

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 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. 97-3508-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON J. GROFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

DYKMAN, P.J.¹ Jason Groff appeals from a judgment convicting him of operating a motor vehicle after revocation (OAR), sixth offense, contrary to

¹ On April 23, 1998, the chief judge ordered that this appeal would be heard by a three-judge panel. See § 809.41, STATS. Effective April 28, 1998, the statute at issue in this case, § 343.44(2), STATS., was repealed and recreated. See 1997 Wis. Act 84, § 70. On May 18, 1998, the court concluded that a three-judge panel was not necessary, and the chief judge ordered that this appeal would be decided by a single judge. See § 752.31(2)(f), STATS.

§ 343.44(1) and (2)(e), STATS., and an order denying his motion for postconviction relief. Groff argues that he should not have received a criminal penalty under § 343.44(2)(e)1 because his operating privileges were suspended or revoked solely because of his failure to pay a fine or forfeiture. He contends that he instead should have received a civil penalty under § 343.44(2)(e)2. We conclude that the trial court properly imposed a criminal penalty because a demerit point suspension in effect at the time of the offense was not based solely on Groff’s failure to pay a fine or forfeiture. Accordingly, we affirm.

On February 19, 1996, Groff was cited for OAR. He pleaded no contest to OAR, sixth offense, and the court sentenced him to sixty days in jail. Groff then filed a motion for postconviction relief, arguing that he should be resentenced under § 343.44(2)(e)2, STATS., because the suspensions and revocations in effect at the time of the offense were based solely on his failure to pay a fine or forfeiture.

When Groff was cited for OAR on February 19, 1996, his operating privileges had been suspended eight times and revoked once. Seven of the suspensions were due to Groff’s failure to pay a fine or forfeiture. The other suspension was a demerit point suspension. The department of transportation’s order suspending his operating privileges for excessive demerit points read in relevant part:

Your privilege to operate a motor vehicle on Wisconsin highways is suspended ... effective March 30, 1995, for one year because you have accumulated the following violation and conviction record with the demerit point values shown:

<u>violation</u>	<u>conviction</u>	<u>reason</u>	<u>points</u>
08-30-94	09-26-94	speeding intermediate	4
01-13-95	02-13-95	operating while suspended	8

01-13-95	02-13-95	operating while suspended	8
07-07-95	07-25-95	operating while suspended	8
07-31-95	08-16-95	operating while suspended	8
08-27-95	09-19-95	operating while suspended	8

Each of Groff's five operating while suspended (OAS) convictions were due to his operating privileges being suspended for failure to pay a fine or forfeiture.

The parties dispute whether Groff's demerit point suspension provided sufficient grounds for the trial court to impose a criminal penalty under § 343.44(2)(e)1, STATS. Section 343.44 provides in relevant part:

(1) No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state during such suspension or revocation

....

(2)(e)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.

The issue is whether Groff's demerit point suspension 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 [OAR/OAS]," thus invoking the civil penalties of § 343.44(2)(e)2, STATS. Because Groff's demerit point suspension was based on a speeding conviction in addition to his OAS convictions, we conclude that the demerit point suspension

was not based *solely* on Groff's failure to pay a fine or a forfeiture. Accordingly, we conclude that the civil penalty provision does not apply.

In *State v. Biljan*, 177 Wis.2d 14, 501 N.W.2d 820 (Ct. App. 1993), we explained when the criminal penalties, and conversely, when the civil penalties of § 343.44, STATS., apply. We stated:

[The criminal penalty provision does not apply] if the revocation or suspension that is the basis for the current violation was imposed solely because of the defendant's failure to pay a fine or forfeiture. However, if a revocation or suspension in effect at the time the defendant is cited for OAR or OAS was imposed for other than, *or in conjunction with*, the defendant's failure to pay a fine or forfeiture, the defendant's failure to pay a fine or forfeiture is not the sole basis for the revocation or suspension; therefore, [the civil penalty provision] does not apply.

Id. at 20, 501 N.W.2d at 823 (emphasis added).

The key phrase is “in conjunction with.” Groff's demerit point suspension was not based solely on his failure to pay a fine or forfeiture, but rather, was based on his speeding conviction “in conjunction with” his failure to pay a fine or forfeiture. Accordingly, we conclude that the criminal penalty provision of § 343.44(2)(e)1, STATS., applies to Groff's OAR conviction.

Groff contends that *Biljan* is distinguishable. In *Biljan*, the defendant's operating privileges were suspended both for failure to pay a forfeiture and failure to post a security deposit under § 344.13, STATS. *Biljan*, 177 Wis.2d at 18, 501 N.W.2d at 822. We concluded that Biljan's operating privileges were not suspended solely for failure to pay a forfeiture, noting that Biljan's suspension for failure to post a security deposit was “independent of Biljan's failure to pay a fine or forfeiture.” *Id.* at 20, 501 N.W.2d at 823. Groff contends

that, unlike in *Biljan*, his demerit point suspension was not “independent” of his failure to pay a fine or forfeiture.

Groff’s argument ignores the “in conjunction with” language of *Biljan*. Although Biljan’s two suspensions were independent of one another, we did not hold that the criminal penalties of § 343.44, STATS., apply only when the defendant has a suspension that is wholly independent of his or her nonpayment-related suspensions. Rather, we stated that the criminal penalty provision applies when one of the defendant’s suspensions or revocations “was imposed for other than, *or in conjunction with*, the defendant’s failure to pay a fine or forfeiture.” *Biljan*, 177 Wis.2d at 20, 501 N.W.2d at 823 (emphasis added). Groff’s license was suspended for his speeding conviction “in conjunction with” his OAS convictions, and therefore, the criminal penalty provision applies.

Groff further argues that his demerit point suspension was based solely on his failure to pay a fine or forfeiture because the OAS demerit points, standing alone, were sufficient to support the suspension. We disagree. We do not believe that Groff can pick and choose among the violations for which his license was suspended to show that his operating privileges could have been suspended solely for failure to pay a fine or forfeiture. The department of transportation did not suspend Groff’s license for one year solely because he accumulated forty demerit points for OAS; its order of suspension also shows that his operating privileges were suspended because he received four demerit points for speeding. Accordingly, Groff’s suspension was not based solely on his failure to pay a fine or forfeiture.

Finally, Groff argues that *State v. Taylor*, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992), is controlling. We disagree. In *Taylor*, the

defendant was cited for OAR, fifth offense, after his license was revoked based on his status as a habitual traffic offender (HTO). *Id.* at 527, 489 N.W.2d at 666. We concluded that the criminal penalties of § 343.44, STATS., did not apply because Taylor's HTO revocation was based solely on convictions arising from suspensions for nonpayment of fines or forfeitures. *See id.* at 528-530, 489 N.W.2d at 666-67.

Here, unlike the defendant in *Taylor*, Groff was convicted of an offense—speeding—that was unrelated to his failure to pay a fine or forfeiture. And, unlike in *Taylor*, Groff's suspension was not based solely on his failure to pay a fine or forfeiture, but rather, was also based on the demerit points assessed against him for speeding. Because Groff's demerit point suspension, unlike Taylor's HTO revocation, was not based solely on his failure to pay a fine or forfeiture, we conclude that the trial court properly gave Groff a criminal penalty under § 343.44(2)(e)1, STATS.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

