COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1658-CR **Cir. Ct. No. 2015CT523**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA H. QUISLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Joshua Quisling was convicted of operating with a prohibited blood alcohol concentration, third offense, based on a maximum

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). The State explicitly relies on the 2013-14 version of the Wisconsin Statutes for its substantive analysis in this appeal. Without explicitly doing so, Quisling apparently takes the same approach, which I also adopt. For the sake of clarity, I discuss the statutes using the present tense, but I emphasize that my attention is directed entirely on the 2013-14 version.

blood alcohol concentration level of 0.02. The State contended that he was appropriately assigned a maximum 0.02 level because, pursuant to WIS. STAT. § 340.01(46m)(c), at the time of the alleged offense, he was "subject to" a court order to install an ignition interlock device that had been entered pursuant to WIS. STAT. § 343.301.

¶2 In this appeal, Quisling argues that the circuit court misinterpreted a set of interrelated statutes in denying a motion to dismiss the complaint. More specifically, he argues that, at the time of the alleged offense, he was not "subject to" a device installation order entered pursuant to WIS. STAT. § 343.301, as addressed in § 340.01(46m)(c). According to Quisling's argument, the order requiring him to install a device was contingent on the Wisconsin Department of Transportation issuing him a Wisconsin driver's license, which had not occurred, and therefore his prohibited alcohol concentration remained at the default 0.08 level.[2] I conclude that Quisling was "subject to an order" entered pursuant to § 343.301, as provided in § 340.01(46m)(c), commencing upon entry of the order requiring him to install the device, regardless of the license-issue contingency that triggered the timing of required device installation. Accordingly I affirm.

BACKGROUND

¶3 The following facts are undisputed.

[2] For ease of reference, I refer to devices using the singular ("a device"), but note that an order could require the installation of more than one device. *See* WIS. STAT. § 343.301(1g).

The Prior Case

¶4 In November 2013, Quisling was found guilty of operating while intoxicated, as a first offense. The circuit court entered an order that adjudicated him guilty, and which contained further orders, including that Quisling must: "endure a 7 month revocation of his driver license" and "[i]nstall an ignition interlock device on any vehicle owned or operated by the defendant for a period of 12 months."[3]

¶5 The order did not reflect that the required device installation was to be immediate, as the court could have ordered. *See* WIS. STAT. § 343.301(2m) ("The court may order the installation of an ignition interlock device under sub. (1g) immediately upon issuing an order under sub. (1g.).").[4] Instead, by operation of statute, the installation requirement was contingent on the department issuing him a driver's license, and installation was to commence upon license issue. *See* § 343.301(2m).

¶6 Quisling appealed his conviction in the prior case and this court affirmed. According to Quisling, penalties stayed pending appeal "were reimposed on February 16, 2015."

[3] The State asserts that the device installation order was required because Quisling had improperly refused to submit to a breath test, and Quisling does not dispute this.

[4] I note that a docket entry contained on the Wisconsin Circuit Court Access program purports to reflect that the device restriction was effective beginning on the day the order was entered. However, I ignore that entry because the order does not reflect this decision.

This Case

¶7 The criminal complaint in this case charged that on May 22, 2015, Quisling operated a motor vehicle with a prohibited alcohol concentration above 0.02, at a time that he was "subject to" an order under WIS. STAT. § 343.301, and thus by operation of statute his maximum allowable alcohol concentration was 0.02. The complaint alleged a breath alcohol reading of 0.07.

¶8 Quisling moved to dismiss the complaint. I address it more fully below, but stated briefly, his argument was, and remains, the following: by operation of WIS. STAT. §§ 340.01(46m) and 343.301(2m), his prohibited alcohol concentration had not been reduced from the default level of 0.08 to 0.02 by May 22, 2015, because the reduction was to commence *only after* the department issued a Wisconsin license to him, and on May 22, 2015, Quisling was operating with a valid Nevada license and "did not have a valid Wisconsin license." Given that the contingency of license issuance had not occurred by May 22, 2015, Quisling contended, he was not "subject to" an order to install a device, and the complaint's allegation of a prohibited alcohol concentration of 0.07 was insufficient to establish probable cause that he had operated at the 0.08 level.

¶9 After considering arguments, the circuit court denied the motion to dismiss on the ground that Quisling's statutory interpretation "would lead to an absurd result." Quisling was convicted at a stipulated trial and appeals.

DISCUSSION

¶10 I now summarize pertinent portions of the statutes necessary to understand Quisling's argument, then summarize his argument, and finally explain why I agree with the counterarguments presented by the State.

