

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 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. 98-0993-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD E. ZILTENER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
MICHAEL J. BYRON, Judge. *Affirmed.*

ROGGENSACK, J.¹ Richard E. Ziltener appeals the judgment of conviction and the penalty imposed for operating a motor vehicle while under the influence of an intoxicant (OMVWI) in violation of § 346.63(1)(a), STATS. This was Ziltener's third conviction. Ziltener contends that the penalty of

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

§ 346.65(2)(c), STATS., applies only if a defendant has been convicted of a second offense at the time he commits the third offense because a second conviction is an element the State must prove. We conclude Ziltener is incorrect because a prior conviction is not an element of a conviction for OMVWI. Additionally, all prior convictions are added together to determine the appropriate penalty under § 346.65(2) regardless of the sequence of the offenses. Because Ziltener had a total of three convictions at the time the penalty was applied, we affirm the conviction and penalty imposed by circuit court.

BACKGROUND

On November 16, 1996, Ziltener was arrested for OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration (PAC) in violation of §§ 346.63(1)(a) and (b), STATS. (Case. No. 96-CT-642). On September 8, 1997, Ziltener was again arrested for the same violations (Case No. 97-CT-499B). According to an intoxilyzer test administered during the September 8th arrest, Ziltener's blood alcohol concentration was 0.15 %.

On December 4, 1997, Ziltener pled no contest and was convicted of both OMVWI charges. As of that date, Ziltener had one previous OMVWI conviction, in 1993. When sentencing Ziltener on the conviction from which he appeals, the court applied § 346.65(2)(c), STATS., which outlines penalties for violating § 346.63(1), STATS., and it calculated the penalties for each of the two new convictions, taking into consideration the total number of OMVWI convictions, which as of that date were three. The court sentenced Ziltener in case numbers 96-CT-642 and 97-CT-499B as a second and third conviction, respectively. This appeal followed.

DISCUSSION

Standard of Review.

This case presents a question of statutory interpretation, which we review *de novo*. *Patients Comp. Fund v. Lutheran Hosp.*, 216 Wis.2d 49, 52-53, 573 N.W.2d 572, 574 (Ct. App. 1997).

OMVWI.

Ziltener contends that in Case No. 97-CT-499B he should have been sentenced as though his total number of OMVWI convictions on December 4, 1997, were two because at the time the offense was committed, he had been convicted of OMVWI once. We disagree.

Section 346.63(1), STATS., sets out the criteria under which a driver may be charged with OMVWI. Ziltener was convicted of violating subsection (a) which states:

No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant ... to a degree which renders him or her incapable of safely driving.

Section 346.65(2), STATS., provides civil penalties for the first OMVWI offense and criminal penalties for all subsequent violations of § 346.63(1), STATS. Subsection (c) establishes the relevant penalties. It provides as follows:

Any person violating s. 346.63(1):

....

(c) Except as provided in par. (f), shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not

less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 3 in a 10-year period.

Section 343.307(1)(a), STATS., requires all convictions of violating § 346.63(1), STATS., to be counted when determining the penalties under § 346.65(2), STATS.

1. Elements of OMVWI.

Ziltener contends that before the § 346.65(2)(c), STATS., penalty may be applied, he must have been *convicted* of an OMVWI second offense at the time he *committed* the third offense because the second offense is an element of the third offense. Ziltener cites *State v. Ludeking*, 195 Wis.2d 132, 536 N.W.2d 392 (Ct. App. 1995), and *State v. Alexander*, 214 Wis.2d 627, 571 N.W.2d 662 (1997), in support of his argument.

Both *Ludeking* and *Alexander* confirm that prior § 343.307(1), STATS., convictions may provide proof for the status element of the crime of driving with a PAC, as a third or subsequent offense. However, both *Alexander* and *Ludeking* address this issue as it pertains to operating a motor vehicle with a prohibited alcohol concentration of 0.08% or higher. *Ludeking*, 195 Wis.2d at 136, 536 N.W.2d at 394; *Alexander*, 214 Wis.2d at 639, 571 N.W.2d at 667.

The crime of PAC-0.08% has three elements: (1) the defendant drove or operated a motor vehicle on a highway, (2) the defendant had a prohibited alcohol concentration at the time he or she drove or operated the motor vehicle, and (3) at the time the defendant drove or operated the motor vehicle, he or she had two or more convictions, suspensions or revocations as counted under § 343.307(1), STATS. *Ludeking*, 195 Wis.2d at 136, 536 N.W.2d at 394;

Alexander, 214 Wis.2d at 639, 571 N.W.2d at 667. The prior convictions component is important because if a defendant has two or more prior convictions, the prohibited alcohol concentration is 0.08%; however, if the defendant has one or no prior convictions, the prohibited alcohol concentration is 0.10%. *Alexander*, 214 Wis.2d at 639-40, 571 N.W.2d at 667. *Ludeking* and *Alexander* are not applicable here because Ziltener was convicted of OMVWI, not PAC-0.08%.

Furthermore, in the case at hand, the issue is the penalty, not the substantive offense. The graduated penalty structure in § 346.65(2), STATS., is a penalty enhancer similar to a repeater statute which does not alter the nature of the prohibited conduct. *State v. McAllister*, 107 Wis.2d 532, 535, 319 N.W.2d 865, 867 (1982). Therefore, under § 346.65(2), proof of two prior convictions is not an element of the crime of OMVWI. *See id.* at 538, 319 N.W.2d at 868. Therefore, Ziltener's second offense OMVWI is not an element of his third offense OMVWI, rather his convictions are counted solely for the purpose of punishment under § 346.65(2).

2. *Penalties under § 346.65(2), STATS.*

The penalty provisions in § 346.65(2), STATS., apply regardless of the sequence of the offenses. *State v. Banks*, 105 Wis.2d 32, 48, 313 N.W.2d 67, 74 (1981). In *Banks*, the supreme court held that where a defendant committed a first offense of OMVWI twice in a three-month period, and was subsequently convicted in each case, second offense OMVWI penalties should be applied in the second conviction even though there was no OMVWI conviction in existence at the time of the second offense. *Id.* at 47-50, 313 N.W.2d at 72-76. In other words, the key factor in determining what penalties apply to an OMVWI

conviction is not the number of OMVWI convictions at the time of the offense, but the number of OMVWI convictions at the time of sentencing.

Ziltener was charged with second offense OMVWI twice in a year, and was subsequently convicted in each case. In determining what penalties apply under § 346.65(2), STATS., the circuit court correctly counted the number of convictions at the time of sentencing. Thus, because Ziltener had three OMVWI convictions at the time of sentencing, third offense OMVWI penalties were applied to the third conviction (Case No. 97-CT-499B).

CONCLUSION

Ziltener's prior convictions are not an element of his third offense of OMVWI because § 346.63(1)(a), STATS., does not have a prior convictions element. Furthermore, the penalty structure under § 346.65(2), STATS., does not alter the nature of the substantive offense and applies regardless of the sequence of the offenses. Therefore, the circuit court properly applied third conviction OMVWI penalties to the conviction from which this appeal arises.

By the Court.—Judgment affirmed.

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

