COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2645-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTORIA L. QUAERNA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Reversed and cause remanded.*

DEININGER, J.[1] Victoria Quaerna appeals a judgment convicting her of operating a motor vehicle after her driving privilege had been revoked (OAR), in violation of § 343.44(1), STATS., as a fifth or subsequent offense.[2] The

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

[2] Quaerna committed the offense on July 7, 1997. The revisions to § 343.44, STATS., enacted in 1997 Wis. Act 84, were not effective at the time of the offense. *See* Note following § 343.44, STATS., 1997-98.

trial court imposed criminal penalties for the offense under § 343.44(2)(e)1, which Quaerna claims was error. She argues that the court should have granted her motion to dismiss the criminal prosecution of this offense because the revocations and suspensions of her driving privilege which were in effect at the time of the offense "were imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating" § 343.44(1). *See* § 343.44(2)(e)2, STATS.[3] We agree with Quaerna that, on the record before us, she should be subject to a civil forfeiture and not criminal penalties for the instant OAR offense. Accordingly, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

BACKGROUND

The facts are undisputed. On July 29, 1997, the State filed a criminal complaint charging Quaerna with OAR/OAS as a ninth offense.[4] The complaint alleges that she drove on July 7, 1997, at a time when her operating privilege had been suspended due to her driving record, and it sought the imposition of criminal penalties for the offense. Quaerna moved to dismiss the complaint, claiming that the offense should be prosecuted as a civil forfeiture offense under § 343.44(2)(e)2, STATS.

At the hearing on the motion, the State submitted a certified copy of Quaerna's driving record as maintained by the Department of Transportation (DOT). According to that record, there were ten suspensions and two revocations

[3] We quote § 343.44(2)(e)1 and 2, STATS., below in the text of our opinion.

[4] OAS refers to operating a motor vehicle after the suspension of one's driving privilege. Under § 343.44, STATS., as effective on July 7, 1997, no distinction is drawn between OAR and OAS for purposes of imposing penalties.

of Quaerna's operating privilege in effect on July 7, 1997. Nine of the suspensions in effect on that date were imposed for failure to pay fines or forfeitures (FPF). The tenth suspension, however, had been imposed by the DOT on March 13, 1997, as a result of Quaerna's poor driving record.

There is no evidence in the record establishing with certainty what traffic offenses precipitated the March 1997 driving record suspension, but it seems clear that Quaerna's rash of OAS violations in late 1996 and early 1997 were the major contributing factor, since each resulted in the assessment of six demerit points. The State initially argued that an October 1996 speeding violation may have contributed to Quaerna's driving record suspension, but it abandoned that position when it told the court that "[i]t's the State's position it was because she was in the middle of a driving record suspension it becomes criminal whether they're all related to the OAS or not." The court accepted the concession, stating that it would "ignore the driving infractions for purposes of this decision," and in its written order denying Quaerna's motion, the court made the following finding of fact:

> Based solely on the demerit points assessed for the Operating After Suspension convictions based solely on the suspension for failure to pay a forfeiture, defendant's driving privileges were ordered suspended for driver's record.

The two revocations in effect on July 7, 1997, were also based on Quaerna's previous OAS convictions arising out of suspensions for FPF. The DOT declared Quaerna to be a habitual traffic offender (HTO) on February 25, 1997, and it revoked her driving privileges for that reason. *See* § 351.02, STATS. The HTO revocation order cites four convictions for OAS as having triggered the HTO revocation on February 25. All four were entered between January 14 and February 25, 1997; and all were apparently based on FPF suspensions. The

second revocation in effect was a driving record revocation ordered by the DOT on April 29, 1997. The DOT revocation order specifies that this revocation was based on three OAS convictions, all of which again appear to have stemmed from FPF suspensions.

In its oral ruling, the court noted that "initially the ones that precipitated her revocation of her driver's license were all failure to pay forfeiture," and that the DOT driving record revocation order "clearly indicates that she was revoked for points because of three [OAS], and those were all based on failure to pay forfeiture." The court concluded that "without the point problem this would be a civil matter." It also concluded, however, that once Ms. Quaerna accumulated sufficient demerit points to have her operating privilege revoked, any subsequent OAR/OAS violations became criminal offenses. In its written order denying Quaerna's motion, the court determined "as a matter of law that suspensions for demerit points assessed for convictions for Operating After Suspension for failure to pay a forfeiture are not 'imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating sub. (1)' and therefore 343.44(2)(e)2 does not apply."

Following the denial of her dismissal motion, Quaerna pleaded no-contest to OAR, as a fifth or subsequent offense. The court imposed a sixty-day jail sentence and a fine of $1,950 under § 343.44(2)(e)1, STATS. Quaerna appeals the judgment of conviction.

ANALYSIS

The proper application of a statute to undisputed facts is a matter of law which we decide without deference to the trial court's opinion. *See* ***State v. Michels***, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). The statute at issue in this appeal is § 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.

