COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2303-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KATHLEEN A. KROGMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed and cause remanded with directions.*

NETTESHEIM, J. Kathleen A. Krogman appeals from a criminal judgment of conviction for operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC) in violation of § 346.63(1)(a) and (b), STATS. Krogman was convicted as a repeat offender.

On appeal, Krogman argues that: (1) the amended complaint failed to confer subject matter jurisdiction because it did not sufficiently recite her prior convictions; (2) she is not a repeat offender because her most recent prior conviction occurred more than five years from the date of the violation of the instant offense; and (3) evidence of a blood test was admitted without proper foundation testimony. We reject Krogman's arguments and affirm the judgment of conviction. However, we remand for correction of the judgment to recite but one conviction.[1]

We will recite the relevant facts as we address each issue.

DISCUSSION

1. The Dates of the Prior Allegations

In this portion of our opinion, we address rulings made by Judge John R. Race. The State filed a criminal complaint against Krogman alleging an OWI violation. The complaint alleged that Krogman was a repeat offender based on three prior convictions, which were documented in a teletype of Krogman's driving record attached to the complaint.

Later, the State filed an amended complaint adding the PAC charge. In all other respects, the amended complaint mirrored the original complaint *except* it failed to attach the teletype of Krogman's driving record. Therefore, the amended complaint did not recite the dates of Krogman's prior convictions.

[1] As we have noted, the judgment recites that Krogman is convicted of both OWI and PAC, although the sentence imposed was for one offense. While § 346.63(1)(c), STATS., permits the charging of both OWI and PAC, it allows but a single conviction. We remand for the court to enter an amended judgment reciting but one conviction for either OWI or PAC.

Krogman responded with a motion to dismiss the amended complaint. She contended that the amended complaint "fail[ed] to set forth essential facts from which it could be inferred the defendant committed a crime and fail[ed] to state the essential facts constituting the offense charged." More specifically, Krogman contended that the amended complaint failed to allege "with sufficient specificity the existence of prior *convictions*." Krogman contended that this omission deprived the circuit court of both subject matter and personal jurisdiction.

At the hearing on the motion, Krogman on the one hand, and the State and Judge Race on the other, were operating on different wave lengths. Although Krogman's motion challenged the amended complaint, at the motion hearing she referred only to the "complaint." As a result, the State and Judge Race noted that the teletype attached to the original complaint recited Krogman's prior conviction dates. Krogman's counsel replied that he would "take a look at that, and I won't dispute what the court's saying." Apparently counsel never followed up on this remark. As a result, Judge Race never substantively ruled on the question.

In light of this record, we ordinarily would hold Krogman to waiver of this issue. Nonetheless, we address the issue because, assuming the omission of the dates of Krogman's prior convictions travels to subject matter jurisdiction, such jurisdiction can never be waived. *See* ***State ex rel. Skinkis v. Treffert***, 90 Wis.2d 528, 534, 280 N.W.2d 316, 319 (Ct. App. 1979). We thus address the issue on the merits.

The amended complaint, like the original complaint, alleged that if Krogman was convicted, "this would be a fourth offense … for which the

penalties shall be a fine of not less than $600.00 nor more than $2,000.00 and imprisonment of not less than sixty (60) days nor more than one (1) year in the county jail." In a later portion of the amended complaint entitled "Proof of Prior Offenses," the complaint alleged:

> Complainant has reviewed a teletype report of defendant's driving record … which teletypes he or she has referred to in the past and found to be accurate and reliable. According to said teletype … the defendant has been previously convicted 3 times for VIOLATIONS of the type charged herein and considered prior offenses under 346.65(2)(c) and (d) and 343.307, Wisconsin Statutes, the VIOLATION dates being: 02-28-88, 03-16-90, 12-31-90.

