COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0618-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT P. BEHM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

CANE, C.J. Robert Behm appeals a judgment of conviction and sentence finding him guilty of operating a motor vehicle while intoxicated, in violation of § 346.63(1)(a), STATS.[1] Behm contends that the trial court erred when

[1] The trial court sentenced Behm to four months in jail, an $1,800 fine, his license revoked for three years, and completion of an alcohol assessment. Further, the trial court stayed the sentence pending this appeal.

it relied on two prior "uncounseled" civil forfeiture OWI convictions to subject him to prosecution and punishment as a third-time OWI offender. This reliance, Behm contends, violates his due process and equal protection rights. This court rejects his arguments and affirms the trial court's judgment of conviction and sentence.

I. FACTS

In February 1992, Behm was convicted of OWI and received a first offense civil forfeiture. He did not retain counsel. Then, in September 1994, Behm was convicted of OWI a second time, but a plea agreement amended this second offense to a first offense; therefore, while it was his second offense, Behm received another first offense civil forfeiture. Accordingly, the prior 1994 conviction did not trigger second offense penalties under § 346.65(2)(a), STATS., because the parties agreed to characterize it as a first offense.[2] Behm claims that these first two convictions were "uncounseled," that is, he claims he did not retain counsel for either of these forfeiture convictions. In June 1997, Behm was cited for OWI a third time, resulting in his third OWI offense within the ten-year statutory period. Behm pled no-contest to the third OWI charge, but reserved his right to dispute the use of his prior convictions for recidivist purposes. The trial court counted his two prior OWI forfeiture convictions to convict and sentence Behm as a third-time offender.

[2] The record suggests that counsel represented Behm in connection with this second offense and helped him obtain the plea agreement making his "second offense" another "first offense." This fact, however, does not affect this case's outcome or this court's review.

II. ANALYSIS

Behm contends that the trial court violated his due process and equal protection rights when it predicated a third OWI conviction and sentence on two uncounseled civil forfeitures. This court presumes that a statute is constitutional. ***State v. Ruesch***, 214 Wis.2d 547, 555, 571 N.W.2d 898, 902 (Ct. App. 1997). Because of this strong presumption of constitutionality, a party challenging a statute bears the heavy burden of proving that the statute is unconstitutional beyond a reasonable doubt. *See* ***In re: Hezzie R.***, 219 Wis.2d 849, 863, 580 N.W.2d 660, 664 (1998). In this case, the issues involve the application of constitutional standards to undisputed facts, which is a question of law this court decides de novo. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).

Under § 346.65(2)(a), STATS., a conviction for OWI as a first offense results in a civil forfeiture. *See* ***State v. Foust***, 214 Wis.2d 567, 569, 570 N.W.2d 905, 906 (Ct. App. 1997). Second and subsequent OWI offenses are criminal violations and result in progressively higher fines and longer mandatory minimum jail sentences. Section 346.65(2)(b)-(e), STATS.; ***Foust***, 214 Wis.2d at 569, 570 N.W.2d at 906. A prior OWI conviction triggers "second offense" penalties if it occurs within five years of the present offense. Section 346.65(2)(b), STATS. Prior OWI offenses within a ten-year period are considered when determining whether the present offense is a third or subsequent offense. Section 346.65(2)(c)-(e), STATS. Under this statutory scheme, it is possible for a person to acquire two noncriminal "first offense" OWI convictions and then be subject to third offense criminal penalties if another OWI conviction is obtained within ten years of the first conviction. *See* ***Foust***, 214 Wis.2d at 569, 570 N.W.2d at 906. A court may not, however, rely on defective prior OWI

convictions to charge or sentence a defendant for a present offense. ***Id***. at 569-70, 570 N.W.2d at 906-07.

1. Due Process violation

Behm contends that the OWI penalty scheme, which subjects him to significant criminal sanctions for a third offense based upon two predicate civil forfeiture first offenses, bears no rational or reasonable relationship to the statute's purpose as a penalty enhancement scheme. *See* ***id.*** at 575, 570 N.W.2d at 908-09 (noting that § 346.65(2), STATS., is primarily a penalty enhancer statute). This court rejects Behm's argument.

Due process requires that the means the legislature chooses bears a reasonable and rational relationship to the purpose or objective of the enactment. *See* ***State v. Jackman***, 60 Wis.2d 700, 705, 211 N.W.2d 480, 484 (1973). The clear policy of the OWI penalty scheme is to facilitate the removal of drunk drivers from the highways, particularly repeat offenders. *See* ***State v. Banks***, 105 Wis.2d 32, 49, 313 N.W.2d 67, 75 (1981). The statute creating the ten-year window counts all offenses that occur within the ten-year period without regard to whether the offenses were criminal offenses or civil forfeitures. *See* ***State v. Baker***, 169 Wis.2d 49, 68, 485 N.W.2d 237, 244 (1992) (noting that under the OWI penalty scheme, the use of criminal sanctions is predicated on a defendant's status as an adjudicated offender, not upon the nature of the prior OWI offenses). This is a rational method to further the legislative end or goal of deterring drunk driving and punishing repeat OWI offenders. Accordingly, Behm's conviction as a third-time OWI offender based upon *two* prior offenses, albeit noncriminal offenses, is consistent with his status as a third-time offender, and his sentence

properly reflects the legislature's goal of increasing criminal sanctions for repeat drunk drivers.

More specifically, Behm also seems to argue that the use of *two* prior uncounseled convictions *expands* the holding in ***State v. Novak***, 107 Wis.2d 31, 42-43, 318 N.W.2d 364, 370 (1982). Under ***Novak***, a defendant's *first* conviction under a civil forfeiture action for OWI at which he was not represented by counsel is valid for all purposes, including providing a basis for incarcerating a defendant as a *second* offender pursuant to § 346.65, STATS. The holding in ***Novak*** is not as narrow as Behm suggests. In fact, ***Novak*** expressly provides that uncounseled civil forfeiture OWI convictions are valid for *all* purposes, including providing a basis for incarcerating a defendant. ***Id.*** Notably, ***Novak*** was decided before 1993 WIS. ACT 317, which created the ten-year "look back" period for counting OWI offenses; this "look back" period creates the possibility for a person to acquire two noncriminal OWI convictions, but then be subject to third offense criminal penalties if another OWI conviction is obtained within ten years of the first conviction. Section 346.65(2)(c)-(e), STATS.

Additionally, this court declines to adopt the dissent in ***Novak***. *See* ***Novak***, 107 Wis.2d at 43, 318 N.W.2d at 370. A dissent is not the law; rather, it is what the law is not. The dissent states that the legislature should not predicate imprisonment on a prior civil conviction unless the defendant had counsel. ***Id.*** Under ***Novak***, however, an OWI offender accused of a forfeiture is not constitutionally entitled to counsel. ***Id***. at 41, 318 N.W.2d at 369. Conduct punishable by civil forfeiture is not a crime, so the Sixth Amendment right to counsel does not apply to either of Behm's "first" offenses. *See* ***Village of Bayside v. Bruner***, 33 Wis.2d 533, 535, 148 N.W.2d 5, 7 (1967); § 939.12, STATS. The legislature has not given civil defendants a right to counsel; therefore, the fact that

Behm was not represented by counsel for his first offense and possibly the second offense does not render those convictions defective. Although ***Foust*** allows Behm to collaterally attack his prior convictions, ***id.*** at 575, 570 N.W.2d at 908-09, there is no *defect* enabling him to do so. *See* ***id***. Therefore, Behm's due process challenge fails.

2. Equal Protection violation

Similar to his due process argument, Behm contends that the use of the two prior "uncounseled" OWI forfeiture convictions as a predicate to reach a third OWI conviction violates his equal protection rights. Behm seems to argue that the penalty scheme creates disparate treatment in terms of the procedural rights available to similarly situated third-time offenders. Specifically, Behm appears to claim that as a third-time offender, his inability to collaterally attack his uncounseled prior civil forfeiture convictions is different from the third-time offender with a second offense criminal conviction who can collaterally attack his second conviction. This court does not agree.

State v. Duffy, 54 Wis.2d 61, 65-67, 194 N.W.2d 624, 626-27 (1972), provides the standard for reviewing an equal protection attack to an allegedly discriminatory sentencing provision of the traffic code. *See* ***State v. Thompson***, 134 Wis.2d 330, 332, 397 N.W.2d 121, 122 (Ct. App. 1986). Equal protection is denied only when the legislature has made irrational or arbitrary classifications. ***Id***. The test is not whether the classification results in equality, but whether *any* reasonable basis exists to justify the classification. ***Id***. (citing ***McGowan v. Maryland***, 366 U.S. 420, 426 (1961)). It is the legislature's province to designate specific penalty provisions and to determine the penalty for the evil sought to be remedied. ***Id***. at 332-33, 397 N.W.2d at 122.

Section 346.65, STATS., classifies sentences for OWI convictions based on the number of previous OWI convictions. Under the statute, first, second and third-time offenders are treated differently, but there is a rational basis for this different treatment. As the State notes, the legislature decided that those with three previous convictions over a ten-year period should receive a higher penalty than those with only two convictions. This progressively punishes those who repeatedly violate the law and thus furthers the legislative goal of deterring drunk driving. *See* ***Thompson***, 134 Wis.2d at 334-35, 397 N.W.2d at 123. Significantly, while *all three-time OWI offenders are indeed similarly situated, the statute treats them the same*; § 346.65 counts *all* prior OWI convictions (whether criminal or civil) within the previous ten years for purposes of sentencing. *See* ***Foust***, 214 Wis.2d at 569, 570 N.W.2d at 906. The fact that a defendant cannot "collaterally attack" a prior civil conviction on the basis of a Sixth Amendment right to counsel does not make the treatment, the sentencing, "different" under the statute.

Further, while Behm may not be accorded the “benefit” of collaterally attacking a second criminal conviction on the basis of a right to counsel, he certainly received the “benefit" of his plea bargain agreement as he did not serve a more serious criminal punishment and incur its associated stigma. Because he agreed to amend the criminal complaint, he should not now claim denial of equal protection because of his inability to collaterally attack the prior conviction. Behn's arguments fall far short of showing that the statute is unconstitutional beyond a reasonable doubt. There is a reasonable basis for the classification, and all third-time offenders are treated the same under the statute. Accordingly, Behm's equal protection challenge also fails.

Because Behm has failed to establish beyond a reasonable doubt that the OWI penalty statute is unconstitutional, the trial court's judgment of conviction and sentence are affirmed.

By the Court.—Judgment affirmed.

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