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DISTRICT II

March 13, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2459-CR

State of Wisconsin v. Thomas Koeppen (L.C. #2013CF770)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Thomas Koeppen appeals from a judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We reject Koeppen's claim that WIS. STAT. § 346.63(1), which prohibits the

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

operation of a motor vehicle while intoxicated or with a prohibited blood-alcohol concentration (OWI/PAC statute), is unconstitutionally vague as applied to him. We affirm.

In 2013, Koeppen was operating a motor bicycle while intoxicated and charged with OWI and PAC. Koeppen successfully moved to dismiss the charges, arguing that a “motor bicycle” was not a “motor vehicle” for purposes of the OWI/PAC statute. The State appealed and we reversed, stating that “a plain-language reading leads to the conclusion that a ‘motor bicycle’ is a ‘motor vehicle’ for purposes of the OWI/PAC statute, at least when the motor bicycle being operated is self-propelled, rather than pedaled.” *State v. Koeppen*, 2014 WI App 94, ¶9, 356 Wis. 2d 812, 854 N.W.2d 849. The charges were reinstated, and Koeppen pled guilty to PAC.

Koeppen filed a postconviction motion seeking to withdraw his plea on the ground that that the OWI/PAC statute is unconstitutionally vague as applied to him.² He premised his claim on the fact that the original circuit court judge who first dismissed the charges read the OWI/PAC statute as not applicable to a motor bicycle. The postconviction court rejected Koeppen’s as-applied challenge, concluding that one judge’s misinterpretation of the statute does not render it unconstitutionally vague. Koeppen appeals.

² Koeppen’s postconviction motion raised the due process violation as a claim of ineffective assistance of trial counsel. Both the postconviction court and the State, on appeal, went straight to the merits of Koeppen’s claimed constitutional violation. Likewise, this court will address the constitutional claim on its merits.

“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *State v. Grandberry*, 2018 WI 29, ¶33, 380 Wis. 2d 541, 910 N.W.2d 214 (citation omitted). In an as-applied challenge, a reviewing court assesses the merits by considering the facts of the particular case, “not hypothetical facts in other situations.” *State v. Hamdan*, 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785. “Under such a challenge, the challenger must show that his or her constitutional rights were actually violated.” *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. “It falls to the party challenging the constitutionality of a statute to prove that the statute is unconstitutional beyond a reasonable doubt.” *Grandberry*, 380 Wis. 2d 541, ¶12 (citation omitted).

Koeppen has not established a constitutional violation. The plain language of the OWI/PAC statute shows its applicability to motor bicycles. *Koeppen*, 356 Wis. 2d 812, ¶9. As we further explained, “if we consider only the words and definitions used in the OWI/PAC statute and the statutes defining ‘vehicle,’ ‘motor vehicle,’ and ‘motor bicycle,’ it is a simple matter to conclude that a ‘motor bicycle,’ at least when operated in a self-propelled manner, is a ‘motor vehicle’ for purposes of the OWI/PAC statute.” *Id.*, ¶14. That the original circuit court judge misinterpreted the statute does not render it unconstitutionally vague.

Moreover, as the circuit court explained in denying Koeppen’s postconviction motion, the statute was not unconstitutional as applied to Koeppen who, “when pursued by officers, accelerated under the motive power of the self-propelling motor.” He “was not accelerating under the motive power of the manual pedaling of the wheels.” His “feet were dangling at the side of the motor bicycle,” and “the motor switch was in the ‘on’ position when apprehended by

the officers.” A reasonable person would have understood that Koeppen was operating his motor bicycle as a motor vehicle.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals