COURT OF APPEALS
DECISION
DATED AND RELEASED

September 20, 1995

No. 95-0904-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. SHEETS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

NETTESHEIM, J. Jeffrey L. Sheets appeals from that portion of a judgment of conviction for operating a motor vehicle while intoxicated (OWI) which ordered the installation of an ignition interlock device on two vehicles which Sheets owned.[1] Sheets also appeals from a

[1] Section 340.01(23v), STATS., defines an ignition interlock device as a "device which measures the person's alcohol concentration and which is installed on a vehicle in such a manner that the vehicle will not start if the sample shows that the person has a prohibited alcohol concentration."

postconviction order which denied his request for elimination of the provision on the second vehicle.

Sheets raises two issues on appeal. First, he contends that § 346.65(6)(a), STATS., permits a trial court to order installation on only one vehicle owned by a convicted defendant. We deem this issue waived because Sheets did not assert this challenge in the trial court. Second, Sheets contends that the trial court misused its discretion by ordering the installation of interlock devices on two vehicles. We conclude that the trial court did not misuse its discretion.

The facts are not in dispute. Sheets was convicted of OWI as a repeat offender. At sentencing, the trial court ordered two vehicles owned by Sheets equipped with ignition interlock devices.[2] Sheets objected, contending that the cost of installing the interlock devices on two vehicles would represent an undue economic strain on him and his family. However, he never contended that the statute did not permit the court to order ignition interlock devices on more than one vehicle owned by a convicted defendant. The court noted the objection, but did not alter its ruling.

By postconviction motion, Sheets asked the trial court to eliminate the provision requiring installation of an ignition interlock device on the second vehicle. In support, Sheets again contended that the cost of installing the second device would create an undue hardship to him. However, he again failed to

[2] The trial court also ordered that two other inoperable vehicles owned by Sheets be immobilized pursuant to the same statute. Sheets does not challenge this provision of the judgment.

assert that the statute did not permit the installation of such devices on multiple vehicles. The trial court denied the motion without a formal hearing, making the following written notation on the face of Sheets's motion:

> [g]iven the fact that this was the defendant's third OWI conviction the court on behalf of the public cannot afford having the defendant have available for easy use a car un-equipped with an I.I.D. The strain on the public outweighs the financial strain the defendant alleges.

Later, the court entered a written order denying Sheets's motion to modify the judgment.

On appeal, Sheets contends that § 346.65(6)(a), STATS., allows for the installation of an ignition interlock device on only one vehicle owned by a defendant convicted of OWI. However, it is clear from the trial court record that Sheets never raised this issue either at the sentencing or at the postconviction proceeding. We deem the issue waived.

We thus turn to Sheets's further contention that the trial court misused its discretion in ordering ignition interlock devices installed on the two vehicles. The relevant provisions of § 346.65(6)(a), STATS., provide:

> Except as provided in this paragraph, the court *may* order a law enforcement officer to seize a motor vehicle, or, if the motor vehicle is not ordered seized, *shall* order a law enforcement officer to equip the motor vehicle with an ignition interlock device or immobilize any motor vehicle owned by the person whose operating privilege is revoked …. The court shall not order a motor vehicle equipped with an ignition interlock device or immobilized if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person.

Id. (emphasis added).

We begin by making certain observations about this statutory scheme which the parties do not address. First, the sentencing court's authority to order seizure of a motor vehicle is couched in discretionary terms: "the court may order a law enforcement officer to seize …." *See* ***id***. Thus, the court has discretion whether to order seizure.[3] However, if seizure is not ordered, the statute then mandates that the trial court order either an ignition interlock device or immobilization: "or, if the motor vehicle is not ordered seized, [the court] *shall* order a law enforcement officer to equip the motor vehicle with an ignition interlock device or immobilize any motor vehicle owned by the person …." ***Id***. (emphasis added). Thus, on a threshold basis, installation of an ignition interlock device or immobilization is mandatory, not discretionary.

In this case, the trial court did not order seizure of any motor vehicle. Thus, the trial court properly ordered installation of an ignition interlock device pursuant to § 346.65(6)(a), STATS.[4] However, the final sentence of this subsection provides that the court shall not order an interlock device or immobilization "if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person." ***Id***. It is this language on which Sheets premises his argument.

