COURT OF APPEALS
DECISION
DATED AND RELEASED

August 10, 1995

NOTICE

No. 94-1745-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIE F. BANKSTON, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed*.

GARTZKE, P.J.[1] Willie F. Bankston, Jr., appeals from a judgment convicting him of operating a motor vehicle after revocation (OAR), § 343.44(1), STATS., fifth offense, and imposing a sentence under § 343.44(2)(e)1. Bankston contends that the trial court erred in imposing criminal sanctions. We disagree and affirm.

[1] This is a one-judge appeal under § 752.31(2)(c), STATS.

On July 8, 1993, the department of transportation (DOT) revoked Bankston's operating privilege because of his driving record. It also found him to be an habitual traffic offender (HTO) and revoked his operating privilege because he was an HTO.

On August 20, 1993, while his operating privilege was revoked (and suspended), Bankston drove a motor vehicle on a highway. As a result, he was cited for OAR, § 343.44(1), STATS., as an HTO, § 351.08, STATS. He pleaded no contest to the charge of OAR, fifth offense, as an HTO. The trial court accepted the plea. The complaint refers to a DOT teletype, which is not of record, and alleges that Bankston was convicted of OAR on July 19, 1993, June 2, 1993, May 11, 1993, and November 10, 1992.[2]

At the sentencing hearing, Bankston asserted that all the revocations and suspensions in effect at the time of the August 20 violation were based solely on his failure to pay forfeitures, and therefore the sentencing court could only impose a civil penalty under § 343.44(2)(e)2, STATS. The court rejected his assertion and imposed a twenty-day jail sentence, a $300 fine, and costs, under § 343.44(2)(e)1, STATS. Bankston appeals.

The proper interpretation of a statute poses a question of law which we review independently from the trial court's determination. ***State v. Muniz***, 181 Wis.2d 928, 931, 512 N.W.2d 252, 253 (Ct. App. 1994). The purpose of statutory construction is to give effect to legislative intent. ***Id.*** To determine that intent, we first examine the statutory language. ***Id.***

The relevant statute, § 343.44, STATS., provides in pertinent part:

> (1) No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any

[2] In appendices to its brief, the State refers us to documents pertaining to Bankston's driving record, including a certified amended driving record, that were not considered by the trial court. We do not consider these documents because they are not part of the record.

> highway in this state during such suspension or revocation or thereafter before filing proof of financial responsibility or before that person has obtained a new license in this state, including an occupational license, or the person's operating privilege has been reinstated under the laws of this state.
>
> ....
>
> (2)(e)1. Except as provided in subd. 2., for a 5th or subsequent conviction under this section ... within a 5-year period, a person may be fined not more than $2,500 and may be imprisoned for not more than one year in the county jail.
>
> 2. If the revocation or suspension that is the basis of a violation was imposed solely due to failure to pay a fine or forfeiture and one or more subsequent convictions for violating sub. (1), the person may be required to forfeit not more than $2,500....

Bankston renews his argument that all the revocations and suspensions in effect at the time of the current violation are based solely on a failure to pay a forfeiture, and therefore subd. 2, rather than 1, applies. We reject his argument.

The accumulation of twelve demerit points in a twelve-month period results in revocation or suspension of a person's driving privilege. WIS. ADM. CODE § TRANS 101.04 (1991); § 343.32(2)(c), STATS. Both parties agree that the July 8 driving record revocation includes six points accumulated from a May 11, 1993, OAR conviction (for failure to pay a forfeiture), four points for a June 2, 1993, speeding conviction, and six points for a June 2, 1993, OAR conviction (for failure to pay a forfeiture). The points accumulated from these three violations total sixteen.

Because the demerit points from the May and June non-payment OARs total twelve, enough to result in a driving record revocation, Bankston argues that the driving revocation resulted from those OARs. He claims that

the four points accumulated from his June 2 speeding violation are "superfluous" to the revocation and are "not sufficient to provide an independent basis" for the revocation.

