COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP923-CR **Cir. Ct. No. 2016CM625**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BOBBY LOPEZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] This case concerns whether operating a motor vehicle while intoxicated (OWI) and operating with a prohibited alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

concentration (PAC) charges based on an offense occurring on July 9, 2016, can be charged as second offenses based on an earlier July 9, 2006 offense. In short, did the 2006 OWI and the 2016 alleged OWI/PAC occur "within a 10-year period" or not? *See* WIS. STAT. § 346.65(2)(am)2. We conclude they did not. Therefore, the present OWI/PAC may not be charged as a second offense.

BACKGROUND

¶2 WISCONSIN STAT. § 346.63(1) prohibits OWI and PAC and punishes these offenses "under an escalating penalty scale." ***City of Eau Claire v. Booth***, 2016 WI 65, ¶22, 370 Wis. 2d 595, 882 N.W.2d 738. A first-offense OWI or PAC is a civil offense punishable only by a forfeiture. *See* WIS. STAT. § 346.65(2)(am)1.; *see also* ***Booth***, 370 Wis. 2d 595, ¶22. However, if a defendant is convicted of two violations of § 346.63(1)—either OWI or PAC—"within a 10-year period," then the second offense is treated as a criminal matter subject to as much as six months of confinement.[2] Sec. 346.65(2)(am)2. Section 346.65 also specifies that "the time period shall be measured from the dates of the … violations" that form the basis of the charges. Sec. 346.65(2c).

¶3 In this case, the State charged Bobby Lopez with OWI and PAC, both second offenses. The complaint alleged that Lopez committed the offenses on July 9, 2016. To support the charges as second offenses (and hence, criminal offenses), the complaint averred that Lopez had been previously convicted of an

[2] WISCONSIN STAT. § 346.65(2)(am) sets forth the penalty structure for WIS. STAT. § 346.63(1). It provides that "if the number of convictions under [WIS. STAT. §§] 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under [WIS. STAT. §] 343.307(1) within a 10-year period, equals 2," then an OWI or PAC charge is treated as a criminal matter. Sec. 346.65(2)(am)2. Section 343.307(1) specifies that previous convictions under § 346.63(1) are counted.

OWI that occurred on July 9, 2006. Lopez moved to dismiss the complaint because he maintained that the previous OWI offense was not committed "within a 10-year period" as required for the new offenses to qualify as second offenses under WIS. STAT. § 346.65(2)(am)2. The circuit court agreed with Lopez and dismissed the charges. The State appeals.

DISCUSSION

¶4 The sole issue on appeal is whether Lopez's 2006 OWI offense was committed "within a 10-year period" of the present charges. The answer to this question depends in part on whether the day of Lopez's 2006 offense is counted for purposes of the ten-year period. If the day of the first offense is excluded, then the 2006 OWI and the present charges both fall within a ten-year period. This is a question of statutory interpretation, a question of law we review de novo. ***Pufahl v. Williams***, 179 Wis. 2d 104, 107, 506 N.W.2d 747 (1993).

¶5 Prior to 1951, our supreme court generally dealt with counting problems as follows:

> The rule is well established on an issue of limitation where the time is to be computed from a certain date, that in the computation the day of the date is to be excluded, and where the computation is from a certain event the date of that event must be included.

Siebert v. Jacob Dudenhoefer Co., 178 Wis. 191, 194, 188 N.W. 610 (1922), *abrogated by* ***Pufahl***, 179 Wis. 2d at 109.

¶6 In 1951, the legislature enacted WIS. STAT. § 370.001(4) (1951). This new statute modified the common-law rule for statutes prescribing the time "within which an act is to be done or a proceeding had or taken." 1951 Wis. Laws ch. 261, § 5. Unless such a construction "would produce a result inconsistent with

the manifest intent of the legislature," § 370.001(4) provided that "[t]he time within which an act is to be done," when expressed in days, is "computed by excluding the first day and including the last." In 1955, the statute was amended and renumbered, more specifically responding to the rule stated in ***Siebert***:

> **(4) TIME, HOW COMPUTED.**
>
> (a) The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last ….
>
> ….
>
> (d) Regardless of whether the time limited in any statute for the taking of any proceeding or the doing of an act is measured from an event or from the date or day on which such event occurs, the day on which such event took place shall be excluded in the computation of such time.

