COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 1999

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.

Nos. 98-2592-CR
98-2593-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

98-2592-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS W. PFEIFER,

DEFENDANT-APPELLANT.

98-2593-CR
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. SCHEIBER,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. In this consolidated appeal, Thomas Pfeifer and John Scheiber appeal their judgments of conviction for the felony of operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC),[1] both as a third offense and both with a minor passenger under the age of sixteen in the vehicle, contrary to §§ 346.63(1) and 346.65(2)(c) and (f), STATS.[2] The appellants argue that these statutes, when

[1] Scheiber was found guilty of OWI and PAC, but Pfeifer was found guilty only of the PAC count.

[2] All references to the Wisconsin Statutes are to the 1997-98 volume, unless otherwise indicated. Section 346.63(1), STATS., provides:

> (1) No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
>
> (b) The person has a prohibited alcohol concentration.
>
> (c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

Section 346.65(2), STATS., provides, in pertinent part:

(continued)

applied together, either create an unconstitutional mandatory presumption or violate the equal protection clause; and that the implied consent law is unconstitutional because it understates the consequences of consenting to a test for persons subject to a felony prosecution. In addition, Pfeifer argues that the officer did not have the requisite reasonable suspicion to expand the scope of the traffic stop. We conclude the statutory scheme does not create a mandatory presumption or violate the appellants' right to equal protection; the implied consent statute is not unconstitutional; and there was reasonable suspicion to expand the scope of the investigatory stop of Pfeifer. We therefore affirm.[3]

> (2) Any person violating s. 346.63 (1):
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> ….
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> (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, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
>
> ….
>
> (f) If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction under s. 346.63 (1), the applicable minimum and maximum forfeitures, fines or imprisonment under par. (a), (b), (c), (d) or (e) for the conviction are doubled. An offense under s. 346.63 (1) that subjects a person to a penalty under par. (c), (d) or (e) when there is a minor passenger under 16 years of age in the motor vehicle is a felony and the place of imprisonment shall be determined under s. 973.02.

[3] The appellants also argue that if we decide the implied consent law is unconstitutional, then the results of the blood tests are not admissible under an alternative theory. In light of our decision, we need not consider this argument.

BACKGROUND

The vehicle Scheiber was driving was stopped for speeding by Officer Michael J. Hogan of the City of Watertown Police Department. One of the passengers was under the age of sixteen. Based on Officer Hogan's observations during the stop, he noted in his report that Scheiber emitted an odor of intoxicants, slurred his speech, admitted he had consumed alcohol before driving, and displayed impairment when he performed field sobriety tests.

Officer Hogan arrested Scheiber for OWI and read the "Informing the Accused" form to Scheiber to advise him of his rights and obligations under the implied consent law, as required by § 343.305(4), STATS. The pertinent paragraphs of the form provide:

> 4. If you take one or more chemical tests and the result of any test indicates you have a prohibited alcohol concentration, your operating privilege will be administratively suspended in addition to other penalties which may be imposed.
> 5. **If** you have a prohibited alcohol concentration **or** you refuse to submit to chemical testing **and** you have two or more prior suspensions, revocations or convictions within a 10 year period and after January 1, 1988, which would be counted under s.343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

Scheiber agreed to submit to a chemical test of his blood, and the results showed he had an alcohol concentration of .234. Scheiber's motion to dismiss was denied and he was found guilty of the offenses of OWI and driving with a PAC, both with a passenger under the age of sixteen. The conviction was Scheiber's third offense under § 343.307(1), STATS.

The vehicle Pfeifer was driving was stopped by Officer Scott A. Durkee of the City of Jefferson Police Department at 2:13 a.m. for having a red license plate lamp, instead of a white one as required by § 347.13(3), STATS. A passenger in the vehicle was under the age of sixteen years. Officer Durkee testified at the motion hearing that he noticed a strong odor of intoxicants coming from inside the vehicle and asked Pfeifer if he had been drinking: Pfeifer admitted that he had. Officer Durkee then had Pfeifer perform field sobriety tests and, the officer testified, Pfeifer's performance on those tests indicated that his "ability to safely operate a motor vehicle was impaired."

Officer Durkee arrested Pfeifer and took him to the police station where he read him the Informing the Accused form, including paragraphs 4 and 5 quoted above. Pfeifer agreed to submit to a blood test. The results of that test showed that he had an alcohol concentration of .185. Pfeifer's motions to dismiss and to suppress evidence were denied, and he was found guilty of operating with a prohibited alcohol content (PAC) with a passenger under the age of sixteen after a stipulated trial. The conviction was Pfeifer's third under § 343.307(1), STATS.

