

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 97-2730-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN T. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

VERGERONT, J.¹ Allen Peterson appeals from a conviction for operating while intoxicated, fourth offense, in violation of § 346.63(1)(a), STATS., and operating after revocation, second offense, in violation of § 343.44(1), STATS.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Peterson asserts that the trial court erred in denying his motion to dismiss the complaint on the ground that the lower prohibited alcohol concentration (PAC) of .08 for persons with two or more prior convictions, as compared to the PAC of .1 for persons with one or no prior convictions under §§ 346.63(1)(b) and 340.01(46m), STATS.,² and the correlative lower threshold for the presumption of intoxication under § 885.235(1)(c) and (cd), STATS.,³ violate his right to equal

² Section 346.63(1), STATS., provides in pertinent part:

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a prohibited alcohol concentration.

Section 340.01(46m), STATS., provides in pertinent part:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has one or no prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.1 or more.

(b) If the person has 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.08 or more.

³ Section 885.235(1), STATS., provides in pertinent part:

(1) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle ... evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the

(continued)

protection and due process of law. We reject this contention because Peterson has not shown that he has been injured by application of the lower PAC level to him. We therefore affirm the judgment of convictions.

The complaint charged Peterson with operating while under the influence of an intoxicant (OWI) and operating with a PAC, fourth offense, and operating after revocation (OAR) as a habitual traffic offender, second offense. The complaint alleged that the intoxilyzer test results were .22 grams of alcohol in 210 liters of Peterson's breath. Peterson moved to dismiss the complaint on the ground that a lower PAC for third and subsequent offenses, based solely on his status as a third or subsequent offender, violated his rights to equal protection and due process of law. The trial court denied the motion, concluding that, since no suspect classification was involved and the distinction had a rational basis, the statute is not unconstitutional.

Peterson then waived his right to a jury trial. The matter was tried to the court on stipulated exhibits, including the police report and a stipulation to a

sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

....

(c) The fact that the analysis shows that the person had an alcohol concentration of 0.1 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.1 or more.

(cd) In cases involving persons who have 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), the fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

blood alcohol concentration (BAC) of .22%. The court found Peterson guilty of OWI, fourth offense, and OAR, second offense, and imposed a sentence of alcohol assessment, forfeiture, one year in jail with Huber privileges, and revocation on the OWI charge; and forfeiture, six months in jail with Huber privileges, stayed with conditions, and concurrent license revocation on the OAR charge.⁴

Peterson renews his constitutional challenge on appeal. However, we do not reach his constitutional arguments because we agree with the State that Peterson does not have standing to raise them. Appellate courts will not reach constitutional issues where resolution of another issue disposes of an appeal. *See Grogan v. PSC*, 109 Wis.2d 75, 77, 325 N.W.2d 82, 83 (Ct. App. 1982).

As Peterson acknowledges, in order to have standing to challenge a statute as unconstitutional, he must show that he is injured by the statute and that he is within the zone intended to be protected by the constitutional guarantee. *See Mogilka v. Jeka*, 131 Wis.2d 459, 466, 389 N.W.2d 359, 362 (Ct. App. 1986). Whether a person has standing to make a constitutional challenge presents a question of law. *Id.* We conclude that Peterson has not shown that he is injured by the constitutional infirmities he alleges.

Initially, we observe what is implicit in Peterson's brief—that the PAC level is not in any way pertinent to the OAR charge or conviction.

⁴ Pursuant to § 346.63(1)(c), STATS., a person may be charged with both OWI and operating with a PAC for acts arising out of the same incident. If the individual is found guilty of both, there shall be only one conviction for sentencing purposes and for counting convictions for determining the relevant PAC under § 343.30(1q), STATS., and for certain revocation purposes. *See* § 343.305(10), STATS. We are unable to tell from the record whether the court found Peterson guilty of operating with a PAC as well as OWI. It may be that the court listed only the conviction for the OWI in the judgment because that was the conviction for which it chose to sentence. In any event, this uncertainty does not affect our decision.

Therefore, his challenge would not in any event result in a dismissal of the OAR charge or a reversal of that conviction. With respect to the PAC charge, Peterson's BAC of .22 is sufficient to establish a violation of § 346.63(1)(b), STATS., even if the .1 level for first and second offenders were applied to him. We fail to see how he is injured by the application of the .08 standard rather than the .1 standard as to that charge even if he were convicted of operating with a PAC. *See supra* note 4.

With respect to the OWI charge, Peterson claims he is injured because of the "two-tier system" of presumptions under § 885.235(1)(c) and (cd), STATS. Under this statute, an alcohol concentration of .1 or more is *prima facie* evidence of intoxication for persons with fewer than two prior convictions, but if there are two or more prior convictions, a level of .8 constitutes *prima facie* evidence of intoxication. Again, we fail to see how Peterson is injured, given his BAC of .22. Since he agreed to a trial to the court on stipulated facts, no instructions on *prima facie* evidence were given and the record does not disclose how, if at all, the court considered Peterson's BAC in arriving at the finding of OWI. The facts observed by the arresting officer, contained in the police report that was presented to the court by stipulation, are more than sufficient to support a finding of driving while under the influence of an intoxicant, even without reference to Peterson's BAC. But, in any event, since Peterson's BAC was well above .1, it is *prima facie* evidence of intoxication without regard to the number of prior offenses. Thus, he is not injured by the lower threshold for the presumption for persons with two or more prior convictions. We therefore affirm the judgment of convictions.

By the Court.—Judgment affirmed.

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