WIS. STAT. § 990.001(4)(a), (d) (1955). These provisions remain unaltered in the current version of the statute. *See* § 990.001(4).[3]

¶7 The State argues WIS. STAT. § 990.001(4) is controlling and applies to the ten-year time period in WIS. STAT. § 346.65(2)(am)2.[4] If so, the first day

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[3] **(4) TIME, HOW COMPUTED.** (a) The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last ….

….

(d) Regardless of whether the time limited in any statute for the taking of any proceeding or the doing of an act is measured from an event or from the date or day on which such event occurs, the day on which such event took place shall be excluded in the computation of such time.

[4] The State also points out that "[o]ther sections of the Wisconsin Statutes use the same method of computation" as WIS. STAT. § 990.001(4). The State does not argue that any of those statutes are applicable here.

must be excluded, making Lopez's 2006 OWI conviction just barely within the prescribed period. In other words, we would begin our count on July 10, 2006, the day after Lopez's 2006 OWI offense. The State does not acknowledge the common-law counting rule of ***Siebert***; it simply asserts that § 990.001(4) "supplies the answer" to our counting dilemma. However, we do not read the language of § 990.001(4) as prescribing a general rule for computing time in any statute.

¶8 WISCONSIN STAT. § 990.001(4), by its plain language, applies only where a statute prescribes "[t]he time within which an act is to be done or proceeding had or taken." WISCONSIN STAT. § 346.65(2)(am)2. does not fit into this category. It does not prescribe the time within which a proceeding must be had, because it prescribes no proceeding that must take place. Neither do we think § 346.65 prescribes "[t]he time within which an act is to be done." Nothing in § 346.65 says some action needs to be taken. This is unlike other cases where our courts have applied the counting rule in § 990.001(4) to statutes that plainly require something to be done. *See, e.g.*, ***State v. Edwards***, 98 Wis. 2d 367, 370-71 & n.1, 297 N.W.2d 12 (1980) (applying § 990.001(4) to a statute providing that "[a] search warrant must be executed and returned not more than 5 days after the date of issuance" (citation omitted)); ***Kurt Van Engel Comm'n Co. v. Zingale***, 2005 WI App 82, ¶43, 280 Wis. 2d 777, 696 N.W.2d 280 (applying § 990.001(4) to a statute of limitations providing that an action "shall be commenced within 6 years after the cause of action accrues"); ***State ex rel. Walker v. McCaughtry***, 2001 WI App 110, ¶11, 244 Wis. 2d 177, 629 N.W.2d 17 (applying § 990.001(4) to WIS. STAT. § 893.735(2), requiring prisoners to seek certiorari review within forty-five days after the cause of action accrues or forfeit the opportunity to do so). Section 346.65(2)(am)2., by contrast, does not require any "act" to be done within a certain time period. Rather, it changes the character of an OWI/PAC offense

based on the number of offenses committed within a ten-year period, but does not, in our reading, prescribe when a proceeding must occur or when a specific act must take place.

¶9 We are not aware of, nor does the State cite, any Wisconsin case applying WIS. STAT. § 990.001(4) to a statute that does not require the performance of some act or occurrence of some proceeding. Nor are we aware of any case holding that § 990.001(4) applies to all expressions of time in our statutes. Had the legislature intended a far broader application, drafting language saying so would not have been difficult. What the text states is that § 990.001(4) only applies where a statute prescribes, "[t]he time within which an act is to be done or proceeding had or taken." Thus, we take the statutory language at face value and conclude that § 990.001(4) does not apply to WIS. STAT. § 346.65(2)(am)2. and therefore does not answer the question here.