¶11 Statutory interpretation raises issues of law that I review de novo on appeal. ***State v. Alger***, 2015 WI 3, ¶21, 360 Wis. 2d 193, 858 N.W.2d 346.

¶12 Courts are to "assume that the legislature's intent is expressed in the statutory language." ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. If the language is clear, I apply it as it reads, because the words used by the legislature are the best evidence of its intent. ***Id.***, ¶45. Resort to a dictionary definition "'is appropriate for the purpose of determining meaning that is plain on the face of the statute.'" ***State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.***, 2017 WI 70, ¶33 n.15, 376 Wis. 2d 239, 898 N.W.2d 35 (quoted source omitted).

¶13 Statutes are to be interpreted "'in relation to the language of surrounding or closely-related statutes.'" ***State v. Reyes Fuerte***, 2017 WI 104, ¶27, 378 Wis. 2d 504, 904 N.W.2d 773 (quoting ***Kalal***, 271 Wis. 2d 633, ¶46). Closely related statutes "are in the same chapter, reference one another, or use similar terms." ***Id.***, ¶27 (citation omitted).

Details Regarding Pertinent Statutes

¶14 Pertinent statutory references appear above. But because this appeal involves interplay among multiple closely related provisions, I now walk through them in the context of this case.

¶15 Quisling was charged in the instant case with operating a motor vehicle while he had a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b). More specifically, the State charged Quisling with operating with a prohibited alcohol concentration, when his maximum was 0.02, which the State submitted was the appropriate level because he was, at the time of the offense, a

person who was then "*subject to an order* under s. 343.301." *See* WIS. STAT. § 340.01(46m)(c) (emphasis added); *see also* § 340.01(46m)(a) (setting the level at 0.08 for those with 2 or fewer prior convictions, suspensions, or revocations).[5]

¶16 This brings me to WIS. STAT. § 343.301. As pertinent here, § 343.301 provides that a "court shall order a person's operating privilege … be restricted to operating vehicles that are equipped with an ignition interlock device" if "[t]he person improperly refused to take a test under s. 343.305." § 343.301(1g)(a). As explained above, based on an improper refusal, the court in the prior case ordered license revocation for a period of seven months and installation of a device for a period of 12 months, although the court did not order immediate device installation.

¶17 Together with the phrase discussed above, a "person subject to an order under s. 343.301," the lynchpin of Quisling's argument involves the following additional provision from WIS. STAT. § 343.301, namely, subsection (2m), which addresses timing issues involving required device installation and use:

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[5] WISCONSIN STAT. § 340.01(46m) lacks a subsection (b) and states in its entirety:

> "Prohibited alcohol concentration" means one of the following:
>
> (a) If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.
>
> (c) *If the person is subject to an order under s. 343.301* or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

(Emphasis added).

> The court shall restrict the operating privilege under [WIS. STAT. § 343.301] sub. (1g) [*i.e.*, ordering installation of an ignition interlock device as a restriction on the privilege] for a period of not less than one year nor more than the maximum operating privilege revocation period permitted for the refusal …, *beginning on the date the department issues any license granted under this chapter*, except that if the maximum operating privilege revocation period is less than one year, the court shall restrict the operating privilege under sub. (1g) for one year. *The court may order the installation of an ignition interlock device under sub. (1g) immediately upon issuing an order under sub. (1g.).*

WIS. STAT. § 343.301(2m) (emphasis added).

Quisling's Argument

¶18 With those statutory provisions in mind, Quisling's argument starts with two undisputed facts: (1) in the prior case, the court did not make its device installation order immediate; and (2) the department did not issue a license to Quisling between the time license revocation was ordered in November 2013 and the May 22, 2015 instant alleged offense.

¶19 In addition, the State does not contest the following legal proposition: if Quisling was not a "person subject to an order under s. 343.301," as that phrase is used in WIS. STAT. § 340.01(46m)(c), when he allegedly committed the instant offense, then his prohibited alcohol concentration level remained at 0.08. By the same token, Quisling makes no serious argument that, if he was a "person subject to an order under s. 343.301" at that time, then his maximum allowed alcohol concentration level was *not* reduced to 0.02.

¶20 Quisling acknowledges that the order from the prior case containing the device installation requirement literally existed at the time of the alleged

offense in the instant case. It was 18 months old at that point and had not been modified or withdrawn.

