

FWA-SPD appl.

STATE OF WISCONSIN  
IN THE SUPREME COURT

FILED

JUL 10 2000

Clerk of Supreme Court  
Madison, WI

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

Case No. 99-3142-CR

JEREMY J. HANSON,

Defendant-Appellant

## PETITION FOR REVIEW

FROM AN ADVERSE DECISION  
FILED JUNE 8, 2000, IN THE  
COURT OF APPEALS, DISTRICT IV

## DRAFTED BY:

James B. Connell

State Bar ID#1015474

CROOKS, LOW, CONNELL &  
ROTTIER, S.C.

531 Washington Street

P.O. Box 1184

Wausau, WI 54402-1184

(715) 842-2291

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### INTRODUCTION

Jeremy Hanson respectfully petitions the Supreme Court of Wisconsin, pursuant to Rules 808.10 and 809.62, Wis. Stats., for review of the Decision of the Wisconsin Court of Appeals, District IV, in State v. Hanson, Appeal No. 99-3142-CR, filed on June 8, 2000.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can a defendant be convicted of operating after revocation as a habitual traffic offender when his status as a habitual traffic offender was rescinded pursuant to §351.09, Wis. Stats., after the violation but before conviction?
2. Did Mr. Hanson waive his right to challenge his criminal conviction by entering a no contest plea?

### STATEMENT OF THE CRITERIA SUPPORTING REVIEW

This court should grant review because this case involves a fact situation likely to recur and involves issues of jurisdiction and waiver which need development and clarification.

**STATEMENT OF THE CASE**

On December 12, 1996, Jeremy Hanson was determined by the Department of Motor Vehicles to be a habitual traffic offender under Chapter 351 of the Wisconsin Statutes. His operating privilege was revoked for a period of five years. (R. 18, pg. 4).

Mr. Hanson became a habitual traffic offender because of four operating after suspension convictions. Two of those convictions were failure to pay fine suspensions and two were the result of an accumulation of points. The point accumulations were all related to license related offenses. Mr. Hanson has never had a drunk driving, reckless driving, speeding or other conviction of the rules of the road contained in Chapter 346. (R. 18, pg. 3 & 7).

On April 13, 1998, the legislature created Section 351.09, Wis. Stats., which provides:

Recalculation of habitual traffic offender status:

"Any person whose operating privilege is revoked as a habitual traffic offender or as a repeat habitual traffic offender and whose classification as a habitual traffic offender or repeat habitual traffic offender resulted from one or more convictions for violations of s. 343.44(1), or a local ordinance in conformity therewith, or the law of another jurisdiction that prohibits the

operation of a motor vehicle with a suspended or revoked operator's license, may apply to the department for recalculation of that person's status as a habitual traffic offender or repeat habitual traffic offender. Upon receiving an application under this section, the department shall recalculate whether the person's record of convictions brings the person within the definition of a habitual traffic offender or repeat habitual traffic offender. If the recalculation demonstrates that the person is not a habitual traffic offender or repeat habitual traffic offender, the department shall rescind the order declaring the applicant a habitual traffic offender or repeat habitual traffic offender. Upon the completion of the recalculation under this section, the department shall provide written notice to the person of the result of the recalculation, of the order of rescission, if any, under this section and, if appropriate, of the process for reinstating the person's operative privilege. This section does not apply on or after January 2, 2003.

On October 31, 1998, Officer Brennecke of the New London Police Department received an anonymous tip that Jeremy Hanson would be driving a blue Buick to a residence in New London and that he did not have a driver's license. Officer Brennecke staked out the residence and arrested Mr. Hanson when he observed him driving in the area of the residence. (R. 2).

Mr. Hanson was issued a citation for operating a motor vehicle after revocation of his operating privilege as a habitual traffic offender.

After the issuance of the citation, Mr. Hanson requested a recalculation under Section 351.09, Wis. Stats. On February 3, 1999, the Motor Vehicle Department rescinded Mr. Hanson's habitual traffic offender status. On May 4, 1999, Mr. Hanson pled no contest and was convicted of operating a motor vehicle after revocation as a habitual offender and he was ordered to pay a fine and court costs and serve a twenty day jail sentence. (R. 13).

Mr. Hanson brought a motion for post-conviction relief on the grounds that the criminal court lacked jurisdiction because Mr. Hanson's habitual traffic offender status had been rescinded. Judge Hoffman denied the motion.

Mr. Hanson then filed an appeal with the Court of Appeals. On June 8, 2000, the Court of Appeals issued a Decision affirming the conviction. (Ap. App. 1). The Court of Appeals concluded that Mr. Hanson waived his right to challenge the conviction and sentence when he pled no contest to the criminal charge of operating after revocation as a habitual traffic offender. Mr. Hanson seeks review of this Decision.



### ARGUMENT

I. THE TREATMENT OF MR. HANSON AS A HABITUAL TRAFFIC OFFENDER WAS IN ERROR BECAUSE MR. HANSON'S STATUS AS A HABITUAL TRAFFIC OFFENDER HAD BEEN RESCINDED PRIOR TO THE PLEA AND SENTENCE.

