COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 7, 1996

NOTICE

No. 95-3395-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT J. KETNER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Shawano County: EARL W. SCHMIDT, Judge. *Modified and, as modified, affirmed.*

LaROCQUE, J. Robert Ketner appeals a judgment of conviction for operating a vehicle while under the influence of an intoxicant (OWI), second offense, and operating a motor vehicle with a blood alcohol concentration (BAC) of .10% or greater. The arresting officer testified he stopped Ketner because Ketner's car had a defective headlight and he was speeding. Ketner argues that the trial court erred by (1) concluding that there was probable cause for the stop without explicitly finding that Ketner was speeding or that his car's headlight was defective, (2) relying on the arresting officer's testimony when there was evidence contradicting the officer's version of the facts, and (3) failing to dismiss either the OWI or the BAC count as required by § 346.63(1)(c), STATS.[1]

[1] Section 346.63(1), STATS., provides in part:

This court rejects Ketner's arguments because: (1) The trial court implicitly found that the headlight was defective and Ketner was speeding, (2) judging the credibility of competing testimony is within the province of the trial court, and (3) although § 346.63(1)(c), as interpreted by case law, requires dismissal of one of the counts, the trial court's failure to dismiss is harmless error because the court treated both convictions as one offense for purposes of sentencing and counting convictions.

Shawano police officer Jeffrey Heffernon testified that on October 22, 1994, at 3:14 a.m., he was traveling the speed limit in a twenty-five-mile-per-hour zone when he noticed Ketner's vehicle approaching rapidly from behind. Heffernon testified that Ketner's vehicle had a defective headlight. He stopped the vehicle for both the defective headlight and speeding.

When Heffernon approached Ketner's vehicle, he noticed the odor of intoxicants. Heffernon administered field sobriety tests and an Intoxilyzer test. Based on the results of these tests, Heffernon cited Ketner with operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(a), STATS., and operating a motor vehicle with a BAC greater than or equal to .10% contrary to § 346.63(1)(b), STATS.

(..continued)

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a prohibited alcohol concentration.

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30 (1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

Ketner brought a motion to suppress evidence, alleging that the stop was illegal because Heffernon did not have reasonable grounds to believe Ketner was violating or had violated a traffic regulation when he stopped him.[2] *See* § 345.22, STATS. At the motion hearing, Ketner testified that his headlights provided "fine light" on the night he was arrested and that his headlights both worked the morning after the arrest. The affidavit of Ketner's mechanic stated that he checked the headlights of Ketner's vehicle the day before Ketner was arrested and found them to be in working order. Ketner also challenged the officer's observation that Ketner was speeding on grounds that the officer did not use radar or the pacing method to measure speed.

The trial court ruled that Heffernon had reasonable grounds for the stop. Ketner then argued that either the OWI count or the BAC count should be dismissed pursuant to § 346.63(1)(c), STATS. The trial court refused to dismiss either count, but noted that both counts are treated as one for purposes of sentencing and counting convictions. Ketner pled guilty to both counts with the understanding that he could withdraw his pleas if the trial court's decision was overturned on appeal.

Ketner first argues that the trial court erred by concluding that Heffernon had a reasonable basis to stop him. His argument is based upon the court's failure to make an express factual finding that either Ketner's headlights were defective or that he was speeding. The trial court stated:

> [T]he affidavit from [the mechanic], if it would have been the day of the incident or the morning after as to whether the lights were working or not, would certainly be more probative. Of course, Mr. Ketner testified they were working. I guess that's not dispositive on the issue of whether it was working at the time the officer said it wasn't. ...

[2] In the motion to the trial court Ketner also claimed the arresting officer failed to observe Ketner for 20 minutes prior to administering the breath test. Ketner does not pursue this claim on appeal.

> But I think clearly the officer's testimony with regard to the speed is other than Mr. Ketner saying he was driving twenty-five. ... [T]his trier of fact's observation and the knowledge and experience in the affairs of life would indicate clearly that if you are going twenty-five and someone is coming up on you rapidly, you know they are going faster than twenty-five. So the officer made the stop. He has probable cause to stop the vehicle I think on both counts ....

This court may conclude that a missing finding on an issue "was determined in favor of or in support of the judgment." ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). This court concludes that the trial court implicitly found that Ketner's headlight was defective and that Ketner was speeding at the time Heffernon stopped him.

Next, Ketner argues that the trial court could not reasonably find that either his headlight was defective or he was speeding. This court does not set aside findings of fact by a trial court unless the findings are clearly erroneous. Section 805.17(2), STATS. Ketner does not dispute that Heffernon's testimony supports both of these findings; rather, he refutes Heffernon's testimony based on his own testimony and his mechanic's affidavit that his headlights worked the day before the arrest. The weight of the evidence and the credibility of witnesses are matters entirely within the province of the trier of fact. ***Lac La Belle Golf Club v. Village of Lac La Belle***, 187 Wis.2d 274, 289, 522 N.W.2d 277, 283 (Ct. App. 1994). This court rejects Ketner's argument.

Third, Ketner argues that the trial court erred by failing to dismiss either the OWI count or the BAC count. Section 346.63(1)(c), STATS., provides that if a person is found guilty of both OWI and BAC "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions ...." ***Town of Menasha v. Bastian***, 178 Wis.2d 191, 195, 503 N.W.2d 382, 383 (Ct. App. 1993), interpreted this subsection: "In other words, the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed." The trial court treated the convictions as one for purposes of sentencing and noted that the convictions would be treated as one for purposes of counting convictions, but refused to dismiss one of the convictions. Because this court is bound by the published

decisions of another district, the BAC count must be deemed dismissed. *See* ***State v. Lee***, 157 Wis.2d 126, 130 n.4, 458 N.W.2d 562, 563 n.4 (Ct. App. 1990).

Although the case law suggests one of the charges must be dismissed, the error is harmless. Ketner does not contend that he was prejudiced by the court's failure to dismiss one of the charges as long as the charges are treated as one for purposes of sentencing and counting convictions. This court is authorized to reverse a judgment only where an error in the trial court prejudiced the complaining party's case. Section 805.18(2), STATS. This court therefore modifies the judgment dismissing the BAC count.

By the Court. – Judgment modified and, as modified, affirmed.

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