¶21 With that as background, Quisling contends that, pursuant to WIS. STAT. §§ 343.301(1g), (2m), when a court issues an order requiring device installation and does not make the order immediate, as happened here, then the order has no effect until the department issues a Wisconsin license to the person. And therefore, the argument proceeds, because the license issuance contingency had not occurred by the time he allegedly committed the instant offense, Quisling was not then a "person subject to an order under s. 343.301," as that phrase is used in WIS. STAT. § 340.01(46m)(c).

Analysis

¶22 Applying a plain meaning interpretation, I conclude that Quisling became a "person subject to an order under s. 343.301" upon entry of the 12-month device installation requirement in the order entered in November 2013, and that he remained a "person subject" to that order on May 22, 2015, even though the department had not yet issued a Wisconsin license to him, and perhaps never would. Quisling was no less "subject to" the order merely because it contained a contingency by operation of law. This interpretation of WIS. STAT. § 340.01(46m)(c) defeats the only argument that Quisling presents on appeal.

¶23 Quisling's argument confuses two timing concepts that are treated as distinct in the statutory language: (1) when a device *must first be installed* and (2) when a person becomes and remains *subject to a device installation order*. As the State points out, "delaying the effective date of [required installation] does not change whether [the] person is subject to the order" requiring installation, in the event that the department issues a license.

¶24 Turning to the statutory analysis, WIS. STAT. § 340.01(46m)(c), which contains the "subject to" language, is itself part of a list of definitional terms. The pertinent portion of the statute is merely the following short phrase: "If the person is subject to an order under s. 343.301." *See* n.4 *supra*. This language provides no clue that "subject to" has a technical or specialized meaning. Neither party provides a specific definition for the phrase "subject to" generally, nor for the phrase as specifically used in § 340.01(46m)(c).

¶25 However, one dictionary definition for the phrase "subject to" that would appear to fit this context is the following: "affected by or possibly affected by (something)." https://www.merriam-webster.com/dictionary (last visited on Apr. 9, 2018). I see no reason not to treat this broad definition as suitable for the facially broad phrase "subject to," which the legislature selected to define the 0.02-limit operator in this context. The legislature did not select more narrow or detailed language, as it could have.

¶26 It is evident that, at a minimum, Quisling was at all pertinent times a person who was "subject to" the 12-month device installation requirement in the order from the prior case, because it was something that *possibly affected* him. The possible effect of the order was certain from the moment of entry: if the department ever issued a driver's license to him, he would be obligated to install a device for a twelve-month period. The fact that the department had not issued a license to him by May 22, 2015, does not mean that the order had expired under its own terms, or that it had been nullified by operation of any law cited by Quisling.

¶27 Given this conclusion, I need not discuss in detail the timing elements in WIS. STAT. § 343.301(2m), because there is no dispute that they merely create the contingent aspect of the device installation order discussed

above. To repeat, the State does not contest the existence of or nature of the contingency, but instead argues, I think persuasively, that a person is "subject to" a device installation order from the time of its entry, regardless whether a contingency that would have triggered required device installation has occurred.

¶28 Quisling asserts that his circumstances here are comparable to those pertaining to two hypothetical persons: the "probationer with an imposed and stayed prison sentence [who is *not*] bound by the prison's rules during the pendency of his probation," and the criminally charged person who is *not* "subject to the conditions of a signature bond … before the bond is signed." However, Quisling fails to explain how these analogies advance his argument. No doubt the hypothetical probationer and charged person each enjoy the benefits of the contingent nature of their respective orders. But Quisling fails to provide legal authority, or even a developed argument based on logic, to support the notion that these hypothetical persons are not "subject to" their respective contingent orders from the moment those orders are entered.

¶29 Separately, Quisling argues that the State's interpretation leads to an absurd result: a person "who resides primarily outside of Wisconsin, following a first offense OWI conviction including [a device installation] order, would be perpetually subject to [a device installation] order and .02 PAC level because [the department could never issue] that person … a Wisconsin license in order to commence the 12-month time frame" for required device installation and use during operation. However, Quisling fails to persuade me that it would be absurd, under his scenario, for Wisconsin law to create a "perpetual" maximum level of 0.02 for such a person whenever he or she operates a motor vehicle on a Wisconsin roadway. Just as I see nothing absurd in the fact that, as of May 22, 2015 and extending indefinitely into the future, Quisling had to install a device

and use it for 12 months upon the department issuing him a license, I also fail to see absurdity in the concept that, indefinitely into the future, he could not lawfully operate a motor vehicle in Wisconsin above the 0.02 level.

¶30 Both parties make additional arguments based on policy considerations and statutory provisions not referenced above. However, I see nothing in Quisling's side of these arguments that undermines the plain language interpretation above.

By the Court.—Judgment affirmed.

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