Quaerna relies on ***State v. Taylor***, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992), for her argument that only civil penalties under § 343.44(2)(e)2, STATS., may be imposed for her July 7, 1997 offense. In ***Taylor***, we held that where an HTO revocation is based solely on suspensions for failure to pay fines or forfeitures, the HTO revocation cannot form the basis for a criminal prosecution for OAR. Only a civil prosecution under § 343.44(2)(e)2, is permissible in that circumstance. ***Id***. at 528-30, 489 N.W.2d at 666-67. Thus, the HTO revocation in effect on July 7th does not trigger criminal sanctions for Quaerna's present offense, and Quaerna argues that the rationale of ***Taylor*** should apply to the driving record revocation and suspension as well. That is, since the trial court found that the driving record revocation and suspension were also based solely on OAS convictions stemming from FPF suspensions, under the reasoning in ***Taylor***, the presence of the driving record suspension and revocation should not result in criminal sanctions. We agree.

The rationale of our holding in ***Taylor***, 170 Wis.2d at 530, 489 N.W.2d at 667, is that HTO is not an offense; it is a status. We held in ***Taylor***, that if HTO status is based solely on FPF suspensions, it cannot convert noncriminal conduct into criminal conduct. As we further explained in ***State v. Biljan***, 177 Wis.2d 14, 20-21, 501 N.W.2d 820, 823 (Ct. App. 1993):

> [O]ur decision in ***Taylor*** rested upon the fact that the legislature chose not to denominate habitual traffic offender status as a separate offense. Thus, in ***Taylor***, there was no intervening revocation or suspension that was imposed for an offense separate from a failure to pay a fine or forfeiture.

We agree with Quaerna that like HTO status, driving record suspensions or revocations are not in themselves traffic offenses. And, if all of the offenses which produce a driving record suspension or revocation are convictions for FPF-related OAS, we see no reason why Quaerna should be treated any differently than the defendant in ***Taylor*** whose status as an HTO stemmed solely from past convictions for FPF-related OAS.

We emphasize that our conclusion is based on the trial court's finding that the driving record license sanctions imposed by the DOT were solely the result of Quaerna's FPF-related OAS convictions. Had the State established that traffic offenses other than FPF-related OAS contributed to Quaerna's driving record suspension on March 13, 1997, our conclusion might well be different. *See* ***Biljan***, 177 Wis.2d at 20-21, 501 N.W.2d at 823 (distinguishing ***Taylor*** on the grounds that in ***Taylor***, "there was no intervening revocation or suspension that was imposed for an offense separate from a failure to pay a fine or forfeiture"); *see also* ***State v. Kniess***, 178 Wis.2d 451, 456, 504 N.W.2d 122, 124 (Ct. App. 1993) (holding that an HTO revocation which was "imposed for reasons other than … failure to pay a fine or forfeiture" could form the basis for criminal prosecution for repeated offenses of driving after suspension.).

The trial court expressed its concern that adopting Quaerna's position, as we have done, undermines the DOT's demerit point system:

> [T]hey would do away with the point system which is established by the Department of Transportation, points of driving record, because for people who are [convicted] of operating after suspension, failure to pay forfeiture, it doesn't matter how many you get because you could never be revoked. The points are meaningless. The points awarded for operating after revocation would be meaningless.

We disagree. Our holding here no more undermines the demerit point system than our holding in ***Taylor*** could be said to undermine the HTO statute.

Because of the driving record suspension and revocation, Quaerna was subjected to an absolute period of suspension or revocation based on her past OAS offenses. That is, the driving record suspension and revocation imposed by the DOT rendered it impossible for Quaerna to regain her operating privilege by simply paying off all of her outstanding fines and forfeitures—at least during the period the driving record license sanctions were in effect. Our present holding, like that in ***Taylor***, simply ascertains the penalty we conclude was intended by the legislature under § 343.44(2)(e)2, STATS., when all of the culpable conduct at issue traces to a license suspension imposed for the failure to pay fines or forfeitures. Quaerna's operation in violation of her driving record suspension and

revocation need not go unpunished—our holding requires only that the punishment be a civil forfeiture rather than a criminal sentence.[5]

By the Court.—Judgment reversed and cause remanded.

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

[5] This court, and in particular the author of this opinion, has commented in several unpublished opinions on the considerable confusion and frustration that the penalty provisions of § 343.44(2), STATS., have spawned among prosecutors, defense counsel and sentencing courts. This writer has also previously noted that our published opinions interpreting the statute, as well as several of our unpublished decisions, are not analytically consistent, and they have not assisted in alleviating the difficulty one encounters when attempting to apply the present OAR/OAS penalty provisions in cases where a defendant's driving record is lengthy and complex. The legislature has responded to the pleas for clarification of this statute. *See* Note following § 343.44, STATS., 1997-98.

The parties to this appeal recommended that it be converted to a three-judge appeal so that our opinion could be published. We acknowledge that there are, and will continue for some time to be, cases to which the "old" penalty structure will apply. This writer does not believe, however, that another published opinion at this late date will materially assist in resolving the interpretational difficulties the present statute presents. Happily, the struggles of bench and bar with applications of the statute to complicated driving records are nearing their end.