Bankston relies on ***State v. Biljan***, 177 Wis.2d 14, 501 N.W.2d 820 (Ct. App. 1993), ***State v. Anderson***, 178 Wis.2d 103, 503 N.W.2d 366 (Ct. App. 1993), and ***State v. Kniess***, 178 Wis.2d 451, 504 N.W.2d 122 (Ct. App. 1993), to argue that criminal penalties can be imposed only if a revocation or suspension in effect at the time of the violation is independent of any failure to pay a fine.

The ***Biljan*** court held that where defendant had multiple revocations or suspensions,

> if a revocation or suspension in effect at the time the defendant is cited for OAR or OAS [operating after suspension] was imposed for other than, or in conjunction with, the defendant's failure to pay a fine or forfeiture, the defendant's failure to pay a fine or forfeiture is not the sole basis for the revocation or suspension; therefore, sec. 343.44(2)(c)2 does not apply.

Biljan at 20, 501 N.W.2d at 823. For that reason, the court concluded that

> there is a sufficient causal relationship between the suspension for failure to post a security deposit, which is independent of Biljan's failure to pay a fine or forfeiture, and the current violation. The existence of a basis other than failure to pay a fine or forfeiture renders sec. 343.44(2)(c)2, STATS., inapplicable.

Id. The ***Anderson*** court relied on the ***Biljan*** court's language regarding sufficient causal relationship independent of failure to pay a fine or forfeiture. The court held that an OAR/OAS conviction under § 343.44(1), STATS., subjected Anderson to criminal penalties when the suspensions and revocations had been based on Anderson's failure to appear in court as well as his failure to pay a fine or forfeiture. The court concluded that "[t]he existence of a basis

other than failure to pay fine or forfeiture renders sec. 343.44(2)(e)2, STATS., inapplicable." ***Anderson***, 178 Wis.2d at 109, N.W.2d at 369 (Ct. App. 1993).

The ***Kniess*** court concluded that criminal sanctions were available where Kniess had in effect two suspensions for failure to pay a fine or forfeiture and a suspension due to his habitual traffic offender status. His HTO status was based on a "barrage of traffic crimes none of which involved failing to pay a fine or forfeiture." ***Kniess***, 178 Wis.2d at 455, 504 N.W.2d at 124.

Our prior decisions in ***Biljan***, ***Anderson***, and ***Kniess*** should not be read to mean that criminal penalties may be imposed only if a revocation or suspension in effect at the time of the violation is "independent" of any failure to pay a fine. As long as a revocation or suspension was in effect and imposed for other than, or in conjunction with, the defendant's failure to pay a fine or forfeiture, defendant's failure to pay a fine or forfeiture is not the sole reason for the revocation that is the basis of this violation.

Defendant's argument that the June 2 speeding violation is superfluous to the revocation does not withstand analysis. While the additional four speeding points may have been superfluous to defendant, they were not to the State. WIS. ADM. CODE § TRANS 101.04(3) (the former § TRANS 101.04(4), 1991) provides a sliding scale of demerit points. Any number of demerit points received between twelve and sixteen results in a two-month revocation or suspension. The State chose to count additional demerit points received beyond the minimum of twelve because violators are at risk for a longer revocation based on the total demerit points they receive.[3] Hence, the additional four points defendant earned were not superfluous, but worked in conjunction with his nonpayment OARs. Therefore, § 343.44(2)(c)2, STATS., is inapplicable.

Consequently, the trial court properly imposed criminal sanctions against Bankston.

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[3] Twelve to sixteen demerit points accumulated in a twelve-month period results in a two- month revocation or suspension; seventeen to twenty-two points in a four-month revocation or suspension; twenty-three to thirty points in a six-month revocation or suspension; more than thirty points in a one-year revocation or suspension. WIS. ADM. CODE § TRANS 101.04(3).

By the Court.—Judgment affirmed.

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