COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 99-0387-CR
99-0388-CR
99-0389-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDOLPH P. HAUSHALTER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Reversed and causes remanded.*

CURLEY, J.[1] Randolph Haushalter appeals the judgments of conviction for his second, third and fourth counts of operating a motor vehicle while under the influence of an intoxicant (OWI), contrary to § 346.63(1)(a),

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

STATS. Haushalter argues that the trial court erred in interpreting the penalty statutes found in §§ 343.307 and 346.65, STATS., to permit the trial court to utilize the penalties proscribed for a fourth offense OWI when sentencing Haushalter on his second and third OWI offenses. This court agrees that the trial court erred in its interpretation and, as a result, the trial court's judgments are reversed and the matters are remanded back to the trial court for sentencing on all three counts. The trial court is instructed to use the graduated penalties proscribed for second, third and fourth offenses set forth in § 346.65.[2]

I. BACKGROUND.

Haushalter was charged with second offense OWI on March 29, 1998, after he was discovered driving the wrong way on a one way street in West Milwaukee. He was charged with second offense OWI because he had been convicted some time in the previous five years for first offense OWI. He pled guilty to the March 29, 1998 charge on May 18, 1998. On May 3, 1998, he was arrested in Wauwatosa for the identical charge at a McDonald's restaurant after a citizen notified the police that an erratic driver was in the parking lot. Haushalter also plead guilty to this charge, his third such offense, on May 18, 1998. After pleading guilty to the two charges, Haushalter's sentencing was put over to another date. On May 28, 1998, Haushalter was again arrested for OWI. This arrest took place in Milwaukee after Haushalter was observed deviating from his lane of traffic and almost striking the curb and several cars. He pled guilty to this offense, his fourth offense, on September 3, 1998. Because Haushalter had not yet

[2] Haushalter has asked that this decision be published. One-judge appeals are not publishable pursuant to § 809.23(4)(b), STATS. Moreover, Haushalter has not requested that a three-judge panel review this matter.

been sentenced on the two earlier counts, the trial court proceeded to sentence Haushalter on all three counts on September 3, 1998.

Previous to Haushalter being charged with his fourth count of OWI, the trial court ruled that the legislative scheme for the OWI penalties permitted the trial court to sentence Haushalter as a third offender on both the second and third offenses. The trial court reasoned that the language of § 346.65(2), STATS.,[3]

[3] Section 346.65(2), STATS., provides:

> **(2)** Any person violating s. 346.63 (1):
>
> **(a)** Shall forfeit not less than $150 nor more than $300, except as provided in pars. (b) to (f).
>
> **(b)** Except as provided in par. (f), shall be fined not less than $300 nor more than $1,000 and imprisoned for not less than 5 days nor more than 6 months if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 2 within a 10-year period. Suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
>
> **(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.
>
> **(d)** Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 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 4, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
>
> **(e)** Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 6 months nor more than 5 years if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 5 or more, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(continued)

setting forth the graduated penalty scale for violations, coupled with the language found in § 343.307(1) & (1)(a), STATS.,[4] allowed him to count the number of offenses as convictions at the time of sentencing in deciding which penalty applied. The trial court stated:

> A conviction exists under section 343.307 after a defendant's plea of guilty is entered and accepted or after a jury returns a verdict of guilty. This is true even if no written judgment is entered under section 972.13, a statute plagued with ambiguity given its use of the term *conviction*. ***State v. Pham***, 137 Wis. 2d 31, 34, 403 N.W.2d 35, 36 (Wis. 1987). We use the term *conviction* to refer to both (1) the finding of guilt before imposition of sentence and (2) the entry of a formal, written judgment of conviction that complied with section 972.13, ***State v. Wimmer***, 152 Wis. 2d 654, 658, 449 N.W.2d 621, 621-22

> **(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.

[4] Section 343.307(1) & (1)(a), provides:

> **Prior convictions, suspensions or revocations to be counted as**
>
> **(1)** The court shall count the following to determine the length of a revocation or suspension under s. 343.30 (1q) (b) and to determine the penalty under s. 346.65 (2):
>
> ….
>
> **(1)** The court shall count the following to determine the length of a revocation under s. 343.30 (1q) (b) and to determine the penalty under s. 346.65 (2):
>
> **(a)** Convictions for violations under s. 346.63 (1), or a local ordinance in conformity with that section.

> (Wis. Ct. App. 1989) (quoting ***Davis v. State***, 134 Wis. 632, 638, 115 N.W. 150, 153 (1908), *which quoted from,* ***Commonwealth v. Gorham***, 99 Mass. 420, 422 (1868)). Thus, when a judge sentences a drunk driver under Wisconsin's penalty enhancer at section 346.65(2), a conviction occurs even if sentence has yet to be rendered and no finding has been made as to any credit due toward the service of the sentence under WIS. STAT. § 973.155. ***Mikrut v. State***, 212 Wis. 2d 859, 869-70, 569 N.W.2d 765, 770 (Wis. Ct. App. 1997) (once a guilty plea is accepted by the court on a charge, then this constitutes a conviction for purposes of a repeater statute); ***State v. Wimmer***, 152 Wis.2d at 664, 449 N.W.2d at 625 (Wis. Ct. App. 1989) (a defendant is convicted upon the finding of guilt even if sentence has yet to be imposed).

