COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2081-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. ARPKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Michael J. Arpke appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) as a third-time offender pursuant to WIS. STAT. § 346.63(1)(a). Arpke was originally charged as

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

a second-time offender. However, the complaint was later amended to allege a third offense because Arpke was convicted of a second OWI offense while this action was awaiting trial. On appeal, Arpke contends that this amendment violated his due process right to adequate notice of the charge, exposed him to ex post facto punishment, and violated his equal protection rights. We disagree. We affirm the judgment of conviction.

¶2 We begin with Arpke's OWI history. Arpke's first OWI conviction occurred in November 1996. On June 19, 1999, Arpke was again arrested for OWI. He pled not guilty and requested a jury trial. While awaiting trial on that matter, Arpke was yet again arrested for OWI on October 6, 1999, in this case. The complaint charged Arpke with both OWI and operating with a prohibited alcohol concentration (PAC). Because Arpke's second OWI matter was still pending, the complaint in this case also alleged a second-time offense. Arpke pled not guilty and requested a jury trial.

¶3 While this case was awaiting trial, a jury found Arpke guilty of OWI in the pending June 19, 1999 matter. As a result, the State amended the charges in this case to allege a third offense. Arpke objected on the due process, ex post facto and equal protection grounds we have noted. The trial court rejected these challenges. At the ensuing trial, a jury found Arpke guilty of OWI and PAC. The trial court dismissed the PAC charge and convicted Arpke on the OWI charge as a third-time offender. Arpke appeals.

¶4 Arpke sounds a common theme in all of his constitutional arguments. He contends that the amendment alleging a third offense improperly permitted the State to rely upon the reduced alcohol concentration level which constitutes prima facie evidence of intoxication under WIS. STAT.

§§ 340.01(46m)(a) and (b), and 885.235(1g)(cd). Under these statutes, if a person has two or more prior convictions, the prima facie level of intoxication is reduced from an alcohol concentration of 0.1% to 0.08%.[2] Arpke contends that because he was originally charged as a second-time offender, he was constitutionally entitled to be tried under the 0.1% prima facie level of intoxication.

¶5 On a threshold basis, the State challenges Arpke's standing to raise his constitutional issues. The State contends that Arpke's appellate challenges travel only to the PAC charge. Since that charge was dismissed, the State contends that Arpke's issues are moot. We disagree. At the trial, the State introduced the evidence of Arpke's blood alcohol concentration, and it received the benefit of the corresponding jury instruction advising that such evidence was prima facie evidence of intoxication. While the blood alcohol concentration evidence established Arpke's guilt as to the PAC charge, it also was relevant to the OWI charge. Indeed, the jury may well have premised its guilty verdict on this evidence. We reject the State's argument that Arpke does not have standing to raise his appellate issues. We turn to the merits.

¶6 Arpke contends that the amendment to the complaint violated his due process right to fair and adequate notice. Specifically, Arpke complains that "he could not predict with any certainty that the lower prohibited limit and its attendant presumptions would ultimately apply to his case." He relies on the law of ***State v. Givens***, 28 Wis. 2d 109, 115, 135 N.W.2d 780 (1965), which holds that "a criminal statute must be definite enough to inform those who are subject to it as to what acts will render them liable to its penalties."

[2] If the person has three or more convictions, the prima facie evidence of intoxication is further reduced to an alcohol concentration of 0.02%. WIS. STAT. § 340.01(46m)(c).

¶7 We reject Arpke's lack of notice argument. At the time of his arrest and thereafter, Arpke obviously knew that he had previously been arrested for a second OWI offense on June 19, 1999, and that he was awaiting trial on that charge. As such, Arpke also knew that the current charge could represent his third offense if he was convicted on the June 19 charge. The law presumes that all persons are held to know the criminal law. *See* ***Topolewski v. Plankinton Packing Co.***, 143 Wis. 52, 73, 126 N.W. 554 (1910). If the law were otherwise, "mere ignorance in fact of the law would furnish immunity from punishment for violation of the criminal code." ***Id***. Thus, Arpke is properly held to know that he was in peril of prosecution in this case as a third-time offender under the reduced prima facie levels set out in the statutes. This knowledge was not altered by the fact that the State was forced to initially charge Arpke as a second-time offender in this case because the June 19, 1999 offense had not yet been tried.

