

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2001

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. 00-2101-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOUIS E. GUERRA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MICHAEL G. GRZECA, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Louis Guerra appeals from his third conviction for operating a motor vehicle while intoxicated. The sole issue on appeal is whether

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

Guerra's first conviction for OWI, which was a forfeiture action, is subject to collateral attack on the basis that when entering his guilty plea he was not advised of his right to a jury trial. The trial court denied Guerra's motion to collaterally attack the first OWI conviction, concluding that a prior civil forfeiture action is not subject to collateral attack based upon a possible statutory violation. This court agrees and affirms the conviction.

¶2 For purposes of Guerra's motion, the State conceded that when Guerra entered his guilty plea to the first OWI offense, the trial court had not advised him of his statutory right to a jury trial. Guerra reasons therefore that his plea was entered involuntarily. Consequently, he concludes that the OWI forfeiture conviction cannot be used to enhance his punishment in this case. This court is not persuaded.

¶3 In *State v. Hahn*, 2000 WI 118, ¶¶28, 238 Wis. 2d 889, 618 N.W.2d 528, our supreme court held that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges a violation of a constitutional right.² In

² Additionally, *Hahn* requires the offender to allege a violation of a constitutional right to a lawyer. But, even assuming one may allege a violation of a constitutional right to a jury, this court will address Guerra's claim. See *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528.

traffic civil forfeiture actions, a right to a jury trial exists only by statute. WIS. STAT. § 345.34(1).³ Guerra suggests, however, that he was entitled to a jury trial in the OWI forfeiture action under art. I, § 5, of the Wisconsin Constitution.⁴ He makes this conclusionary statement, however, without developing the argument. In any event, in *State v. Ameritech Corp.*, 185 Wis. 2d 686, 697, 517 N.W.2d 705 (Ct. App. 1994), *aff'd*, 193 Wis. 2d 150, 532 N.W.2d 449 (1995), we held that a party has a constitutional right to a jury trial in a civil action only if it existed at common law in 1848. As the State observes correctly, from a historical perspective, it is obvious that the offense of operating a motor vehicle while intoxicated did not exist at common law in 1848. Therefore, because Guerra has not shown a violation of a constitutional right when entering his plea to initial OWI forfeiture action, he does not have the right to collaterally challenge that conviction.

³ WISCONSIN STAT. § 345.34(1) provides:

- (1) If the defendant appears in response to a citation, or is arrested and brought before a court with jurisdiction to try the case, the defendant shall be informed that he or she is entitled to a jury trial and then asked whether he or she wishes presently to plead, or whether he or she wishes a continuance. If the defendant wishes to plead, the defendant may plead guilty, not guilty or no contest.
- (2)

⁴ Article I, § 5, of the Wisconsin Constitution provides:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

By the Court.—Judgment affirmed.

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