A. The statute permits rescission of the habitual traffic offender status.

Section 351.09, Wis. Stats., is unambiguous. It permits persons classified as habitual traffic offenders to apply to the Department of Motor Vehicles for recalculation of their status. The statute then provides:

"If the recalculation demonstrates that the person is not a habitual traffic offender or repeat habitual traffic offender, the department shall *rescind* the order declaring the applicant a habitual traffic offender or repeat habitual traffic offender." (emphasis added)

Mr. Hanson contends that because his status as a habitual traffic offender was rescinded, he cannot be convicted of operating after revocation as a habitual traffic offender.

Section 351.09, Wis. Stats., does not define the word "rescind". There is no statutory definition of the word "rescind" contained in Chapter 351. If the legislature does not assign a technical meaning to a statutory word, Sec. 990.01(1), Wis. Stats., provides that the word "shall be

construed according to common and approved usage." State v. Kirch, 222 Wis.2d 598, 587 N.W.2d 919 (Ct. App. 1998).

The words "rescind" and "recission" have a common and approved usage. In Illges v. Congdon, 248 Wis. 85, 20 N.W.2d 722 (1945), the Wisconsin Supreme Court quoted from 5 Williston, Contracts (rev. ed.), p. 4061, in defining the meaning of the words "rescind" and "recission":

"'Rescind' and 'recission' are words in ordinary use, and should have no different signification in legal terminology than they have in other connections. 'Rescind' means to abrogate or annul..."

This definition is consistent with the legal dictionary definition of "rescind". The Wisconsin Supreme Court has recognized legal dictionaries as legitimate sources for determining the ordinary and common meaning of words. Wood County v. State Bd. of Vocational, Technical & Adult Educ., 60 Wis.2d 606, 211 N.W.2d 617 (1973).

Black's Law Dictionary, 1471 (4<sup>th</sup> Ed. 1957), defines "rescind" as:

"To abrogate, annul, avoid or cancel a contract; particularly nullifying a contract by the act of a party...to declare a contract void in its inception and to put an end to it as though it never were...Not merely to terminate it and release parties from further obligation to each other but

to abrogate it from the beginning and restore parties to relative positions which they would have occupied had no contract ever been made..." (case citations omitted)

Jeremy Hanson's habitual traffic offender status was rescinded by the Department of Motor Vehicles on February 3, 1999. The legal effect of the rescission was that Mr. Hanson was put back into the position he would have been in if he had never been designated a habitual traffic offender. His status was annulled. In Wisconsin, for instance, when a marriage annulment takes place, the legal theory is that no marriage ever existed. In Re Marriage of Falk v. Falk, 158 Wis.2d 184, 462 N.W.2d 547 (Ct. App. 1990).

The act of rescission, like an annulment, declares the person's status as void at its inception. The effect of the Motor Vehicle Department's recalculation of the habitual traffic offender status was to put Mr. Hanson back in the status he was in before he was determined to be a habitual traffic offender.

The words used by the legislature are unambiguous. The recalculation by the Department of Motor Vehicles nullified Mr. Hanson's status as a habitual traffic offender. Being classified as a habitual traffic offender is not a separate

offense. It is a status. State v. Taylor, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992). Because Mr. Hanson's status as a habitual traffic offender was rescinded — that is nullified, annulled and voided — the court was precluded from imposing a criminal penalty on him based upon the habitual traffic offender status.

**B. Treating the rescinded habitual traffic offender status as a nullity is consistent with the legislature's intent.**

Mr. Hanson contends that resort to legislative intent in this case is unnecessary because the statute is clear and unambiguous. If, however, legislative intent were considered, it is evident that the legislature intended to exclude persons like Mr. Hanson from the enhanced penalties based upon habitual traffic offender status.

The creation of Sec. 351.09 followed the recommendation of the 1995 Governor's task force on operating after revocation and operating under the influence.

The task force submitted recommendations for changes in the OAR, OWS and HTO statutes. The revisions were passed as 1997 Wisconsin Act 84. In August, 1998, the Department of

Transportation put into effect Act 84 provisions relating to habitual traffic offender status calculations.

The intent of the task force in proposing revisions to the statutes was to reserve the imposition of criminal penalties for operating after revocation to a limited number of serious cases. The task force recommendations adopt penalties based upon whether a person's privilege is suspended or revoked. Persons who operate while revoked face criminal penalties. Persons who operate while suspended face civil penalties. Sobotik, OAR and OWS Law Changes Begin, Vol. 73, Wisconsin Lawyer No. 2, p. 24, February, 2000.

The task force recommendations concerning the habitual traffic offender law make operating while suspended a minor as opposed to a major offense for habitual traffic offender purposes. Jeremy Hanson's predicate offenses were all operating after suspension violations. The task force recommendations make it plain that such violations should not form the basis of habitual offender status.