Following this logic, the trial court ruled that each of the two charges then pending was subject to the penalties proscribed for a third offense of OWI. However, the trial court had never sentenced Haushalter on the second and third offenses before the fourth offense was committed.

On September 3, 1998, the trial court employed the identical logic and determined that Haushalter could be sentenced on all three charges as a fourth-time offender. The penalty for a fourth offense of OWI reads: "Any person violating s. 346.63(1)" for a fourth time, "shall be fined not less than $600 nor more than $2000 and imprisoned for not less than 60 days nor more than one year in the county jail …." Section 346.65(2)(d), STATS. The trial court then proceeded to sentence Haushalter in the following fashion: ten months in jail consecutive and a $600 fine for the March 29, 1998 offense; eleven months in jail consecutive and a $600 fine for the May 3, 1998 offense; twelve months consecutive to the other two sentences and a $600 fine for the May 28, 1998 offense. As a result, the trial court's sentences exceeded the maximum penalties permitted under § 346.65(2)(b) & (c), STATS., for a second offense. Haushalter appeals.

II. ANALYSIS.

Haushalter argues that the trial court erred in its interpretation of § 363.307, STATS., permitting each offense to be subject to the penalty provisions provided for a fourth offense. Haushalter posits, *inter alia*, that the trial court's reasoning is incorrect and frustrates the legislature's decision to graduate the penalties for operating while intoxicated for repeat offenders; and that the trial court's interpretation is unconstitutional. Although the State's brief ostensibly agrees that the trial court's interpretation of the statute in question is correct, the State devotes most of its brief to pointing out the problems that will occur if the trial court's interpretation is affirmed.

The standard of review of a question concerning the interpretation of a statue is *de novo*. *See* ***State v. Irish***, 210 Wis.2d 107, 110, 565 N.W.2d 161, 162 (Ct. App. 1997).

This court first addresses the cases relied upon by the trial court in its decision. The trial court cited ***State v. Wimmer***, 152 Wis.2d 654, 449 N.W.2d 621 (Ct. App. 1989), for its contention that a conviction, to be utilized in enhancing the penalties for operating while intoxicated, need only consist of an accepted plea of guilty and does not require a sentence. ***Wimmer*** does not support the trial court's determination that the trial court can apply the penalties for a fourth conviction OWI when sentencing a violator on his second and third convictions. The facts in ***Wimmer*** are that Wimmer pled guilty to two counts of battery and one count of resisting arrest, but the sentencing was adjourned. The next day Wimmer again battered his girlfriend, a victim of one of the earlier batteries. Wimmer was then charged, convicted and sentenced as a repeat offender pursuant to § 939.62, STATS., although he had not yet been sentenced for

the underlying conviction. ***Wimmer*** addressed the limited issue as to what constitutes a conviction under § 939.62. Since Haushalter has not been charged as a habitual criminal under § 939.62, the rationale of this case does not apply. Moreover, the holding in ***Wimmer*** did not authorize the trial court to apply the penalty enhancer to Wimmer's first charges, it merely permitted the penalties for his new offense to be enhanced.

The trial court also relied on ***State v. Pham***, 137 Wis.2d 31, 403 N.W.2d 35 (1987), for authority for its interpretation. ***Pham*** does not support the trial court's interpretation either. Pham objected to the trial court's sentencing him without a written judgment of conviction. The supreme court rejected Pham's argument and found that the trial court may proceed to sentence a defendant, after accepting a guilty plea, without the existence of a written judgment. *See* ***id.*** at 36-37, 403 N.W.2d at 37. In this case, the supreme court never authorized the trial court to substitute a more severe graduated penalty enhancer for the penalty proscribed for an earlier conviction.

Finally, the trial court's order mentions ***Mikrut v. State***, 212 Wis.2d 859, 569 N.W.2d 765 (Ct. App. 1997), as another case supporting his position. A reading of ***Mikrut*** reveals only that a formal judgment of conviction is controlling for purposes of the repeater statute. This case makes no mention of the use of harsher penalties when sentencing for older convictions after new offenses are committed. Thus, this court determines the authority cited by the trial court does not support the trial court's interpretation.

Next, this court addresses the arguments made by the appellant and the State. The State cites ***State v. Banks***, 105 Wis.2d 32, 313 N.W.2d 67 (1981), for the proposition that the trial court could apply the penalties for fourth offense

OWI to Haushalter's second and third offenses. This court concludes that ***Banks*** offers little support for the State's contention. ***Banks*** dealt with the problem presented when a court commissioner sentenced Banks as a first-time offender of OWI and later learned that it was Banks's second such offense within five years. In ***Banks***, the court commissioner vacated the improperly charged first offense and the district attorney's offense re-issued a criminal charge of second offense OWI against him. When presented with the new charge, the trial court ruled that it did not have jurisdiction over this reissued charge.

