COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2285-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHERYL D. STUCKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Reversed and cause remanded with directions.*

EICH, C.J.[1] Sheryl Stuckey appeals from a judgment convicting her of operating a motor vehicle after suspension/revocation (OAS/OAR). Because it was her ninth such conviction in the past five years, it was processed as a criminal charge, with an enhanced penalty pursuant to the habitual traffic offender statutes,

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

ch. 351, STATS. She moved to dismiss the charge, arguing that she was not subject to criminal penalties because her license had been suspended in 1993 for failure to pay a forfeiture. She claimed that because her license had not been suspended or revoked for any reason other than that failure—together with subsequent OAS convictions—she could be subject to only civil penalties under § 343.44(2)(e), STATS., which provides as follows:

> 1. Except as provided in subd. 2., for a 5th or subsequent conviction under 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 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 Stuckey's revocation was based solely on her failure to pay a fine or forfeiture, thus permitting the State to proceed against her only in a civil action.

The trial court denied Stuckey's motion to dismiss, concluding that because her license had also been suspended for accumulation of demerit points[2]—even though the points were accumulated as a result of the OAS convictions—the suspension for failure to pay forfeitures did not constitute the "sole" reason for the revocation and criminal penalties were appropriate. Stuckey

[2] Under § 343.32, STATS., various traffic violations carry "points" based on the seriousness of the violation, and accumulation of more than twelve points in any twelve-month period results in license suspension. At the time the point-suspension order was issued, it appears that Stuckey had accumulated twenty-two points in the preceding twelve-month period.

then pled to the charge, preserving her challenge to the criminal penalties for appeal.

Stuckey's driving record is mountainous, and we offer only a summary. Her license was suspended in October 1993 for failure to pay a nontraffic forfeiture. She was convicted in June 1994 of operating after suspension and was assessed six demerit points. She was convicted in July 1994 and again in August 1994 of operating after suspension and was assessed eight points for each of these violations. On August 19, 1994, the Department of Transportation suspended Stuckey's license for one year for accumulation of points, entered an order to that effect and mailed it to Stuckey. Stuckey's license was subsequently suspended on September 8, September 15, and November 22, 1994—and again on February 15, March 16, March 23, and April 6, 1995—for failure to pay forfeitures assessed for her earlier convictions.[3]

In November 1994 and January 1995, Stuckey was convicted of five additional OAS charges. Then, on March 21, 1995, the department issued an "Amended" order that revoked Stuckey's license for five years (effective January 24, 1995) under the habitual traffic offender law for her eight OAS convictions between June 21, 1994, and January 31, 1995.[4]

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[3] Aside from the one-year suspension for accumulation of demerit points, it appears from the record—and the State does not contest the point—that all of Stuckey's suspensions were based on her failure to pay forfeitures.

[4] Section 351.02(1)(a)4, STATS., defines a habitual offender as one who is convicted four or more times within a five-year period of operating after suspension or revocation, regardless of the basis for the suspension or revocation. *See* ***State v. Taylor***, 170 Wis.2d 524, 529, 489 N.W.2d 664, 667 (Ct. App. 1992).

The instant case involves a charge of operating after revocation on May 10, 1995.

Stuckey 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 a habitual-traffic-offender 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 that only a civil prosecution is available to the State in those circumstances. ***Id.*** at 528-30, 489 N.W.2d at 666-67. The State advances a single argument: that ***Taylor*** is inapposite because, at the time of her arrest, Stuckey's license had been suspended not only for her failure to pay forfeitures for past offenses—which, under ***Taylor***, would limit the State to civil remedies—but also for accumulation of demerit points.

Whatever the merits of such an argument, it is not available to the State in this case because the record indicates that in March 1995—two months before Stuckey's arrest—the department amended its prior demerit-point revocation order, apparently replacing it with an order revoking her license for five years based on her status as an habitual traffic offender. And we said in ***Taylor*** that "being classified as a habitual traffic offender is not a separate offense, but is a status based upon one's driving record that can result in exposure to enhanced penalties," and that the legislature, in enacting § 343.44(2), STATS., "decided not to expose persons who have been convicted of operating after revocation or suspension based (1) solely upon nonpayment of a fine or forfeiture; or (2) solely upon nonpayment of a fine or forfeiture and subsequent convictions of operating after revocation or suspension to enhanced penalties." ***Id***. at 530, 489 N.W.2d at 667.

The State, referring us to the text of the amended order, asserts that it "only reflects an increase[d] period of revocation due to additional violations … which increased the demerit points against Ms. Stuckey's driving record." We are not persuaded. First, the "Order of Revocation" letter plainly states that it is "Amended," and the State has not offered anything to rebut the inference that the order, as it states, "amended" the department's prior orders—including the point-accumulation suspension on which the State relies. Second, the order itself makes no reference whatsoever to demerit points. It states simply that the department "found [Stuckey] to be an habitual traffic offender" based on her prior convictions for operating after suspension, and that, as a result, her license was being suspended for five years.

On the record and the parties' arguments, we have little choice but to conclude that § 343.44(2)(e), STATS., mandates that Stuckey, like the defendant in ***Taylor***, may be proceeded against only civilly for the instant offense.[5] We therefore reverse and remand this case for further proceedings consistent with this opinion.

By the Court.–Judgment reversed and cause remanded with directions.

[5] We note here, as we have in the past, that § 343.44(2), STATS., has spawned numerous appeals—and much confusion—over the years. In a recent unpublished opinion, for example, we noted the plethora of cases and said that, as a result, "It could well be argued that the language of the statute has created confusion among prosecutors, defense attorneys and trial courts over the proper application of these statutes to specific driver histories. It could also be argued that our opinions have not assisted in dispelling this confusion." ***State v. Smith***, No. 96-2085-CR, unpublished slip op. at 8 n. 8 (Wis. Ct. App. Mar. 6, 1997). We continue to believe, as we also noted in ***Smith***, that the penalty provisions of the statute "would benefit from legislative attention."

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