

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0672-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDALL McCONOCHIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Randall McConochie appeals from a conviction for violating WIS. STAT. § 346.63(1)(a), operating a motor vehicle while under the influence of an intoxicant (OMVWI), second offense. McConochie argues that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the default judgment entered in his first offense was constitutionally defective and, therefore, not valid for purposes of sentence enhancement under WIS. STAT. § 346.65(2)(b). He contends that his motion to collaterally attack the prior civil forfeiture determination was wrongly denied. We are not persuaded and affirm the conviction and the order.

¶2 On June 28, 1998, McConochie was issued a citation for OMVWI in Dodge county with a court appearance date of August 4, 1998. A second citation, alleging a violation of WIS. STAT. § 346.63(1)(b) (BAC) from the same incident, was issued to McConochie on July 6, 1998. By mail, McConochie entered pleas of not guilty on July 31, 1998. Upon receipt of the not guilty pleas, a trial was scheduled for October 13, 1998, and notice was mailed to McConochie at the address indicated on the two citations—401 Gascoigne Drive, Waukesha, Wisconsin 53188. McConochie failed to appear on the October 13 trial date and a default judgment of guilty of OMVWI was entered on October 16, 1998.²

¶3 On October 9, 1998, McConochie was issued a second citation for OMVWI in Waukesha county. A misdemeanor complaint was filed on December 14, 1998, charging McConochie with OMVWI and BAC violations, enhanced under WIS. STAT. §§ 346.65(2) and 343.30(1q)(b),³ based upon the existing Dodge county default judgment. McConochie moved the misdemeanor court to strike the use of the Dodge county default judgment for enhancement purposes because it

² The record is silent on the disposition of the BAC charge which we assume was dismissed.

³ Sections 346.65(2) and 343.30(1q)(b) enhance the penalty for a second violation of § 346.65 to a fine of not less than \$300 nor more than \$1000, a driver's license revocation of not less than twelve months nor more than eighteen months, and a jail term of not less than five days nor more than six months.

was constitutionally invalid. McConochie apparently failed to receive notice of the first citations, the court trial date and the default judgment because the notices were apparently mailed to a previous address. The court denied the motion to strike.

¶4 McConochie contends that the trial court's holding, that he could not collaterally attack the constitutional validity of a prior municipal ordinance conviction being used to enhance a subsequent WIS. STAT. § 346.65 penalty, was in error. He cites to *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), and *State v. Foust*, 214 Wis. 2d 568, 570 N.W.2d 905 (Ct. App. 1997), to support his contention that he was denied constitutional due process in Dodge county, and, therefore, the prior default forfeiture judgment is void. Both cases can be distinguished from this case.

¶5 In order for McConochie to collaterally attack the Dodge county default judgment based upon constitutional due process protections, he must first establish the existence of those protections. We review such constitutional questions independently because “[t]he scope of constitutional protections, representing the basic value commitments of our society, cannot vary from trial court to trial court, or from jury to jury.” *State v. Fry*, 131 Wis. 2d 153, 171, 388 N.W.2d 565 (1986) (citations omitted).

¶6 “Due process requires that a person have notice of the offense and the opportunity to be heard at a meaningful time and in a meaningful manner.” *Town of East Troy v. Town & Country Waste Serv., Inc.*, 159 Wis. 2d 694, 704, 465 N.W.2d 510 (Ct. App. 1990). However, constitutional rights are implicated by use of the criminal procedure which “is restricted by due process and by art. I, sec. 7 of the Wisconsin Constitution and the sixth amendment to the United States

Constitution which guarantee to an accused the right to be informed of ‘the nature and cause of the accusation.’” *State v. George*, 69 Wis. 2d 92, 97, 230 N.W.2d 253 (1975).

¶7 The difference between traffic forfeiture violations and traffic crimes has been previously established and addressed in Wisconsin. A conviction for OMVWI as a first offense results in the imposition of a noncriminal forfeiture. *See* WIS. STAT. § 346.65(2)(a); *see also Foust*, 214 Wis. 2d at 570. Second and subsequent OMVWI offenses are criminal convictions resulting in progressively higher fines and longer mandatory minimum jail sentences. *See* § 346.65(2)(b)-(e); *see also Foust*, 214 Wis. 2d at 570. Civil forfeiture offenses are prosecuted under WIS. STAT. ch. 345, while traffic crimes are prosecuted pursuant to the Criminal Procedure Code under WIS. STAT. ch. 967. *See State v. Mudgett*, 99 Wis. 2d 525, 526, 299 N.W.2d 621 (Ct. App. 1980). Forfeiture proceedings are instituted by a uniform traffic citation providing notice that the defendant is subject to the substance and sanctions of noncriminal forfeiture actions, and do not require a complaint setting forth probable cause. *See id.* at 528. A traffic crime requires a complaint setting forth probable cause. *See id.* In sum, when a defendant is charged with a traffic crime, he or she must be put on notice that the substance and sanctions of the criminal law apply. *See id.* at 527-28.

