

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 21, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-2277-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CURTIS A. MOSS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for La Crosse County:  
JOHN J. PERLICH, Judge. *Affirmed.*

EICH, J. Curtis Moss appeals from a judgment convicting him of operating a motor vehicle after suspension/revocation (OAS/OAR). Because it was his seventh conviction in five years, it was processed as a criminal charge,

with an enhanced penalty pursuant to the habitual traffic offender (HTO) statutes, ch. 351.<sup>1</sup>

Moss moved to dismiss the charge, arguing that he was not subject to criminal penalties because the underlying revocation—a five-year HTO revocation—was dependent upon two convictions arising from failure to pay forfeitures. He claimed that because the HTO revocation could not stand independently of those nonpayment-related convictions, he could be subject only to civil penalties under § 343.44(2)(e), STATS., which provides:

1. Except as provided in subd. 2., for a 5th or subsequent conviction under this section or a local ordinance in conformity with this section within a 5-year period, a person may be fined not more than \$2,500 and may be imprisoned for not more than one year in the county jail.

2. If the revocation or suspension that is the basis of a violation was imposed solely due to a failure to pay a fine or a forfeiture, or was imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating sub. (1), the person may be required to forfeit not more than \$2,500. This subdivision applies regardless of the person's failure to reinstate his or her operating privilege.

We are asked to determine whether Moss's HTO revocation—which was dependent, in part, upon two convictions arising from his failure to pay—was

---

<sup>1</sup> Section 351.02(1)(b), STATS., defines a habitual traffic offender as any person who has accumulated twelve or more convictions of moving violations (of traffic regulations or crimes) within a five-year period.

based “solely” on his failure to pay a fine or forfeiture, thus permitting the State to proceed against him only in a civil action.<sup>2</sup>

The trial court denied Moss’s motion to dismiss, concluding that because the failure-to-pay violations did not constitute the “sole” reasons for the underlying HTO revocation, criminal penalties were therefore appropriate. Moss then pled guilty to OAR, seventh, reserving his right to appeal the denial of his motion to dismiss.<sup>3</sup> The court sentenced Moss to thirty days in jail—which was stayed pending appeal—and imposed a fine of \$625.

The relevant facts are as follows. Moss was cited for OAR, eighth offense, on February 2, 1997. At the time, he was under an HTO revocation, which was imposed on August 21, 1995, and under other active suspensions for failure to pay forfeitures.<sup>4</sup> The HTO revocation stemmed from the accumulation of twelve moving-violation convictions within a five-year period. *See* § 351.02(1)(b), STATS. Only two of those violations—OAR convictions on April 5, 1995 and July 13, 1995—arose from Moss’s failure to pay a forfeiture. None of the other ten violations involved nonpayment-related convictions; they involved convictions for speeding, operating without a valid driver’s license,

---

<sup>2</sup> This case presents a question of statutory interpretation that we review as a question of law without deference to the trial court. *State v. Taylor*, 170 Wis.2d 524, 527, 489 N.W.2d 664, 666 (Ct. App. 1992).

<sup>3</sup> Moss was initially charged with OAR-8th, but, pursuant to a plea agreement, pled guilty to OAR-7th.

<sup>4</sup> As noted above, at the time Moss was cited for the eighth-offense OAR, he was also under several active suspensions for failure to pay forfeitures. As Moss points out in his brief, had these been the only suspensions, this would be an easy case, for they were clearly imposed “solely for a failure to pay a fine or forfeiture,” which, alone, would subject him only to civil penalties under § 343.44(2)(e)(2), STATS. Yet, because there was also an HTO revocation in effect at that time, we must look to the underlying basis for that revocation and determine whether that too was based solely on Moss’s failure to pay.

violation of restrictions, improper equipment and OAR and OAS—based on Moss’s driver’s record revocation.

The issue before us, then, is whether the HTO revocation—which forms the basis of the current charge—and which stems in part from two OAS/OAR convictions based on failure-to-pay suspensions, and in part from ten other moving-violation convictions having nothing to do with failure to pay forfeitures—was “imposed solely due to a failure to pay a fine or forfeiture, or was imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for [OAR/OAS],” thus invoking the civil penalties of § 343.44(2)(e)2, STATS. To ask the question is to answer it. Because Moss’s HTO revocation was based on ten *non*-failure-to-pay violations in addition to the two OAS/OAR violations, it was not based *solely* on Moss’s failure to pay. Accordingly, we agree with the trial court that the criminal penalty provision is appropriate.

Moss places principal reliance on our decision in *State v. Taylor*, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992). We held in that case that where an HTO revocation is based solely on suspensions for failure to pay fines or forfeitures, the revocation cannot form the basis for a criminal prosecution under § 343.44, STATS., and only a civil prosecution is available in those circumstances. *Id.* at 528-30, 489 N.W.2d at 666-67. Moss argues that, under *Taylor*, his HTO status does not subject him to criminal penalties because the HTO revocation “could not have occurred but for the OAS and OAR convictions that arose solely from suspensions for failing to pay forfeitures.” He interprets this as meaning that the revocation was thus imposed “solely due to the failure to pay and one or more subsequent OAR convictions.”

We are not persuaded. The test is not whether the HTO revocation could not have been imposed *but for* a failure to pay a forfeiture, but whether it was imposed *solely* due to a failure to pay a forfeiture and/or one or more subsequent OAR/OAS conviction. We explained in *State v. Biljan*, 177 Wis.2d 14, 501 N.W.2d 820 (Ct. App. 1993) that:

if a revocation or suspension in effect at the time the defendant is cited for OAR or OAS was imposed for other than, *or in conjunction with*, the defendant's failure to pay a fine or forfeiture, the defendant's failure to pay a fine or forfeiture is not the sole basis for the revocation or suspension; therefore, [the civil penalty provision] does not apply.

*Id.* at 19-20, 501 N.W.2d at 823 (emphasis added).<sup>5</sup>

Here, the revocation in effect at the time the instant charge was filed was imposed due, in part, to OAS and OAR convictions resulting from failure to pay forfeitures. However, it was also imposed as the result of ten other moving-violation convictions; and those convictions were not based solely on Moss's failure to pay. They were based on his convictions for speeding, operating without a valid driver's license, violation of restrictions, improper equipment, violation of restrictions, speeding, speeding, operating without a valid driver's license, and OAR and OAS (based on a driver's record revocation) "in conjunction with" the two failure-to-pay-based convictions. Stated differently, the HTO revocation in effect at the time of Moss's current OAR violation was not based *solely* on his failure to pay fines or forfeitures or subsequent OAR/OAS convictions. It follows

---

<sup>5</sup> In *State v. Kniess*, 178 Wis.2d 451, 504 N.W.2d 122 (Ct. App. 1993), we held that an HTO revocation that was "imposed for reasons other than Kniess's failure to pay a fine or forfeiture," justified criminal, and not civil, sanctions. *Id.* at 456, 504 N.W.2d at 124.

that the trial court properly imposed criminal penalties under § 343.44(2)(e)1, STATS.

*By the Court.*—Judgment affirmed.

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

