

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 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. 99-1618-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADRIAN B. DUNFORD

DEFENDANT-APPELLANT.

APPEAL from an order and a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 BROWN, P.J. Adrian B. Dunford appeals from an order denying his motion to dismiss and a judgment of conviction for operating after revocation (OAR) or after suspension (OAS) contrary to §§ 343.44(1) and (2)(e)1, and 351.08, STATS. The appellate issue is whether the trial court properly imposed criminal penalties under § 343.44(2)(e)1 or whether civil penalties should have been imposed under § 343.44(2)(e)2. Because the earlier revocations upon which

this proceeding was premised arose at least in part from offenses not related to a failure to pay fines or forfeitures, we conclude that Dunford was properly convicted of a criminal traffic offense. This court affirms.

¶2 This case boils down to whether the facts here fit one published case or another one. If they fit one published case, then Dunford was properly convicted of a crime. If they fit the other, then he was improperly convicted. The two cases are *State v. Taylor*, 170 Wis.2d 524, 527, 489 N.W.2d 664 (Ct. App. 1992), and *State v. Kniess*, 178 Wis.2d 451, 504 N.W.2d 122 (Ct. App. 1993). *Taylor* says that if a person is determined to be a habitual traffic offender (HTO) based solely on multiple OAR/OAS offenses and *all* the underlying revocations or suspensions within the past five years were for failure to pay a fine, then the HTO status does not count as some other reason for suspension. *Kniess* explains, however, that if one or more of the multiple OAR/OAS offenses were not solely due to failure to pay a fine, then the HTO status can be considered the catalyst for criminal rather than civil penalties. Reviewing the two cases, we find that both Taylor and Kniess were in HTO status. The difference between the two was that Taylor's revocations were all due to his failure to pay a fine, but Kniess's original revocation was due to his poor driving record. Thus, not all of Kniess's revocations were due to failure on his part to pay.

¶3 This case is like *Kniess*, not *Taylor*. Dunford's driving record shows that on April 27, 1995, his license was suspended for two months based on his driving record which included two convictions for operating without a license and two convictions for failing to obey a traffic signal. It was during this two-month suspension period that he committed and was eventually convicted of four operating after suspension offenses. The dates of those offenses were May 5, 30, 31 and June 5. Dunford also had a speeding violation on June 5. All his

subsequent suspensions and revocations arose from his failure to pay a fine. But the fact remains that his original suspension came as a result of his poor driving record. This makes his case a *Kniess* case, not a *Taylor* case.

¶4 Dunford attempts to distinguish his case from *Kniess* by observing that his HTO status was originally determined by the Department of Transportation to be due to four driving while suspended violations and nothing else. *Kniess*'s HTO status, on the other hand, was based in part upon his bad driving record. Thus, Dunford argues that since he drove while suspended because he could not or did not pay his fine, and because his HTO status was based solely on these occurrences, his case should be set apart from *Kniess*. Dunford attempts to discredit the State's amended order of revocation which says that the HTO status stems, in part, from the original revocation order of September 29, 1995. He grounds his argument on the fact that he could not have been classified as an HTO on September 29, 1995. His HTO status could not have occurred until after his four suspensions. Therefore, the original reason for his suspension, his bad driving record, is irrelevant.

¶5 We reject Dunford's argument. We first observe that HTO status is arrived at after totaling all offenses occurring within the five-year period before the current offense. It is true that within the past five years he has been convicted of four prior operating after suspension violations, all of which were due solely to his failing to pay a fine. But also within that five-year time span he was suspended due to a bad driving record. It is his total record during those five years that makes for HTO status, and not the event which finally *puts him into* HTO status, that counts. Because his underlying suspension was based on his bad driving record, and the original revocation order was based on incidents when Dunford was operating after that suspension, the amended order of revocation

properly listed the original revocation as one of the offenses forming the basis for his HTO status.

By the Court.—Order and judgment affirmed.

This case will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.