The Legislative Reference Bureau analysis of the new law provides that the law:

"Was designed to make two general changes to the OWS and OAR laws. First, it makes OWS a civil

infraction (punishable only by a forfeiture); and OAR a crime (punishable only by a fine or imprisonment), regardless of the underlying offense that lead to the suspension or revocation. Second, the bill reorganizes the sanctions of suspension and revocation so that an operating privilege may generally be revoked only for serious driving related offenses, such as operating while intoxicated, hit and run and eluding a traffic officer. An operating privilege may be suspended for any other offense."

The intent of the legislature was to treat offenders such as Mr. Hanson whose offenses involve operating after suspension for failure to pay fines or forfeitures or for related accumulation of points as civil offenders rather than criminal.

**C. The statute should be strictly construed.**

Jeremy Hanson contends Sec. 351.09, Wis. Stats., is unambiguous and that, if ambiguity exists, legislative history supports his interpretation of the statute. If, however, the court finds ambiguity that is not clarified by legislative history, the Rule of Lenity should be applied. This rule of construction provides that penal statutes should be strictly construed against the state and in favor of criminal defendants. A corollary principle provides that, in cases of doubt regarding the severity of the penalty prescribed by the



law, the court must favor the milder penalty over the harsher one. In State v. Wilson, 77 Wis.2d 15, 252 N.W.2d 64 (1977), the Supreme Court explained the public policy behind this rule of construction as follows:

"The canon of strict construction is grounded on policy. Since it is within the power of the lawmakers, the burden lies with them to relieve the situation of all doubts. 3 *Sutherland on Statutory Construction*, sec. 59.03, p. 7 (3d ed. 1968-1973). And 'since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it'."

II. THE CIRCUIT COURT OF WAUPACA COUNTY LACKED JURISDICTION OVER THE CRIMINAL PROCEEDING ONCE MR. HANSON'S HABITUAL TRAFFIC OFFENDER STATUS WAS RESCINDED.

The Court of Appeals did not address the issue of whether Judge Hoffman erred in imposing criminal penalties on Mr. Hanson for operating after revocation. The court concluded that Mr. Hanson waived his right to challenge the criminal conviction and jail sentence when he pled no contest to the charge. (Ap. App. 1).

The issue of waiver was not argued on post-conviction motion or in the briefs filed with the Court of Appeals. The Court of Appeals, nonetheless, found waiver and further found

none of the exceptions to the waiver rule applied to this case.

Mr. Hanson contends that one of the well recognized exceptions to the waiver rule applies in this case. The trial court lacked jurisdiction over this matter at the time of the entry of the no contest plea.

Criminal subject matter jurisdiction has been defined by the Supreme Court as the power to inquire into the charged crime, to apply the applicable law and to declare the punishment in a court of judicial proceeding. Mach v. State, 93 Wis.2d 297, 286 N.W.2d 563 (1979).

Subject matter jurisdiction cannot be conferred on the court by consent. Similarly, an objection to subject matter jurisdiction cannot be waived. Kelly v. State, 54 Wis.2d 475, 195 N.W.2d 457 (1972).

Mr. Hanson contends the Circuit Court of Waupaca County lacked jurisdiction over the criminal case because his status as a habitual traffic offender was rescinded. This jurisdictional defect cannot be waived. In Wisconsin, a plea of guilty or no contest admits the facts charged but not the crime. State v. Pohlhammer, 78 Wis.2d 516, 254 N.W.2d 478



(1977). In fact, because Mr. Hanson's status as a habitual traffic offender had been rescinded, the conviction should have been a civil forfeiture matter rather than a criminal conviction.

The United States Supreme Court has held that when a state may not convict a person of a crime no matter how validly his factual guilt is established, a guilty plea does not bar review of the conviction. Menna v. New York, 423 US 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). Menna dealt with a defendant's claim of double jeopardy. The Wisconsin Supreme Court has permitted appeals after guilty or no contest pleas in cases involving statute of limitation defenses and in cases where statutes were amended or repealed prior to conviction. State v. Pohlhammer, *supra*; Truesdale v. State, 60 Wis.2d 481, 210 N.W.2d 726 (1972); State v. Ingersoll, 17 Wis. 651 (1864).

In State v. White, 112 Wis.2d 178, 332 N.W.2d 756 (1983), the Supreme Court stated that it has not yet determined the exact boundaries of the general rule that a voluntary entry of a guilty plea waives the right to appeal.

This case, involving as it does, no issue of fact but strictly a legal issue of whether the Circuit Court had

jurisdiction to impose a criminal penalty, presents the significant question of what claims may or may not be barred by pleas of guilty or no contest.

**CONCLUSION**

Mr. Hanson respectfully requests the Supreme Court accept the Petition for Review for the reasons set forth above.

Respectfully submitted,

CROOKS, LOW, CONNELL &  
ROTTIER, S.C.



James B. Connell  
State Bar ID#1015474  
Attorney for Appellant

POST OFFICE ADDRESS:  
531 Washington Street  
P.O. Box 1184  
Wausau, WI 54402-1184  
(715) 842-2291

**CERTIFICATION**

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(b) and (c) for a brief and appendix produced with a monospaced font. The length of this Brief is fourteen (14) pages.

  
James B. Connell