

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 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. 98-0964-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN L. ALICEA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
PATRICK J. TAGGART, Judge. *Affirmed.*

EICH, J.¹ Melvin Alicea appeals from a judgment convicting him of operating a motor vehicle after suspension/revocation (OAS/OAR). Because it was his seventh such conviction in the past five years, it was processed as a

¹ This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

criminal charge, with an enhanced penalty pursuant to the habitual traffic offender (HTO) laws, ch. 351, STATS.²

Alicea moved to dismiss the charge, arguing that he was not subject to criminal penalties because all his prior suspensions or revocations resulted from either his failure to pay fines or forfeitures or his HTO status. He claimed that because his license had not been suspended or revoked for any other reason, he could be subject only to civil, not criminal, penalties under § 343.44(2)(e), STATS., which provides 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 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 trial court denied Alicea's motion, concluding that because his license had also been suspended for speeding violations, the suspensions for failure to pay did not constitute the "sole" reason for the revocation, and that

² Section 351.02(1)(a)(4), STATS., defines a habitual traffic offender as one who is convicted four or more times within a five-year period of operating after suspension or revocation, regardless of the basis for the suspension or revocation. *See State v. Taylor*, 170 Wis.2d 524, 529, 489 N.W.2d 664, 666-67 (Ct. App. 1992).

criminal penalties were therefore appropriate. Alicea then pled no contest to the charge, reserving his right to appeal the denial of his motion to dismiss.

The relevant facts are as follows. Alicea was cited for OAR, seventh offense, on May 3, 1997. At that time, he was under an HTO revocation, which had been imposed on October 17, 1994, and also under numerous suspensions for failure to pay fines or forfeitures. The HTO revocation stemmed from four OAS convictions dated July 11, July 25, August 29, and September 12, 1994. The underlying suspension, imposed on April 21, 1994, was for an accumulation of demerit points, based on speeding tickets and an OAS violation (for failure to pay).³ At the time of the four 1994 OAS offenses, Alicea was also under failure-to-pay suspension, imposed on May 6, 1994.

The issue before us, then, is whether the HTO revocation—which forms the basis of the current charge—and which stems in part from a failure-to-pay suspension and in part from a demerit point suspension—was “imposed solely due to a failure to pay a fine or 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. To ask the question is to answer it. Because Alicea’s demerit point suspension was based on speeding violations in addition to an OAS violation, it was not based *solely* on Alicea’s failure to pay. Accordingly, we agree with the trial court that the criminal penalty provision is appropriate.

³ Under § 343.32, STATS., various traffic violations carry “points” based on the seriousness of the condition, and accumulation of more than twelve points in any twelve-month period results in license suspension. At the time the point-suspension was issued, Alicea had accumulated twelve points in the preceding twelve-month period. He was eligible for reinstatement due to that point suspension on April 21, 1995, but apparently, never reinstated.

Arguing otherwise, Alicea places principal reliance on our decision in *State v. Muniz*, 181 Wis.2d 928, 512 N.W.2d 252 (Ct. App. 1994). Muniz was convicted of OAR, first offense, in 1989. In 1991, while he was under a two-month demerit point suspension, his operating privileges were again suspended for five years for failure to pay a fine. He did not reinstate his license after expiration of the demerit point suspension, and later that year, he was convicted of criminal OAR (second offense). We reversed his conviction, holding that while he could properly be punished for operating after revocation or suspension if he had failed to reinstate following expiration of the sanction, his failure to reinstate after expiration of the non-failure-to-pay revocation or suspension did not render the subsequent OAR offense criminal. *Id.* at 932-33, 512 N.W.2d at 253-54. Alicea thus argues that our inquiry in this case must be whether any non-failure-to-pay suspensions or revocations were “*in effect* at the time of the current violation.” *Id.* at 933, 512 N.W.2d at 254 (emphasis added). He claims that because his suspension for excess demerit points expired in 1995, there were no non-failure-to-pay suspensions or revocations in effect at the time of the current violation, and the fact that he never reinstated cannot, under *Muniz*, render his current OAR criminal.

We are not persuaded. While it is true that Alicea’s excess demerit point suspension, in and of itself, was no longer in effect at the time of his current violation, his HTO revocation was—and that revocation stemmed from four OAS convictions, which were based in part on the demerit point suspension (while it was in effect). Stated another way, although his demerit point suspension had expired, it “lived on” through the subsequent suspensions that resulted from it.

We explained in *State v. Biljan*, 177 Wis.2d 14, 501 N.W.2d 820 (Ct. App. 1993), that

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 19-20, 501 N.W.2d at 823 (emphasis added). Here, the revocation in effect at the time the instant charge was filed was imposed due to OAS convictions resulting, in part at least, from a demerit point suspension. And that suspension was not based solely on his failure to pay; rather, it was based on his speeding violations “in conjunction with” the failure to pay. In other words, the revocation in effect at the time of Alicea's current OAR violation was not based *solely* on his failure to pay fines or forfeitures or subsequent OAS/OAR convictions. It follows that the trial court properly imposed criminal penalties under § 343.44(2)(e)1, STATS.

By the Court.—Judgment affirmed.

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

