

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-0833-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD D. O'BRIEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

EICH, J.¹ Gerald D. O'Brien appeals from a judgment convicting him of operating a motor vehicle after revocation (OAR). Because it was his eighth conviction in the past five years, it was processed as a criminal charge, with

¹ This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

an enhanced penalty pursuant to the habitual traffic offender (HTO) statutes, ch. 351.²

O'Brien moved to decriminalize 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 a failure to pay forfeitures. He claimed, in essence, that because the HTO revocation could not stand independently of the nonpayment-related convictions, he could be subject to only 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 O'Brien's HTO revocation—which, as indicated, was dependent, in part, upon two OAR convictions arising from his failure to pay, and in part upon two non-payment-related convictions—was based

² Section 351.02(1)(a), STATS., defines a habitual traffic offender as any person who has accumulated four or more convictions of the delineated separate and distinct offenses within a five-year period. These offenses include, among others, operating after revocation, reckless driving and attempting to elude an officer. *See* § 351.02(1)(a)8 and 10, STATS.

“solely” on his failure to pay a fine or forfeiture, thus permitting the State to proceed against him only in a civil action.³

The trial court denied O’Brien’s motion to decriminalize the charge, concluding that because his HTO status was “for reasons other than merely failure to pay fines,” the failure-to-pay violations did not constitute the “sole” reasons for the underlying HTO revocation, and criminal penalties were therefore appropriate. O’Brien then pled guilty to OAR, eighth, reserving his right to appeal the denial of his motion. The court sentenced O’Brien to six months in jail—which was stayed pending appeal—and imposed a fine of \$2,753.

The relevant facts are as follows. O’Brien was cited for OAR, eighth offense, on May 11, 1997. At the time, he was under an HTO revocation, which was imposed on January 27, 1994, and under other active suspensions for failure to pay forfeitures. The HTO revocation stemmed from the accumulation of convictions for four of the listed statutory offenses within a five-year period. *See* § 351.02(1)(a), STATS. Two of those convictions—OAR convictions on September 11, 1992 and November 30, 1993—arose from failure to pay a forfeiture. The other two convictions, however, were non-payment related; they were convictions for reckless driving on March 24, 1992 and attempting to elude an officer on March 27, 1992.

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 OAR convictions based on failure-to-pay suspensions, and in part from two other

³ 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).

convictions having nothing to do with failure-to-pay forfeitures (reckless driving and attempting to elude an officer)—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 O’Brien’s HTO revocation was based on two *non*-failure-to-pay convictions in addition to the two OAR convictions, it was not based *solely* on O’Brien’s failure to pay. Accordingly, we agree with the trial court that the criminal penalty provision is appropriate.

O’Brien 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 to the State in those circumstances. *Id.* at 528-30, 489 N.W.2d at 666-67. O’Brien argues that it is clear from *Taylor* that his HTO status does not subject him to criminal penalties because

the only way the [habitual traffic offender] status existed was to include as one of the four necessary offenses to create the status, a conviction for operating after suspension based on a failure to pay a forfeiture. Thus, the habitual traffic offender status existed solely because defendant had been suspended for failing to pay a fine or forfeiture and subsequently was convicted of OAR during the period of suspension.

He interprets this as meaning that the revocation was therefore 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):

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 20, 501 N.W.2d at 823 (emphasis added).⁴

It is true that the revocation in effect at the time the instant charge was filed was imposed due, in part, to two OAR convictions resulting from failure to pay forfeitures. However, it was also imposed as a result of two other convictions: reckless driving and attempting to elude an officer. Thus, the two OAR convictions had been imposed “for other than, or in conjunction with” the two non-failure-to-pay convictions. Stated differently, the HTO revocation in effect at the time of O’Brien’s current OAR violation was not based *solely* on his failure to pay fines or forfeitures or subsequent OAR convictions. It follows that the trial court properly imposed criminal penalties under § 343.44(2)(e)1, STATS.

By the Court.—Judgment affirmed.

⁴ Moreover, 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,” formed the basis for criminal, and not civil, sanctions. *Id.* at 456, 504 N.W.2d at 124.

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

