

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 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. 00-1534-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DELYNN A. STREIT,

DEFENDANT-APPELLANT.

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

¶1 NETTESHEIM, J.¹ Delynn A. Streit appeals from the repeater sentencing provisions of a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a). In the trial court,

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

Streit collaterally attacked the two prior OWI convictions alleged in the criminal complaint. The trial court rejected the challenges and sentenced Streit as a third-time offender.

FACTS AND DISCUSSION

¶2 The State filed a criminal complaint alleging that Streit operated a motor vehicle while intoxicated on October 1, 1999.² The complaint further alleged two prior OWI convictions against Streit: a conviction on June 7, 1990, relating to an offense on September 24, 1989; and a conviction on January 31, 1996, relating to an offense on December 29, 1995. As a result, the complaint alleged that Streit was subject to the enhanced penalties for a third-time offender as set out in WIS. STAT. § 346.65(2)(c). The 1990 conviction was the result of a criminal prosecution and the 1996 conviction was the result of a civil forfeiture prosecution in a municipal court.

¶3 Eventually Streit pled no contest to the OWI charge.³ However, she challenged both of the repeater allegations. As to the prior criminal prosecution, Streit contended that her plea of guilty in that case was not knowingly entered because the trial court had failed to properly advise her of the elements of the OWI offense. As to the prior civil forfeiture prosecution, Streit contended that a default judgment had improperly been entered against her when she had failed to personally appear in the municipal court where the action was prosecuted. Instead, Streit argued that the municipal court could only issue a warrant for her arrest.

² The complaint also alleged an offense of operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to WIS. STAT. § 346.63(1)(b).

³ The companion PAC charge was dismissed.

¶4 The trial court rejected both of Streit’s collateral challenges to the prior convictions and sentenced her as a third-time offender.

¶5 A defendant may collaterally challenge prior OWI convictions which underpin a repeater allegation. *See State v. Foust*, 214 Wis. 2d 568, 572, 520 N.W.2d 905 (1997). However, such challenges are limited to those convictions that are “constitutionally infirm.” *Id.*

¶6 As to the 1990 criminal case, Streit contends that the trial court did not adequately inform her of the elements of OWI during the plea colloquy.⁴ We disagree. The offense of OWI has two elements: (1) driving or operation of a motor vehicle, and (2) the state of intoxication at the time of such driving or operation. *See WIS JI—CRIMINAL 2663*. The transcript of the plea proceeding in the 1990 criminal case reveals that the trial court asked Streit, “On September 24, 1989 were you driving on South 77th Street in West Allis?” Streit answered, “Right.” The court next asked Streit, “Were you under the influence of intoxicants at the time?” Streit answered, “I was.” Although the court’s colloquy with Streit was otherwise brief, these two questions and answers establish that Streit entered her pleas with knowledge of the elements of the offense.

¶7 As to the 1996 civil forfeiture proceeding, Streit did not personally appear before the municipal court. Instead, she appeared through her counsel who eventually entered a written plea of no contest on Streit’s behalf and the municipal

⁴ Although we rule for the State on this issue, we reject the State’s argument that Streit has failed to provide a complete transcript of the plea colloquy of the 1990 proceeding. While it is true that the appendix to Streit’s appellate brief-in-chief contains only excerpts from the transcript, the appellate record includes the complete transcript.

court entered a forfeiture judgment against Streit based on that admission.⁵ Streit argues that this procedure was improper. Instead, she contends that the municipal court was obligated to follow the plea colloquy procedures set out in WIS. STAT. § 971.08, which require a defendant's personal appearance. And since she did not personally appear before the municipal court, Streit reasons that the municipal court's only option was to issue a warrant for her arrest pursuant to WIS. STAT. § 800.03(4). This statute authorizes the court to issue an arrest warrant if the defendant fails to appear in a prosecution for a violation of an ordinance enacted in conformity with WIS. STAT. § 346.63(1).

¶8 The defect in Streit's argument lies in her assumption that she failed to appear in the municipal court proceeding. That proceeding was, by definition, a civil action. A litigant in a civil proceeding is entitled to appear by counsel, and that is what occurred in the municipal court proceeding. Thus, Streit did not fail to appear in the forfeiture action and therefore WIS. STAT. § 800.03(4) has no application to the municipal court proceeding.

¶9 For the same reason, Streit is incorrect in her belief that the municipal court entered a default judgment against her when she failed to appear. The minutes of the municipal court proceeding reveal that the forfeiture judgment was based upon Streit's written plea of no contest entered through her attorney. Therefore, Streit appeared in the action and she was not in default.

¶10 Finally, Streit cites to no authority, and we are unaware of any, which holds that the plea colloquy procedures for criminal cases set out in WIS.

⁵ Streit makes no claim that her counsel was not authorized to enter the no contest plea on her behalf.

STAT. § 971.08 apply to civil forfeiture OWI proceedings. In short, the municipal court proceeding was not “constitutionally infirm.” See *Foust*, 214 Wis. 2d at 572.⁶

⁶ We add an important caveat to this opinion. On November 1, 2000, the Wisconsin Supreme Court released its opinion in *State v. Hahn*, 2000 WI 118, No. 99-0554, which reexamined its holding in *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), in light of the United States Supreme Court’s post-*Baker* opinion in *Custis v. United States*, 511 U.S. 485 (1994). In *Custis*, the Supreme Court held that the United States Constitution does not require that an offender be given an opportunity to challenge a prior state conviction in a federal enhanced sentence proceeding predicated on the prior state conviction unless the offender asserts the state conviction was obtained in violation of the offender’s constitutional right to a lawyer. See *Hahn*, 2000 WI 118 at ¶16.

In *Hahn*, the Wisconsin Supreme Court adopted the *Custis* rule for purposes of Wisconsin law. The court held that a defendant has no federal constitutional right in an enhanced sentencing proceeding to collaterally challenge a prior conviction except as to a claim of denial of counsel. See *Hahn*, 2000 WI 118 at ¶¶28-29. Since Streit was represented by counsel in both of the prior proceedings, it appears that her claims are barred by *Hahn*. However, since the *Hahn* decision was released after the parties had filed their briefs in this case, we have decided this case on the basis of pre-*Hahn* law.

CONCLUSION

¶11 We hold that both the 1990 criminal OWI conviction and the 1996 civil forfeiture OWI judgment were valid. The trial court properly sentenced Streit as a third-time OWI repeat offender.

By the Court.—Judgment affirmed.

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

