1984) (addressing a defendant's refusal to take a polygraph test, the results of which would have been inadmissible). We conclude that evidence of Friedman's refusal to take the PBT test, the results of which would have been inadmissible for the purpose offered, is equally inadmissible.

¶18 Finally, the State contends that even if the PBT refusal was improperly admitted, it was harmless error. An evidentiary error is subject to a harmless error analysis and requires reversal only when the improperly admitted evidence has affected the substantial rights of the party seeking relief. ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). We will reverse only where there is a reasonable possibility that the error contributed to the final result. ***Id.*** The State insists that, even absent the PBT refusal, there is overwhelming evidence to support the conviction. It refers us to the experience of the arresting officer and his observations on the night of the traffic stop. The State emphasizes

Friedman's inability to complete any field sobriety tests and the evidentiary chemical test of his blood with a result of .191 grams of ethanol per 100 milliliters of blood.

¶19 We agree that there was significant evidence to support the conviction for operating a motor vehicle while intoxicated. Nonetheless, we must consider whether there is a *reasonable possibility* that the PBT refusal contributed to the conviction. *See* ***id.*** Our review of the record demonstrates that such a possibility exists.

¶20 In its opening statement, the State told the jury that Friedman was asked to "submit to a portable breath test at the scene. And he refused to do that." As part of its case-in-chief, the State elicited testimony from Lauderdale as follows:

> Prosecutor: Did you ask [Friedman] to submit to a portable breath test?
>
> Lauderdale: … I told him that if he didn't cooperate with me and follow my instructions … he would leave me with no choice but to arrest him for drunk driving, and I basically pleaded with him to provide me with a sample of his breath on a preliminary or portable breath testing instrument. That's a small breath testing instrument that we carry in our squad cars.
>
> Prosecutor: And did he agree to provide you a sample of that?
>
> Lauderdale: He indicated that he—No, his attorney friends had told him never to do that, and he would not do that.

On redirect examination, Lauderdale testified:

> Prosecutor: Did Mr. Friedman's refusal to provide … or submit to a P.B.T. test out in the field contribute at all to your decision to place him under arrest?
>
> Lauderdale: Yes.

During closing arguments, the State again raised the fact of the refusal. The prosecutor asserted, "[Friedman] is then asked to give a sample of his breath and told that, you know, if the results come back low, I'll get you a way home, I'm not going to arrest you, and [Friedman] refuses to give a sample of his breath."

¶21 The PBT testimony foreshadowed in the opening statement and elicited during the State's case-in-chief provided the jury with evidence that a PBT was available, that the officer "basically pleaded" with Friedman to take the test, and that the portable testing device was commonly used by police (they carry it in their squad cars). The jury was told that Friedman would have been allowed to go home if he would take the PBT and obtain a low result. However, there is no indication anywhere in the record that the jury was familiar with the scientific uncertainty of the PBT device. Further there is no indication that the jury was aware of the differences between the PBT, which carries no statutory sanction for refusal, and the evidentiary chemical breath test, which carries penalties for refusal under the implied consent law.

¶22 In summary, we recognize that the PBT refusal could have been used to establish probable cause, had probable cause been at issue. It is also possible that under certain circumstances it could be used to rebut evidence offered by the defense. However, testimony regarding Friedman's refusal to submit to a PBT is inadmissible on the issue of guilt or innocence in the State's case in chief. The sole purpose of the PBT is to assist the officer in determining whether a driver should be placed under arrest, not whether the driver is actually intoxicated. Thus, a driver's refusal to take a PBT is improperly admitted when it is intended to weigh on the guilt or innocence of the driver. Accordingly, the evidence of the refusal was improperly admitted and the error was harmful.

¶23 Friedman raises other claims of evidentiary error. For example, Friedman complains that a mistrial should have been granted as a result of an officer's testimony, which improperly alluded to the fact that Friedman had a prior drunk driving offense on his record. Also, Friedman complains that the chain of custody for his blood sample was not established and that the State concealed relevant documents that should have been produced during discovery. None of the remaining issues need be addressed because we have resolved the appeal on other grounds. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if the decision on one issue disposes of the appeal, the appellate court will not decide the other issues raised).

CONCLUSION

¶24 We conclude that HIPAA does not require suppression of Friedman's evidentiary chemical blood test result, which was obtained under the implied consent law. However, the circuit court erred when it allowed the jury to hear evidence of Friedman's refusal to take a PBT test and the State's emphasis on this inadmissible evidence raises a reasonable possibility that it contributed to the conviction. Accordingly, the judgment of conviction is reversed and the matter is remanded for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.