

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 20, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2421-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**CHRISTOPHER A. WOLTER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. The State appeals from a judgment convicting Christopher Wolter of seventh offense operating while intoxicated, and from an order denying reconsideration of the probation sentence imposed on Wolters. On

appeal the State argues that WIS. STAT. § 973.09 (1997-98),<sup>1</sup> before its recent amendment, mandated a jail or prison term for Wolter's offense.<sup>2</sup> Wolter agrees, but contends that the statute violated his due process and equal protection rights because it arbitrarily differentiated between intoxicated drivers and all other classes of offenders, save those guilty of the most serious crimes. Because we conclude that the statute was constitutional, we reverse and remand for resentencing.

¶2 WISCONSIN STAT. § 346.63 prohibits operating while intoxicated (OWI). WISCONSIN STAT. § 973.09(1)(d) provides in relevant part that "if a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, at court may place the person on probation.... This paragraph does not apply if the conviction is for any violation under s. 346.63." All other offenders may receive probation except those convicted of crimes punishable by life imprisonment. *See* § 973.09(1)(a), (c).

¶3 The plain meaning of WIS. STAT. § 973.09(1)(d) bars sentences for those convicted of multiple offense operating while intoxicated. No other interpretation is reasonably available. Furthermore, even if the section were ambiguous, the legislative history documented by the State conclusively reveals that the legislature intended that result. Wolters concedes as much.

¶4 We conclude that the bar on probation for OWI offenders is constitutional. Wolters contends that it arbitrarily and irrationally treated OWI

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

<sup>2</sup> The recent amendment to WIS. STAT. § 973.09(1)(d) bars probation only for those convicted of second, third or fourth offense operating while intoxicated. *See* 1999 Wis. Act 9, § 3205d.

offenders differently than most other criminal offenders. The constitutional due process clause “requires that the means chosen by the legislature bears a reasonable and rational relationship to the purpose or object of the enactment.” *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 645 (1989). A statute withstands an equal protection challenge if the classification it makes has a reasonable basis and bears a fair and substantial relation to the purpose behind the statute’s enactment. *See Village of Oregon v. Waldofsky*, 177 Wis. 2d 412, 418, 501 N.W.2d 912 (Ct. App. 1993).

If any ... facts can reasonable be conceived to justify a statutory discrimination, it will not be set aside. If the legislative body has not set forth its rational for creating a classificatory scheme it is the court’s obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination.

*Schramek v. Bohren*, 145 Wis. 2d 695, 711, 429 N.W.2d 501 (Ct. App. 1988) (citations omitted). Here, the legislature could reasonably have determined that a high rate of recidivism for repeat drunk drivers rendered probation an inappropriate sentence. Or, as suggested by the legislative history, the legislature may have wanted to reduce the caseload of probation agents. In either case, the differential sentencing scheme for intoxicated drivers had a reasonable basis, and the bar on probation was a reasonable means of achieving the legislative purpose.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

