COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0417-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN E. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

DEININGER, J.[1] The trial court entered a judgment convicting John Taylor of a fifth or subsequent offense of operating a motor vehicle after revocation (OAR) of his operating privilege, in violation of § 343.44(1), STATS. The court sentenced Taylor under § 343.44(2)(e)1, to six months in jail, ordered

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

him to pay a fine, and denied his postconviction motion to have civil penalties imposed under § 343.44(2)(e)2, in lieu of the criminal sentence.[2] Taylor appeals the judgment of conviction and the order denying postconviction relief, arguing that the trial court erred in imposing criminal penalties for the offense. He claims the suspensions in effect at the time of his current offense were imposed solely for the failure to pay a fine or forfeiture (FPF) because he was eligible to reinstate his operating privilege with respect to all non-FPF suspensions and revocations that had been imposed prior to the offense. We disagree and affirm the judgment and order.

BACKGROUND

Taylor was charged with operating a motor vehicle on April 3, 1992, after his operating privilege had been revoked. At the time of his sentencing on July 17, 1997, the court determined that the conviction constituted a fifth or subsequent offense under § 343.44(2)(e)1, STATS. Although the parties agree on

[2] At the time of Taylor's offense on April 3, 1992, § 343.44(2)(e), STATS., 1989-90, provided as follows:

> 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 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.
>
> 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 shall forfeit not less than $2,000 nor more than $2,500. This subdivision applies regardless of the person's failure to reinstate his or her operating privilege.

These provisions were amended by 1991 Wis. Act 277, effective January 1, 1993, to eliminate the mandatory minimum jail sentence, fine and forfeiture.

the facts comprising Taylor's past driving record, they disagree on whether certain past revocations were still in effect for the purpose of determining the proper penalty for Taylor's April 1992 offense. Three suspensions were in effect on April 3, 1992, for which Taylor was not then eligible for reinstatement of his operating privilege. These were five-year suspensions imposed on June 6, 1990, June 14, 1991, and November 19, 1991, all for FPF. Taylor argues that only these suspensions are relevant to the determination of the proper penalty for the instant offense, and thus, the civil forfeiture specified under § 343.44(2)(e)2, should have been imposed in lieu of a criminal sentence.

Taylor's operating privilege had also been suspended or revoked on at least four other occasions prior to April 3, 1992: a FPF suspension on September 23, 1987; revocations resulting from OAR convictions on September 13, 1988, and March 25, 1990; and a revocation imposed on September 25, 1991, based on the accumulation of driving record demerit points. The suspension or revocation periods for these four operating privilege sanctions had all expired prior to April 3, 1992, but Taylor had not reinstated his operating privilege. Also, on December 12, 1979, the Department of Transportation (DOT) had revoked Taylor's operating privilege indefinitely due to his failure to pay a judgment for damages arising out of a motor vehicle accident. *See* § 344.25, STATS., quoted and discussed below. The trial court concluded that Taylor was "eligible for reinstatement" of his operating privilege from the damage judgment revocation, although, again, he had not done so prior to the time of his present offense. The trial court concluded, and the State argues on appeal, that because Taylor had failed to reinstate his operating privilege following these non-FPF revocations, the criminal penalties of § 343.44(2)(e)1, STATS., apply to Taylor's April 1992 offense.

ANALYSIS

The proper application of § 343.44(2)(e), STATS., to undisputed facts presents a question of law which we decide without deference to the trial court's opinion. *See* ***State v. Michaels***, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). The language of § 343.44(2)(e)2, demonstrates the legislature's intent to decriminalize the offense of operating after revocation or suspension of one's operating privilege in two situations: "(1) if the revocation [or suspension] is based solely on the failure to pay a previously imposed fine or forfeiture; and (2) subsequent revocation or suspension that was in turn based solely upon the previous failure to pay a fine or forfeiture." ***State v. Taylor***, 170 Wis.2d 524, 528, 489 N.W.2d 664, 666 (Ct. App. 1992). In ***State v. Muniz***, 181 Wis.2d 928, 512 N.W.2d 252 (Ct. App. 1994), we held that although a person may be punished for operating after revocation or suspension if he or she has failed to reinstate following the expiration of the sanction, the failure to reinstate, once eligible to do so after a non-FPF revocation or suspension has expired, does not render an OAR offense criminal. ***Id.*** at 932-33, 512 N.W.2d at 253-54. Thus, our inquiry must be whether any suspensions or revocations for other than FPF were "in effect at the time of the current violation." ***Id.*** at 933, 512 N.W.2d at 254.

We conclude that, under our holding in ***Muniz***, Taylor's revocations for OAR and demerit points, all of which had expired prior to April 3, 1992, do not render his present offense criminal, notwithstanding Taylor's failure to reinstate his operating privilege. We also conclude, however, contrary to the trial court's determination, that Taylor was not eligible to reinstate his operating privilege from the indefinite 1979 damage judgment revocation. That determination is a legal conclusion, not a finding of fact, and thus our review is de

novo. *See* ***State v. Rodriguez***, 205 Wis.2d 620, 626, 556 N.W.2d 140, 142 (Ct. App. 1996).