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[3] Section 346.65(6), STATS., provides for the ultimate forfeiture and sale of a seized vehicle.

[4] The trial court did not order immobilization because Sheets's wife required use of a vehicle.

Sheets contends that the trial court erred when it balanced the interests of the public against the financial strain which the ignition interlock provision caused him. Sheets observes that this sentence of the statute says nothing of the interests of the public, and thus, he contends that such consideration is irrelevant to the inquiry. Sheets reasons that if the offender has shown the requisite hardship or extreme inconvenience, the judicial inquiry is over and the court cannot order installation of the ignition interlock device. Sheets further contends that since the trial court acknowledged the requisite hardship on Sheets, the court was duty bound to lift the installation order as to the second vehicle.

We conclude that Sheets's analysis of the statute is too simplistic. We acknowledge that the sentence on which Sheets relies does not expressly state that the interests of the public are a factor for the trial court to consider when addressing a convicted OWI defendant's claim of hardship or inconvenience. However, the public interest is the very reason for the statute's existence. The obvious purpose of the statute is to protect the public from the hazards represented by convicted drunk drivers who are once again tempted to take to the roadways.[5] The ignition interlock provision accomplishes this goal by making a motor vehicle inoperable unless the operator is legally sober.

[5] It is obvious that the mere loss of a driver's license does not preclude a driver from again operating a motor vehicle. It is common knowledge that those whose licenses have been suspended or revoked continue to drive. The legislature has addressed this problem by providing escalating penalties to those who engage in such ongoing activity. *See generally* §§ 343.05(5)(a) and 343.44(2), STATS.

We recognize that the language of § 346.65(6)(a), STATS., upon which Sheets relies, says that the court "shall not order" an ignition interlock device if such results in undue hardship or extreme inconvenience to a person. However, in construing a statute, we are required to consider the statute in toto rather than isolated provisions. *See* ***Graziano v. Town of Long Lake***, 191 Wis.2d 813, 822, 530 N.W.2d 55, 58 (Ct. App. 1995). Our primary purpose when interpreting a statute is to give effect to the legislature's intent. ***Id***. at 818, 530 N.W.2d at 57.

It would be anomalous for us to hold that a trial court may not consider the statutory goal of the public's protection when a convicted OWI defendant asks the court to relax the very sanctions which serve that goal. Yet this is what Sheets asks us to do. Here, Sheets stands convicted of three OWI offenses. The prior two convictions occurred in 1990, within ninety days of each other. In the present case, Sheets struck a parked vehicle. His blood alcohol concentration was 0.286%, nearly three times the presumptive legal limit. *See* § 885.235(1)(c), STATS. Except in circumstances of undue hardship or extreme inconvenience, § 346.65(6)(a), STATS., mandates the use of an ignition interlock device in such a case to keep the repeat offender off the roadways. Functionally, the statute declares such operators a danger to the public.

Since the primary purpose of § 346.65(6)(a), STATS., is to make vehicles inaccessible to drunken drivers convicted as repeat offenders, we conclude that it was proper and necessary for the trial court to consider the public's safety and protection when Sheets asked the court to lift the ignition

interlock device on his second vehicle. That request, if granted, posed the clear risk that Sheets might once again operate a vehicle while intoxicated. Given Sheets's history, the trial court was unwilling to take that risk. We see no misuse of discretion by the trial court as it performed this balancing exercise.

While the use of the word "shall" is usually considered mandatory, in limited circumstances we are at liberty to construe the word "shall" as directory, not mandatory, if such is necessary to achieve the legislative intent. *See* ***Wagner v. State Medical Examining Bd.***, 181 Wis.2d 633, 643, 511 N.W.2d 874, 879 (1994). This is such a case. The interests and safety of the public lie at the foundation of § 346.65(6)(a), STATS. Sheets's interpretation of the statute would eliminate that consideration as a relevant factor when an OWI defendant seeks relief from an ignition installation order. That interpretation flies in the face of the statutory goal.

We conclude that the trial court properly balanced the public's need for protection against the risk posed by making an operable motor vehicle available to Sheets. We affirm the judgment and the postconviction order.

By the Court.—Judgment and order affirmed.

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