The issue is whether the allegation of Krogman's prior violation dates, coupled with the allegation that all the violations resulted in convictions, is sufficient when the conviction dates are not specifically alleged. Criminal complaints are evaluated from a commonsense, nonhypertechnical reading. *See* ***State v. Blalock***, 150 Wis.2d 688, 694, 442 N.W.2d 514, 516 (Ct. App. 1989). A court may draw reasonable inferences from the allegations of a criminal complaint. *See* ***State v. Chinavare***, 185 Wis.2d 528, 534, 518 N.W.2d 772, 774 (Ct. App. 1994). Section 346.65(2c), STATS., 1995-96, provides that "the 5-year or 10-year period shall be measured from the dates of the refusals or violations that resulted in the revocation or convictions."[2] It is self-evident that a conviction cannot precede a violation. Here, all of the violation dates which resulted in convictions fall within a ten-year period measured from the violation date in this case. Read from a commonsense standpoint and drawing reasonable inferences therefrom, we hold that the repeater allegations in this case sufficiently alleged

[2] We note that § 346.65, STATS., was amended by 1997 Wis. Act 237, §§ 527 yg-yx, effective June 9, 1998. All references are to the 1995-96 statute.

Krogman's repeater status. As such, the circuit court had both subject matter jurisdiction over the action and personal jurisdiction over Krogman.

2. Effect of No Conviction Within the Past Five Years

Krogman next contends that the amended complaint fails to state a criminal offense because it recites no conviction within the five-year period preceding the instant violation.

Section 346.65, STATS., sets out the penalty scheme for repeat OWI and PAC offenders. The statute provides that any person who violates § 346.63(1), STATS., is subject to an increasing range of penalties depending upon the number of prior convictions within a five-year or ten-year period.[3] Krogman argues that since her last prior conviction is more than five years from the violation date of the instant offense, the slate is wiped clean and this matter should have been prosecuted as a first offense, forfeiture action. She contends that the statute is at least ambiguous on this question and that the rule of lenity requires that we construe the statute in her favor.

We disagree. We hold that the statute is clear and unambiguous. Section 346.65(2)(a), STATS., says that any person violating § 346.63(1), STATS.,

[3] If the accused is a first time offender, the penalty is a forfeiture of not less than $150 nor more than $300. *See* § 346.65(2)(a), STATS., 1995-96. If the present conviction is the second within a five-year period, the penalties include a fine of not less than $300 nor more than $1000 and imprisonment for not less than five days nor more than six months. *See* ***id***. at para. (b). If the present conviction is the third within a ten-year period, the penalties include a fine of not less than $600 nor more than $2000 and imprisonment for not less than thirty days nor more than one year. *See* ***id***. at para. (c). If the present conviction is the fourth within a ten-year period, the penalties include a fine of not less than $600 nor more than $2000 and a term of imprisonment for not less than sixty days nor more than one year. *See* ***id***. at para. (d). If the present conviction is the fifth within a ten-year period, the penalties include a fine of not less than $600 nor more than $2000 and a term of imprisonment for not less than six months nor more than one year. *See* ***id***. at para. (e).

"shall forfeit not less than $150 nor more than $300, *except as provided in pars. (b) to (f).*" (Emphasis added.) Thus, in order for the accused to qualify as a first time offender under the forfeiture provisions of para. (a), the accused must first be disqualified from the other subsections of the statutes which authorize a criminal prosecution. As noted, these subsections prescribe an increasing range of penalties depending upon the number of prior convictions within either a five-year or ten-year period. We see nothing ambiguous about this process or the statutory language which creates it. The process is simple: the number of convictions against the accused, measured from the dates of violation, are tabulated and then measured against time periods set out in the statute. That process determines the range of the possible penalties and further determines whether the action is criminal or civil.

We therefore reject Krogman's contention that the "threshold" for a repeater prosecution based on the ten-year provision in § 346.65(2)(d), STATS., is satisfaction of the five-year provision set out in para. (b). This interpretation, while creative, flies in the face of the introductory language of para. (a) which says that any person violating § 346.63(1), STATS., shall be subject to a forfeiture "*except*" as provided in the remaining paragraphs. This language does not say that ten-year prosecutions under paras. (c), (d) or (e) are barred unless the five-year scenario under para. (b) is first satisfied. Instead, the statute clearly and unambiguously says that a prosecution under the appropriate paragraph is permitted if the predicate number of prior convictions, measured from the dates of violation, occurred within the stated time period.

