

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 98-0221-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY CORNELIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

MYSE, J. Bradley Cornelius appeals a judgment of conviction for operating after revocation, fifth offense, contrary to § 343.44(1), STATS., and an order denying his postconviction motion. Cornelius argues that the trial court erroneously enhanced his penalty by applying § 343.44(2g), STATS., which enhances the penalty of driving after revocation when the revocation is for an alcohol related offense. While conceding that his license had been earlier revoked

for an alcohol related offense, Cornelius contends that his license is currently revoked for failing to comply with a driver's safety alcohol treatment plan, and is therefore not subject to penalty enhancement under § 343.44(2g). Because this court concludes that the issue is controlled by this court's decision in *State v. Doyen*, 185 Wis.2d 635, 518 N.W.2d 321 (Ct. App. 1994), the judgment and order denying Cornelius's postconviction motions are affirmed.

The facts giving rise to this appeal are essentially undisputed. In May 1992, Cornelius's license was suspended following a conviction for operating a motor vehicle while intoxicated. Shortly thereafter, Cornelius's license was suspended for an additional period for failing to comply with an assessment interview imposed as part of a driver's safety plan. Cornelius ultimately complied with the assessment interview and his driving privileges were reinstated in March 1993.

In January 1994, Cornelius's license was again suspended for continued noncompliance with his driver's safety alcohol treatment plan. His license remained suspended from that time until the date of this offense, when Cornelius was arrested for operating after revocation, fifth offense. Cornelius pled no contest, but contested the applicability of penalty enhancement under § 343.44(2g), STATS. The State contended that the enhancement provision applied because Cornelius's suspension was for noncompliance with a driver's safety plan imposed after an OWI conviction. The court agreed with the State and imposed the enhanced penalties provided by statute.

Cornelius contends that penalty enhancement provisions contained in § 343.44(2g), STATS., do not apply to him because the suspension of his license

was for noncompliance with a driver's safety plan, and not for an alcohol related driving offense. The relevant portion of § 343.44(2g), STATS., is as follows:

(2g) [A]ny person who violates sub. (1) [operating a motor vehicle when driving privilege is revoked or suspended] while his or her operating privilege is suspended or revoked for ... violating s. 346.63(1) [operating a motor vehicle while intoxicated] ... is subject to the following penalties:

....

(e) For a 5th or subsequent conviction under this section or a local ordinance in conformity with this section within a 5-year period, the person shall be fined not less than \$2,000 nor more than \$2,500 and shall be imprisoned for not less than 6 months nor more than one year in the county jail.

Cornelius argues that his license was suspended at the time of this offense under § 343.30(1q)(d), STATS. (failing to comply with a driver safety plan), and not under § 346.63(1), STATS. (operating while intoxicated). For support, Cornelius relies on the fact that his license was reinstated after his earlier suspension for OWI. Because § 343.44(2g), STATS., does not specifically apply to those convicted of operating while their license has been suspended under § 343.30(1q)(d), Cornelius argues that the trial court erroneously applied the penalty enhancement provision.

Cornelius's arguments raise a question of statutory interpretation, which this court decides de novo. *Doyen*, 185 Wis.2d at 640, 518 N.W.2d at 323. In interpreting a statute, this court first looks to the language of the statute itself; resort to extraneous materials is only necessary if the language is ambiguous. *Id.*

The interpretation of the statute at issue here has previously been addressed by this court. In *Doyen*, the court determined that revocation based upon a failure to comply with a driver's safety plan imposed under § 343.30(1q)(d), STATS., was sufficient to invoke the penalty enhancement

provisions of § 343.44(2g), STATS. Because this court is required to apply precedent established by court of appeals decisions, the holding in *Doyen* requires an affirmance of the trial court's conclusion that the penalty enhancement provisions apply to Cornelius.

Here, the defendants had their operating privileges suspended because they had been convicted of OWI. At sentencing for an OWI conviction, the trial court is required to order an alcohol assessment and compliance with the treatment plan. When the defendants failed to comply with the court's alcohol assessment order arising from the OWI convictions, their operating privileges continued suspended as required by statute.

Id. at 642, 518 N.W.2d at 324.

Even though it is true that Cornelius's license was reinstated after his OWI violation, that fact is not dispositive. In *Doyen*, the license of co-appellee Doris Hurning also was valid until a year after the OWI conviction when she failed to comply with the alcohol assessment order. *Id.* at 639, 518 N.W.2d at 323. The *Doyen* court did not distinguish Hurning on this basis; therefore, this court cannot distinguish Cornelius on this basis either. Cornelius's suspension therefore relates back to the time of his initial OWI conviction, and the penalty enhancement provisions of § 343.44(2g), STATS., apply.

By the Court.—Judgment and order affirmed.

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

