COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2992-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JODY T. LINDSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

DEININGER, J.[1] Jody Lindsey appeals a judgment convicting him of operating a motor vehicle after his operating privilege was revoked (OAR), in violation of § 343.44(1), STATS., as a sixth offense. The judgment imposes criminal penalties under § 343.44(2)(e)1, including a six-month jail sentence. The

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

trial court denied Lindsey's postconviction motion to have the criminal penalties set aside and civil penalties imposed under § 343.44(2)(e)2. Lindsey also appeals the order denying that motion. He claims that on the date of the present OAR offense, the only revocations or suspensions of his operating privilege that were in effect had been imposed solely due to (1) his failure to pay fines and forfeitures (FPF), and (2) subsequent convictions for OAR or OAS[2] that were based on revocations or suspensions for FPF, and thus the civil penalties under § 343.44(2)(e)2, should apply. We reject Lindsey's claim and affirm the judgment and order.

BACKGROUND

The parties concur in the following explanation of the status of Lindsey's operating privilege on September 18, 1995, the date of his present offense. On that date, there were three separate suspensions of Lindsey's operating privilege in effect, all for FPF. There were also two revocations in effect, one because of Lindsey's status as an habitual traffic offender (HTO), and one administrative driver record revocation due to his accumulation of demerit points.[3]

The HTO revocation in effect on September 18, 1995, was based on the following offenses of which Lindsey had been convicted during the period

[2] OAS refers to operating after the suspension of one's operating privilege, which is also a violation of § 343.44(1), STATS.

[3] Lindsey's operating privilege had also previously been suspended or revoked on numerous other occasions for various reasons. It appears that he did not reinstate his privilege following the expiration of these prior suspensions and revocations. For our present purpose, however, we disregard Lindsey's failure to reinstate following any expired revocations or suspensions. *See* ***State v. Muniz***, 181 Wis.2d 928, 933, 512 N.W.2d 252, 253-54 (Ct. App. 1994) (failure to reinstate after expired demerit point suspension does not render instant OAR criminal).

February 18, 1992, through July 18, 1995[4]: five OAR/OAS offenses, all of which stem from revocations or suspensions relating to FPF; attempting to elude an officer; and reckless driving. On September 6, 1995, the Department of Transportation also imposed a six-month demerit point revocation, which resulted from the following convictions[5]: OAR (FPF-related) on October 4, 1994 (8 points); reckless driving on June 6, 1995 (8 points); and OAR (FPF-related) on July 18, 1995 (8 points).

ANALYSIS

The proper application of a statute to undisputed facts is a matter of law which we decide without deference to the trial court's opinion. ***State v. Michels***, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). The statute at issue in this appeal is § 343.44(2)(e), STATS., which provides:

> 1. Except as provided in subd. 2., for a 5th or subsequent conviction under this section or a local ordinance in conformity with 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 a 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.

[4] See § 351.02(1)(a), STATS., which provides that HTO status applies to a driver who accumulates four or more convictions for OAS/OAR or certain other serious traffic offenses, including reckless driving and attempting to elude an officer, within a five-year period.

[5] Under § 343.32(2)(c), STATS., the secretary of the Department of Transportation may suspend or revoke a driver's operating privilege if he or she accumulates twelve demerit points in any twelve-month period.

Lindsey relies on ***State v. Taylor***, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992), for his argument that only civil penalties under § 343.44(2)(e)2, STATS., may be imposed for his September 18, 1995 offense. In ***Taylor***, we held that where an HTO revocation is based solely on suspensions for failure to pay fines or forfeitures, the HTO revocation cannot form the basis for a criminal prosecution for OAR. Only a civil prosecution under § 343.44(2)(e)2, is permissible in that circumstance. ***Id***. at 528-30, 489 N.W.2d at 666-67.

We conclude that Lindsey's reliance on ***Taylor*** is misplaced because the revocation of his operating privilege that was in effect on September 18, 1995, is attributable to more than just his HTO status. Our rationale in ***Taylor*** was that HTO is not an offense, it is a status, and we held that if HTO status is based solely on FPF suspensions, it cannot convert non-criminal conduct into criminal conduct:

> [O]ur decision in ***Taylor*** rested upon the fact that the legislature chose not to denominate habitual traffic offender status as a separate offense. Thus, in ***Taylor***, there was no intervening revocation or suspension that was imposed for an offense separate from a failure to pay a fine or forfeiture.

State v. Biljan, 177 Wis.2d 14, 20-21, 501 N.W.2d 820, 823 (Ct. App. 1993). Here, however, Lindsey's operating privilege was also under revocation on September 18, 1995, for a reason unrelated to his status as an HTO: his accumulation of demerit points for recently committed traffic offenses. Thus, we need not address Lindsey's argument that but for his accumulation of FPF-related OAR and OAS offenses, he would not have been subject to an HTO revocation on September 18, 1995.

Lindsey, however, would also have us apply the ***Taylor*** rationale to his demerit point revocation. He argues that the September 6, 1995 driver record revocation would not have been imposed had it not been for his FPF-related OAR

convictions in 1994 and 1995. Specifically, he asserts that "his two most recent OAR convictions would have warranted a driving record revocation even without the reckless driving conviction." This may be so, although we note that even before his OAR conviction on July 18, 1995, Lindsey had accumulated sixteen demerit points within a twelve-month period: an 8-point OAR conviction on October 4, 1994 (violation on August 31, 1994), and an 8-point reckless driving conviction on June 6, 1995 (May 14, 1995 violation). We conclude, however, that even though his demerit point revocation was based at least in part on one or more FPF-related OAR offenses, it was also based in part on a separate traffic offense: reckless driving. Thus, the ***Taylor*** analysis would not apply because of an "intervening revocation or suspension that was imposed for an offense separate from a failure to pay a fine or forfeiture." ***Biljan***, 177 Wis.2d at 20-21, 501 N.W.2d at 823.

In ***Biljan***, the defendant appealed a judgment convicting him of OAR. *See* ***id***. at 18, 501 N.W.2d at 822. Like Lindsey, he argued that civil penalties should be imposed because the sole basis for his revocation was his failure to pay a fine or forfeiture. *See* ***id***. However, this court concluded that because a basis for the defendant's violation included a suspension for failure to post a security deposit, the criminal penalties were applicable. *See* ***id***. We agree with the State that the result here is controlled by the holding in ***Biljan*** that, when the basis for an OAR offense is a revocation or suspension which stems from a traffic offense separate from any FPF-related offenses, the civil penalties of § 343.44(2)(e)2, STATS., do not apply. ***Biljan***, 177 Wis.2d at 20, 501 N.W.2d at 823.

Thus, because Lindsey's failure to pay a fine or forfeiture was not the sole basis for his demerit point revocation, the judgment of conviction

imposing criminal penalties under § 343.44(2)(e)1, STATS., and the trial court's order denying Lindsey's motion for re-sentencing, must be affirmed.[6]

By the Court.—Judgment and order affirmed.

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

[6] We are aware of the considerable confusion and frustration that the penalty provisions of § 343.44(2), STATS., have spawned among prosecutors, defense counsel and sentencing courts. The holdings of this court cited in this opinion, as well as those of several of our unpublished decisions, have not necessarily assisted in alleviating the difficulty one encounters when attempting to apply the OAR penalty provisions in cases such as this where a defendant's driving record is lengthy and complex. Happily, the legislature has responded to the pleas for clarification of this statute. *See* 1997 Wis. Act 84, published April 27, 1998.