In reversing the trial court, the supreme court held that this situation did not result in double jeopardy to Banks. *See* ***Banks***, 105 Wis.2d at 44, 313 N.W.2d at 72. Further, the supreme court observed that the district attorney's office was mandated to charge Banks as a second offender under the wording of the relevant penalty statute. *See* ***id.*** at 40, 313 N.W.2d at 70. The supreme court also distinguished the penalty enhancers found in the OWI penalty section from those found in the general repeater statute and, in doing so, the supreme court determined that the OWI penalty enhancers did not require that the underlying conviction for the first charge occur before the state could properly charge Banks as a second offender. *See* ***id.*** at 44-50, 313 N.W.2d at 72-75. In the instant case, the question posed is whether the trial court can accept guilty pleas to a second and third offense OWI, withhold sentencing, and then, after the defendant pleads guilty to a fourth offense, apply the increased penalties of fourth offense OWI to all the charges at sentencing. With regard to this question, ***Banks*** supports Haushalter's contention. This is so because ***Banks*** emphasizes that there must be a conviction before the penalties can be used. A conviction under § 343.307,

STATS., must meet the requirements of § 972.13(3), STATS., entitled "Judgment."[5] In order to be a valid judgment of conviction, a sentence must have been imposed. Therefore, under ***Banks***, before a judgment of conviction can properly be used to justify an OWI penalty enhancer, the offender must have been sentenced. Thus, Haushalter could not be sentenced as a fourth offender for his second offense. Lending additional support to Haushalter's argument is the following quote from ***Banks***: "This court has recognized that the purpose of general repeater statutes is to increase the punishment of persons who fail to learn to respect the law after suffering *the initial penalties* and embarrassment of conviction." ***Id.*** at 49, 313 N.W.2d at 75 (emphasis added). This statement assumes that the initial penalties, not enhanced penalties, were applied.

Further, ***Banks*** also supports Haushalter's argument that the trial court's interpretation is unconstitutional on vagueness grounds. The "void for vagueness" doctrine rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The test for vagueness of a criminal statute is whether it gives reasonable notice of the prohibited conduct and its penalties. *See* ***State v. Driscoll***, 53 Wis.2d 699, 193 N.W.2d 85 (1972). ***Banks*** held that the OWI penalty enhancer statute only passed constitutional muster and was not void for vagueness because

> The express language of sec. 346.65 (2) (a) Stats. providing that any person violating sec. 346.63(1) (OMVWI) *shall* be fined or imprisoned if the total of license revocations and

[5] Section 972.13(3), STATS., provides:

> **(3)** A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence, and a finding as to the specific number of days for which sentence credit is to be granted under s. 973.155. If the defendant is acquitted, judgment shall be entered accordingly.

> convictions for drunken driving equals 2 within a five-year period, gives ample notice to a driver who wishes to avoid criminal penalties that a second offense of driving under the influence of intoxicants subjects a driver to criminal penalties. Thus applying the standard quoted above to sec. 346.65(2) (a), it is clear that the statute satisfies the due process requirements as it gives ample notice of the prohibited conduct *and penalties.*

Banks, 105 Wis.2d at 50-51, 313 N.W.2d at 75-76. (second emphasis added.) Extrapolating from this holding, this court determines that the trial court's interpretation runs afoul of the guaranteed constitutional protections because an offender is entitled to know the penalty he or she faces when violating the law and, under the trial court's interpretation, the possible penalties for a crime when committed could be modified by the subsequent conduct of the offender.

Finally, this court also notes that the trial court's interpretation frustrates the legislature's mandate that a second and subsequent offenses are subject to certain graduated penalties proscribed by the legislature. The trial court's interpretation would do violence to this legislative directive. *See* ***State v. Machner***, 101 Wis.2d 79, 81, 303 N.W.2d 633, 635 (1981) ("[I]t is the legislative province to prescribe the punishment for a particular crime and the judicial province to impose that punishment."); *Cf.* ***State v. Maron***, 214 Wis.2d 384, 388, 571 N.W.2d 454, 456 (1997) ("A court's authority in sentencing, including [its] power to impose consecutive sentences, is controlled by statute.").

Because this court is satisfied that the case law underpinnings relied upon by the trial court do not support the trial court's interpretation, and at least one of Haushalter's sentences surpasses the proscribed maximum sentence, these cases are remanded for resentencing in accordance with the graduated penalty provisions listed in § 346.65, STATS. Because the trial court sentenced the

appellant thinking the penalties for the fourth offense OWI applied to all of the counts, resentencing should take place in all three cases.

By the Court.—Judgments reversed and causes remanded.

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