Under § 343.38(1), STATS., a person is not eligible to reinstate his or her operating privilege following a revocation until after "the period of revocation has expired." The 1979 revocation was imposed under § 344.25, STATS., which requires the DOT "[u]pon the receipt … of a certified copy of a judgment for damages … arising out of a motor vehicle accident" to "forthwith revoke the operating privilege … of the person against whom such judgment was rendered …." Except where a judgment creditor consents otherwise or installment payments are approved and ordered by the court, the judgment debtor's operating privilege "remain[s] revoked until every judgment in s. 344.25 is stayed, satisfied or discharged" and, "unless 3 years have elapsed since the date of entry of the judgment," certain requirements for "proof of financial responsibility for the future" are met. Section 344.26(1), STATS.

Since more than three years had elapsed since the 1979 revocation, the proof of financial responsibility requirement would no longer have been an impediment to Taylor's reinstatement from the damage judgment revocation. The same is not true, however, with respect to the statutory requirement that, in order to reinstate, Taylor was required to obtain a stay, satisfaction or discharge of the damage judgment. There is no indication in Taylor's DOT driving record, which was relied on by the trial court and the parties and is a part of the record on appeal, that Taylor had met this primary requirement for reinstatement eligibility. Taylor also made no independent showing in the trial court that the damage judgment had

been "stayed, satisfied or discharged."[3] The trial court concluded that Taylor was "probably always eligible to reinstate" because he could have paid the judgment off at any time.[4] The fact remains, however, that on this record, we may only conclude the damage judgment against Taylor had not been stayed, satisfied, or discharged prior to April 3, 1992. Thus, "the period of revocation" for his 1979

[3] Taylor argues in this appeal that we must accept the trial court's "finding" that he was eligible for reinstatement on the revocation, an argument we reject. He does not claim that he met the requirements for reinstatement eligibility under § 344.26, STATS., or that the damage judgment was for some reason no longer effective in April 1992. We do not, therefore, address these potential arguments, except to note that while some methods for enforcing civil judgments may expire sooner, civil judgments appear to have legal effect and be enforceable for at least twenty years. *See* § 815.04(1)(c), STATS.

[4] In response to Taylor's request that the court "make a specific finding as to whether the court feels he was or was not eligible for reinstatement" on the 1979 damage judgment revocation, the court stated:

> Well, some revocations and suspensions are for a particular length of time. And once the time is past, they're eligible to get reinstated. On this December of '79 revocation, frankly, I think he's probably always eligible to reinstate. How would you reinstate? You pay off the judgment. So to that extent, I think he probably was eligible to reinstate.

The court also determined, as do we, that Taylor was eligible to reinstate on the other non-FPF suspensions and revocations he had accrued prior to April 1992. But the trial court concluded that his failure to reinstate following any of these non-FPF revocations made him subject to criminal penalties under § 343.44(2)(e)1, STATS. In reaching this conclusion, the trial court relied on certain language from our opinion in ***State v. Biljan***, 177 Wis.2d 14, 21-22, 501 N.W.2d 820, 823-24 (Ct. App. 1993), from which such a result might be inferred. As we have discussed above, however, we clarified in ***State v. Muniz***, 181 Wis.2d 928, 512 N.W.2d 252 (Ct. App. 1994), that a failure to reinstate one's operating privilege, if otherwise eligible to do so, does not render an OAR offense criminal.

This court is not unmindful of, and has commented in past decisions regarding, the "confusion among prosecutors, defense attorneys and trial courts over the proper application of these statutes to specific driver histories … [which] our opinions have not assisted in dispelling." ***State v. Smith,*** No. 96-2085-CR, unpublished slip op. (Wis. Ct. App. Mar. 6, 1997); *see also* ***State v. Lindsey***, No. 97-2992-CR, unpublished slip op. (Wis. Ct. App. May 21, 1998) (noting that the legislature has responded in 1997 Wis. Act 84 to pleas for clarification of § 343.44(2), STATS.).

revocation had not "expired," thereby precluding his eligibility for reinstatement under § 343.38(1), STATS.

CONCLUSION

We thus conclude that Taylor's failure to pay past fines or forfeitures was not the sole reason his operating privilege was suspended or revoked on April 3, 1992. Also effective at the time was a revocation imposed in 1979 for his failure to pay a motor-vehicle-related civil damages judgment. His failure to reinstate from the 1979 revocation was not simply based on a failure to take the steps required for reinstatement under § 343.38(1), STATS. Because the period of revocation had not expired, and would not expire unless or until the requirements of § 344.26, STATS., were met, Taylor was not eligible for reinstatement under § 343.38(1), STATS. We therefore affirm the judgment imposing criminal penalties under § 343.44(2)(e)1, STATS., and the order denying postconviction relief from that sentence.

By the Court.—Judgment and order affirmed.

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