3. Blood Test Evidence

In this portion of our opinion, we address a ruling of Judge James L. Carlson, who presided at the bench trial in this case. In a prior appeal, this court

upheld a ruling by Judge Race that Krogman had improperly refused to submit to a chemical test. *See* ***State v. Krogman***, No. 97-3400, unpublished slip op. at 1 (Wis. Ct. App. Mar. 18, 1998). Despite her refusal, the police forcibly obtained a blood sample from Krogman. This sample was analyzed by Kim Ricksecker, a chemist with the State Lab of Hygiene. Over Krogman's objection, Ricksecker testified as to the result of the gas chromatography analysis of the blood sample.

On appeal, Krogman renews her argument that the trial court improperly admitted Ricksecker's testimony concerning the blood test result. Krogman first contends that Judge Carlson erroneously admitted the evidence under the automatic admissibility provisions of the implied consent law, § 343.305(5)(d), STATS. This section states, in relevant part, "the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant … or any issue relating to the person's alcohol concentration."

We reject this argument. When Krogman registered this objection, Judge Carlson pointedly responded that he was not admitting the evidence under the implied consent law. The judge said, "I'm not accepting [the evidence] on that basis. I'm accepting it on her expert testimony as this is a legitimate means for testing blood alcohol, and that's her expert opinion it's a reliable method. *I agree it's not an implied consent case.*" (Emphasis added.) Thus, Judge Carlson correctly addressed the evidentiary question independent of the implied consent law. This was in keeping with ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), which expressly recognizes that chemical test evidence obtained independent of the procedures of the implied consent law is admissible if obtained by constitutional means. *See* ***id***. at 41, 403 N.W.2d at 428.

We thus turn to Krogman's alternative argument that Judge Carlson nonetheless erred by admitting the evidence because the State failed to establish that the gas chromatography procedure used by Ricksecker and the State Lab of Hygiene was reliable and accepted by the scientific community. Unfortunately, neither Krogman nor the State cites to any law in support of their respective arguments on this particular issue. We will.

In ***Watson v. State***, 64 Wis.2d 264, 219 N.W.2d 398 (1974), our supreme court expressly rejected the "***Frye***"[4] test which conditions the admission of scientific evidence upon a showing that the underlying scientific principle has gained general acceptance in the particular field to which it belongs. Instead, the supreme court adhered to the relevancy test. *See* ***Watson,*** 64 Wis.2d at 273-74, 219 N.W.2d at 403-04. After ***Watson***, the United States Supreme Court decided ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993). There, the Court held that the Federal Rules of Evidence superseded the ***Frye*** test. *See* ***Daubert,*** 509 U.S. at 589. However, the Court still adhered to the rule that the reliability of the particular scientific evidence was a prerequisite to admissibility. *See* ***id***. But, as with ***Frye***, Wisconsin has not adopted the ***Daubert*** test. In ***State v. Peters***, 192 Wis.2d 674, 687-88, 534 N.W.2d 867, 872 (Ct. App. 1995), the court of appeals said:

> [T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is relevant, § 904.01, STATS.; (2) the witness is qualified as an expert, § 907.02, STATS.; and (3) the evidence will assist the trier of fact in determining an issue of fact, § 907.02.

[4] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

Krogman raises no claim that the evidence was not relevant, that Ricksecker was not a qualified expert, or that the evidence would not assist the trial court as the trier of fact. Judge Carlson properly admitted the evidence.

CONCLUSION

We hold that the amended complaint sufficiently alleged Krogman's prior convictions. We also hold that the State was not precluded from prosecuting Krogman criminally because she did not have a violation or conviction within the prior five years. Finally, we uphold the admission of Ricksecker's expert testimony. We affirm the judgment of conviction for either OWI or PAC and we remand for entry of an amended judgment reciting either conviction, but not both.

By the Court.—Judgment affirmed and cause remanded with directions.

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