DISCUSSION

The appellants argue that the felony PAC charges for third-time offenders with passengers under sixteen years of age, in violation of §§ 346.63(1)(b) and 346.65(c) and (f), STATS., create an irrebuttable mandatory presumption of endangerment to the minor passenger. An irrebuttable mandatory presumption is one that shifts the burden of persuasion for an element of the crime onto the offender, and it violates procedural due process. ***City of Milwaukee v. Hampton***, 204 Wis.2d 49, 56, 553 N.W.2d 855, 858 (Ct. App. 1996). Whether the statutes create such a presumption requires us to interpret the statute; this presents

a question of law, which we decide de novo. *See* ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989).

The purpose of statutory interpretation is to discern the legislative intent. ***Lincoln Sav. Bank, S.A. v. DOR***, 215 Wis.2d 430, 441, 573 N.W.2d 522, 527 (1998). We first consider the language of the statute. ***Id.*** Where the language of a statute is unambiguous, we do not look beyond the statute's language to determine legislative intent. ***Cynthia E. v. La Crosse County Human Servs. Dep't***, 172 Wis.2d 218, 225, 493 N.W.2d 56, 59 (1992). A statute is ambiguous if reasonably well-informed persons may differ as to its meaning. ***TDS Realestate Inv. Corp. v. City of Madison***, 151 Wis.2d 530, 537, 445 N.W.2d 53, 56 (Ct. App. 1989). Whether a statute is ambiguous is a question of law. ***Petrowsky v. Krause***, 223 Wis.2d 32, 35, 588 N.W.2d 318, 320 (Ct. App. 1998).

We conclude §§ 346.63(1)(b) and 356.65(c) and (f), STATS., when applied in concert as they were in these cases, are not ambiguous. The plain language of the statutes clearly define the elements of the felony to be: (1) "driv[ing] or operat[ing] a motor vehicle [with] … a prohibited alcohol concentration" of .08 or higher;[4] (2) with "the total number of suspensions, revocations and convictions counted under s. 343.307(1) equal[ing] 3"; and (3) with "a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction." We have previously rejected the attempt to read into § 346.63(1)(a) a requirement that intent to drive or operate be proved, concluding that proof the defendant operated the vehicle was sufficient. ***County of Milwaukee v. Proegler***, 95 Wis.2d 614, 628-29, 291 N.W.2d 608, 614

[4] *See* § 340.01(46m)(b), STATS.

(Ct. App. 1980). Similarly, we reject here the effort to add elements to those plainly stated in the statute. We conclude that the three elements listed are the only ones the State must prove: it need not establish, as the appellants contend, that the driver endangered the safety of the minor passenger. Since endangering the safety of a child is plainly not an element of the felony, it logically follows that the statutory scheme does not shift the burden of persuasion of an element of the crime to the offender.

In the alternative, the appellants argue that if the statutory scheme does not create a presumption of endangering the minor passenger, it raises equal protection problems by creating several subclasses of drivers who are treated differently than others with identical driving records, based solely on the mere presence of a minor passenger. The constitutionality of a statute is a question of law, which we review de novo. ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). Statutes are presumed constitutional and will be upheld unless the party challenging the statute shows that the statute is unconstitutional beyond a reasonable doubt. ***Id.*** In cases such as this, which do not involve a suspect class, we apply the rational basis test to evaluate equal protection claims: if there is any rational basis to support the classification, the statute is valid. ***Proegler***, 95 Wis.2d at 630-31, 291 N.W.2d at 615. We conclude that the need to protect children who do not drive themselves, and often do not have a choice of whether or not they are a passenger in a vehicle, provides a rational basis for the additional penalty under § 346.65(2)(f), STATS.

The appellants do not disagree with this conclusion or contend that the need to protect children is not a rational basis. Rather, they argue that, if we decide endangering the safety of a minor passenger is not an element of the crime, we may not consider the safety of a minor in analyzing the equal protection claim.

This is not correct. In discerning the elements of a crime by interpreting a statute, we do not look beyond the language of the statute unless that language is ambiguous. ***Cynthia E.***, 172 Wis.2d at 225, 493 N.W.2d at 59. In contrast, in determining whether a statute is unconstitutional on equal protection grounds, we must look for any rational basis to support the constitutionality of the statute and are not confined to the language of the statute. *See* ***Proegler***, 95 Wis.2d at 630-31, 291 N.W.2d 608 at 615.

The appellants next argue that, in cases where the driver is subject to a felony prosecution, the implied consent law, § 343.305(4), STATS., 1995-96,[5]

[5] The implied consent statute in effect at the time the appellants submitted to the tests, § 343.305(4), STATS., 1995-96, stated:

> INFORMATION. At the time a chemical test specimen is requested under sub. (3) (a) or (am), the person shall be orally informed by the law enforcement officer that:
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> (a) He or she is deemed to have consented to tests under sub.(2);
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> (b) If testing is refused, a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior suspensions, revocations or convictions within a 10-year period that would be counted under s. 343.307 (1) and the person's operating privilege will be revoked under this section;
>
> (c) If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration and was driving or operating a motor vehicle, *the person will be subject to penalties*, the person's operating privilege will be suspended under this section and a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior convictions, suspensions or revocations within a 10-year period that would be counted under s. 343.307(1); and
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> (d) After submitting to testing, the person tested has the right to have an additional test made by a person of his her own choosing.

