COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2817

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAY MARSHALL GREENE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

BROWN, J. Jay Marshall Greene appeals pro se from an order denying his motion to vacate his conviction for operating a vehicle while suspended or revoked, fifth offense. Greene's original suspension was the result of driving with a prohibited blood alcohol content. Greene contends that because his original offenses—first offense driving while intoxicated and driving with a prohibited blood alcohol content—are civil in nature, all subsequent operating

after revocation offenses are also civil in nature. Thus, Greene argues, criminal sanctions should not have been imposed. We disagree with Greene and thus affirm.

Before reciting the facts, we briefly describe the statutory scheme under which Greene was sentenced to jail time for the operating after revocation offense. Section 343.44, STATS., provides penalties for one who operates a motor vehicle while his or her license is revoked or suspended (OAR or OWS). The penalties increase with each subsequent conviction under the section within five years. *See, e.g.,* § 343.44(2)(d), (e). However, each paragraph makes clear that if the underlying revocation or suspension was imposed solely due to a failure to pay a fine or forfeiture, only a forfeiture may be imposed, not jail time. *See, e.g.,* § 343.44(2)(d)2, (e)2; *see also* ***State v. Taylor***, 170 Wis.2d 524, 526-27, 489 N.W.2d 664, 666 (Ct. App. 1992) (concluding that § 343.44(2)(e)2 imposes only civil forfeitures on those convicted of OAR when the underlying revocation is due to failure to pay a forfeiture, even if the individual has been classified as a habitual traffic offender (HTO)).

The facts in this case are not in dispute. Greene's license was suspended on September 24, 1991, for driving with a prohibited blood alcohol content. Later that year, Greene was cited twice for driving while suspended. In August 1992, Greene's license was revoked for five years due to his classification as an HTO. *See* § 351.025, STATS. In the five-year period prior to his November 1996 OAR, Greene was convicted of OAR or OWS four times: (1) December 13, 1991 OWS; (2) December 11, 1991 OWS; (3) August 10, 1992 OAR; and (4) September 29, 1995 OAR. These are the dates of prior convictions listed in the complaint and confirmed by the "traffic teletype" showing Greene's traffic history. *See* ***State v. Spaeth***, 206 Wis.2d 135, 153, 556 N.W.2d 728, 735 (1996)

(holding that while the complaint is not enough to establish prior OAR/OWS convictions, a traffic teletype is).[1]

Greene argues that only civil penalties were applicable in this case. Greene relies on ***Taylor*** for the proposition that if the original offense is civil, all OAR/OWS violations stemming from it are also civil. In ***Taylor***, the defendant failed to pay a forfeiture and, as a result, his license was suspended. *See* ***Taylor***, 170 Wis.2d at 527, 489 N.W.2d at 666. He then was convicted four times of OWS. *See* ***id.*** He was classified as an HTO and his license was revoked. *See* ***id.*** The ***Taylor*** court upheld the trial court's conclusion that criminal penalties were not available. *See* ***id.*** This result was dictated by § 343.44(2)(e)2, STATS., which clearly exempts from criminal penalties those offenders whose revocation or suspension was imposed "solely due to a failure to pay a fine or a forfeiture." ***Id.***

Taylor does not help Greene because his original suspension was due to OWI/BAC, not failure to pay a forfeiture. It is true that the suspension and revocation arising out of that offense were for six months and were not in effect in November 1996, the date of conviction at issue here. In November 1996, Greene was driving without a valid license due to the August 1992 HTO revocation. Greene relies on ***Taylor*** for the proposition that an HTO revocation pulls the offender out of § 343.44(2)(e)1, STATS., under which jail time may be imposed,

[1] The State, in its brief, does not mention the September 1995 OAR. Rather, the State counts the November 1996 offense as Greene's fifth offense by counting his September 1991 OWI. However, § 343.44(2)(e), STATS., states that penalties are enhanced for subsequent convictions "under this section or a local ordinance in conformity with this section." An OWI conviction is not under § 343.44. Greene does not dispute that this is his fifth offense. Furthermore, the complaint and the teletype support the claim that it is his fifth offense. *See* ***State v. Rachwal***, 159 Wis.2d 494, 509, 465 N.W.2d 490, 496 (1991) (guilty plea admits all facts alleged in complaint); ***State v. Spaeth***, 206 Wis.2d 135, 153, 556 N.W.2d 728, 735 (1996) (teletype sufficient to establish prior OAR/OWS convictions).

and into § 343.44(2)(e)2, which only authorizes imposition of a fine. We are not persuaded. True, both Greene and Taylor were classified as HTOs and had had their licenses revoked. However, in ***Taylor***, "[e]ach of the revocations were predicated upon Taylor's failure to pay a forfeiture." ***Taylor***, 170 Wis.2d at 527***,*** 489 N.W.2d at 666. Here, Greene's 1991 suspension and revocation were predicated on his intoxicated driving. Neither was a "revocation or suspension ... imposed solely due to failure to pay a fine or a forfeiture." Section 343.44(2)(e)2. Greene is thus not saved from criminal penalty by § 343.44(2)(e)2 and his conviction stands.

By the Court.—Order affirmed.

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