¶10 While we acknowledge plausible arguments on both sides, we think the best reading of WIS. STAT. § 346.65(2)(am)2. puts the 2016 OWI/PAC outside, not "within," a ten-year period. "Within" means "[i]nside the limits or extent of in time, degree, or distance." *Within*, THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982). The 2006 OWI and 2016 alleged OWI/PAC, then, must be "inside" the same period of ten years. Our general counting statutes specifically define the word "year." "'Year' means a calendar year, unless otherwise expressed." WIS. STAT. § 990.01(49). A calendar year is "[t]welve calendar months beginning January 1 and ending December 31." *Year*, BLACK'S LAW DICTIONARY (10th ed. 2009); *see also Year*, THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982). These twelve months are comprised of 365 consecutive days, except during a leap year where a calendar year is 366 days. *See Year*, THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982). Hence, the normal reading of "year" is that it includes

only one of each date. For example, a one-year period beginning on September 6, 1990, would end on September 5, 1991, not September 6, 1991.

¶11 The statutory trigger for the escalating penalty requires both offenses—and hence both dates—to be "within" the same ten-year period. This would mean that we must include the date of the first offense (July 9, 2006) and count ten calendar years out from that date. Doing so, the best reading of the statutory language is that the ten-year period beginning on July 9, 2006, ended on July 8, 2016. Accordingly, the two offenses did not occur within a ten-year period.

¶12 Although no published Wisconsin cases are on point, our analysis is greatly informed by the Minnesota Supreme Court's reasoning in ***State v. Wertheimer***, 781 N.W.2d 158, 160 (Minn. 2010), which involved a similar statutory scheme. The applicable Minnesota statute allowed a person to be convicted of first-degree driving while impaired if he or she "commits the … violation within ten years of the first of three or more qualified prior impaired driving incidents." ***Id.*** At issue was whether a defendant's latest impaired driving incident occurred within ten years of a previous conviction, which would have put his total number of impaired driving incidents over the first-degree threshold. ***Id.*** The latest offense was alleged to have occurred on May 12, 2007, and the defendant argued that his May 12, 1997 driving-while-impaired conviction should not be counted because it occurred more than ten years prior. ***Id.*** at 159-60.

¶13 Of particular note, Minnesota had a counting statute similar to WIS. STAT. § 990.001(4) providing that time "shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time." ***Wertheimer***, 781 N.W.2d at 160. However, the counting statute only applied

"[w]here the performance or doing of any act, duty, matter, payment, or thing is ordered or directed." ***Id.*** The court concluded that the driving-while-impaired statute "does not order or direct the doing or performance of any act, duty, matter, payment, or thing," and therefore, the counting statute did not apply. ***Id.*** at 162.

¶14 The court next concluded that the plain meaning of "within ten years" in the impaired driving statute dictated that the dates of both offenses "must be in the same ten-year period." ***Id.*** at 163. Using the ordinary understanding of a calendar year, the court concluded that offenses committed on May 12, 1997, and May 12, 2007, respectively are not within ten years of each other. ***Id.*** Given the similar statutory scheme and fact pattern, the Minnesota Supreme Court's reasoning is persuasive in our interpretation of WIS. STAT. § 346.65.

¶15 Though we need not go further, we note that our common-law counting rule, to the extent it applies, would lead to the same outcome. Although superseded with regards to statutes prescribing "[t]he time within which an act is to be done or proceeding had or taken," the common-law counting rule enunciated in ***Siebert*** appears to retain vitality in circumstances where WIS. STAT. § 990.001(4) or other time computation statutes do not apply. Assuming it does, WIS. STAT. § 346.65(2)(am)2. measures time "from a certain event"—the event being the commission of an OWI offense. Thus, according to the common-law rule, "the date of that event must be included." Including the date of the 2006 OWI similarly results in the 2016 charges falling outside the ten-year period.

¶16 In sum, we agree with the circuit court that the 2006 OWI and the 2016 alleged OWI/PAC were not within the same ten-year period. Therefore, the circuit court correctly granted Lopez's motion to dismiss the criminal charges against him.

By the Court.—Order affirmed.

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