(continued)

does not adequately protect the driver's right to due process under the United States and Wisconsin Constitutions. They acknowledge that the warning given them—that "other penalties may be imposed" if the tests indicate a PAC—satisfies the requirements of § 343.305(4). *See* ***State v. Lucarelli***, 157 Wis.2d 724, 729, 468 N.W.2d 441, 443 (Ct. App. 1990) ("the warning given to [the defendant] that he could be 'subject to penalties' if he submitted to a chemical test satisfied the mandate of sec. 343.305(4)(c), Stats."). However, they contend that when an officer states that the driver may be subject to "other penalties" and enumerates some potential consequences, but does not indicate that those other penalties include a felony prosecution, the officer is actively misleading the suspect. Such "active misleading," they contend, violates their due process rights under ***Raley v. Ohio***, 360 U.S. 423, 438-39 (1959). We do not agree that ***Raley*** supports their argument.

In ***Raley***, an agent of the state of Ohio told the defendants that the Fifth Amendment privilege against self-incrimination applied as they were interrogated by a state agency. After the defendants refused to answer questions on this basis, the state of Ohio prosecuted them because, under an Ohio immunity law, the privilege did not apply and they had committed an offense by refusing to answer the questions. The Supreme Court concluded that the actions constituted "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." ***Id.*** at 426. In this case, the appellants were not prosecuted for an action that

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(Emphasis added.) The statute has since been revised. *See* 1997 Wis. Act 107, § 1. The current statute does not require officers to inform drivers that they will be subject to penalties if the test results show a PAC, but requires them to inform drivers only that operating privileges may be suspended and the result of the test may be used in court. *See* § 343.305(4), STATS., 1997-98.

officers assured them was legal: they were not told by the officers that it was permissible to drive with a prohibited alcohol content. Rather, the offense had already been committed when the officers read them the "Informing the Accused" form.

More importantly, the appellants here were not "actively misled" by the Informing the Accused form. Taking paragraphs 4 and 5 together, the appellants were informed that if the tests showed a PAC, their operating privileges would be suspended, in addition to "other penalties which may be imposed," and if they had two or more "countable" prior convictions within a ten-year period after January 1, 1988, motor vehicles they own might be equipped with an ignition interlock device, immobilized or seized and forfeited. We reject the appellants' argument, unsupported by any authority, that an offender is actively misled about the consequences of submitting to a chemical test solely because he or she is not informed of each penalty that could result from a PAC given all combinations of circumstances.

Finally, Puffier challenges the scope of Officer Durkee's investigatory stop, asserting that the officer expanded the scope without reasonable suspicion. To execute a valid investigatory stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer must reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. ***State v. Richardson***, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990). An investigatory stop is permissible when the person's conduct may constitute only a civil forfeiture. ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991). Upon stopping the individual, the officer may make reasonable inquiries to dispel or confirm the suspicions that justified the stop. ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

In assessing whether there exists reasonable suspicion for a particular stop, we must consider all the specific and articulable facts, taken together with the rational inferences from those facts. ***State v. Dunn***, 158 Wis.2d 138, 146, 462 N.W.2d 538, 541 (Ct. App. 1990). The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience? ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Pfeifer concedes that the officer had reasonable suspicion to stop his vehicle because his license plate lamp was red. However, he argues that when the officer asked him to perform field sobriety tests, he expanded the scope of the stop beyond that necessary to fulfill the purpose of the temporary detention. Pfeifer quotes ***Florida v. Royer***, 460 U.S. 491, 500 (1983), for the proposition that "[t]he scope of the detention must be carefully tailored to its underlying justification." That is a correct statement of the law. However, a corollary proposition permits officers to expand the scope of the initial stop based on observations that lead them to develop a reasonable suspicion of another crime. "When an officer develops a reasonable, articulable suspicion of criminal activity during a traffic stop, he has justification for a greater intrusion unrelated to the traffic offense." ***United States v. Pereira-Munoz***, 59 F.3d 788, 791 (8th Cir. 1995) (internal quotes omitted).

Once Pfeifer's vehicle was stopped for the illegal lamp, the officer noticed a strong odor of alcohol coming from inside the vehicle and Pfeifer admitted that he had been drinking. We conclude that these observations, coupled with the fact that the stop occurred at 2:13 a.m., provided the officer with the requisite reasonable suspicion that Pfeifer was driving while under the influence of

an intoxicant. It was reasonable for the officer to investigate further by requesting that Pfeifer perform field sobriety tests.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.