¶8 In *Baker*, the case relied upon by McConochie, the defendant collaterally attacked his second and third criminal operating after revocation (OAR) convictions as enhancing his pending fifth and sixth OAR offenses. *See Baker*, 169 Wis. 2d at 56-58. He contended that the second conviction was obtained in violation of his constitutional right to counsel, *see id.* at 58, and the third conviction was obtained in violation of his constitutional right to enter a knowing, voluntary and intelligent guilty plea, *see id.* at 71. The *Baker* court held

that a defendant may collaterally attack, on constitutional due process grounds, a prior criminal conviction for OAR in a subsequent OAR proceeding. *See id.* at 55. “[A] prior conviction may not be used to ... enhance punishment if the prior conviction was obtained in violation of a constitutional right that would affect the reliability of the prior conviction” *Id.* at 70. *Baker* does not directly address whether a defendant has a right to constitutional due process protections in a civil forfeiture OAR proceeding.⁴ Nor can it be read to support such a right.

¶9 In *Baker*, our supreme court distinguished the case of *Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983). *See Baker*, 169 Wis. 2d at 68-69. *Schindler* held that a defendant could not use the *Baker* collateral attack standard to constitutionally challenge a prior OWI civil forfeiture violation because the first OMVWI offense was not used to “support guilt or enhance punishment” for the subsequent offenses. *See Schindler*, 715 F.2d at 345 (citation omitted). Instead, a first offense OMVWI served to impress upon violators the importance of refraining from driving while intoxicated and put them on notice of the consequences of repeated offenses without initial stigma of a criminal conviction. *See id.* at 346.

⁴ In *State v. Foust*, 214 Wis. 2d 568, 570 N.W.2d 905 (Ct. App. 1997), the defendant was charged with a third OMVWI offense on October 15, 1995. *See id.* at 570. The enhanced charge relied upon a prior OMVWI forfeiture judgment dated February 16, 1989, and a second OMVWI misdemeanor conviction on November 17, 1993. *See id.* Foust was allowed to collaterally challenge the prior criminal conviction under *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992). *See Foust*, 214 Wis. 2d at 572. The State conceded that the conviction was constitutionally defective because the guilty plea was not knowing, voluntary and intelligent. *See id.* at 570-71. Because the second criminal conviction could not be relied upon to charge or enhance the third offense, and because the remaining forfeiture offense was more than five years old, we held that Foust could only be subjected to forfeiture penalties for the October 15, 1995 OMVWI charge. *See id.* at 576. Like *Baker*, *Foust* did not address whether a defendant is entitled to constitutional due process protections during a civil forfeiture procedure.

¶10 The *Schindler* reasoning is applicable to McConochie’s challenge to the use of his prior civil forfeiture violation. While the supreme court concluded in *Baker* that prior OAR criminal convictions are used primarily to enhance punishment, it noted that the first forfeiture revocation of a motorist’s license “identifies and classifies that person as a potentially dangerous individual who should not drive a motor vehicle and alerts that person to this status.” *Baker*, 169 Wis. 2d at 64. This same analysis would apply to the OMVWI statutory scheme. The *Schindler* holding is, therefore, consistent with the *Baker* conclusion that a defendant may not collaterally attack a prior conviction in a subsequent proceeding if the prior conviction is used to identify the defendant as a member of a potentially dangerous class of individuals. *See Baker*, 169 Wis. 2d at 59-60.

¶11 McConochie’s Dodge county forfeiture offense was not used to enhance punishment for the present offense, but to classify him as an adjudicated offender subject to criminal sanctions for future OMVWI violations. Thus, we conclude that the Wisconsin case law cited by McConochie does not support his appellate contention that he is entitled to collaterally attack the Dodge county default judgment as being constitutionally invalid.

By the Court.—Judgment and order affirmed.

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