¶8 The concern of due process is fundamental fairness. ***State ex rel. Lyons v. De Valk***, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970). We fail to see how notions of fundamental fairness were violated in this case. Despite the fact that the State could only charge Arpke as a second-time offender when the complaint was issued, Arpke knew of his peril as a potential third-time offender, and he made no complaint of surprise when the State amended the complaint to allege his status as a third-time offender. Due process is flexible and requires only such procedural protections as the particular situation demands. ***Capoun Revocable Trust v. Ansari***, 2000 WI App 83, ¶17, 234 Wis. 2d 335, 610 N.W.2d 129. Arpke would freeze the State's discretionary charging authority to the moment of his arrest. That is too rigid a view of due process.

¶9 Next, Arpke contends that the amendment to the complaint subjected him to unconstitutional ex post facto punishment. Much of Arpke's argument on

this issue harkens back to his lack of notice argument. For instance, Arpke cites to the following language from ***Waukesha Memorial Hospital v. Baird***, 45 Wis. 2d 629, 173 N.W.2d 700 (1970):

> It is, of course, strongly engrafted in our law that one should not be convicted of a violation of an *ex post facto law*.... It is accepted as an axiom of American constitutional law that failure to give a defendant fair warning of the consequences of his conduct, when such conduct is determined to be unlawful only after the fact, provides a constitutional defense.

Id. at 635-36. We have already held that Arpke was given fair warning of the consequences of his conduct. We reject this facet of Arpke's ex post facto argument.

¶10 Arpke also argues that the amendment alleging a third-time offense violated the principle of ex post facto law that prohibits the legislature from increasing the punishment after a criminal act has been committed and from denying a defense which was available when the act was committed. *See* ***State v. Thiel***, 188 Wis. 2d 695, 700, 524 N.W.2d 641 (1994). Essentially, Arpke is arguing that he had immunity against any upgrading of the charge by the State. However, when Arpke was arrested in this case, the law already authorized the prosecution of third-time OWI offenders and authorized the reduced prima facie level for such offenders. Therefore, the amendment to the complaint, which invoked these provisions, did not violate either of the ex post facto prohibitions upon which Arpke relies. We reject this further facet of Arpke's ex post facto argument.

¶11 Last, Arpke mounts an equal protection challenge to WIS. STAT. §§ 340.01(46m) and 885.235(1g)(cd) which set out different prima facie PAC levels depending on the repeater status of a particular OWI offender. Arpke

contends that the statutory classifications are unconstitutional because "human beings do not change physiologically between OWI second and OWI third offenses."

¶12 We presume a statute is constitutional, and the challenger must show to the contrary beyond a reasonable doubt. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989). Equal protection requires that reasonable and practical grounds exist for the classifications drawn by the legislature. ***Id***. at 130. The legislative authority to create classifications allows for some degree of inequity. ***Id***. at 131. Here, we are not dealing with a suspect classification, such as those based on race. *See* ***State v. Ruesch***, 214 Wis. 2d 548, 564, 571 N.W.2d 898 (Ct. App. 1997). Therefore, we must sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. ***McManus***, 152 Wis. 2d at 131.

¶13 The dangers posed by repeat drunk drivers are well known. The State has a substantial interest in apprehending, punishing and deterring drunk drivers. ***State v. Krause***, 168 Wis. 2d 578, 590, 484 N.W.2d 347 (Ct. App. 1992). By imposing escalating OWI penalties against such offenders and by reducing the PAC prima facie level necessary for convicting such offenders, the legislature was obviously trying to punish and deter such recurring activity. The legislative classifications challenged by Arpke bear a rational relationship to this legitimate governmental interest. We reject Arpke's equal protection challenge to the statute.

By the Court.—Judgment affirmed.

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