

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0373

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF CUBA CITY,

Plaintiff-Respondent,

v.

RANDALL D. KIEFFER,

Defendant-Appellant.

APPEAL from final judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

ROGGENSACK, J. The defendant, Randall D. Kieffer (Kieffer), appeals the denial of his motion to dismiss charges of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and operating a commercial vehicle with a prohibited blood alcohol concentration (BAC), and also his conviction. On appeal¹, Kieffer contends that the initiation of a criminal OMVWI/BAC prosecution subsequent to the imposition of an administrative

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

suspension of driving privileges violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Kieffer's argument is contrary to controlling precedent. Accordingly, the decision of the trial court is affirmed.

On October 28, 1995, Cuba City Chief of Police Kevin Atkinson (Atkinson) received two citizen reports of a semi-truck being driven in an erratic manner. Upon investigation, Atkinson observed Kieffer's semi jack-knifing while attempting to make a U-turn on a small city street. As Atkinson approached the semi, Kieffer exited his vehicle and admitted that he had been drinking. Atkinson performed a preliminary breath test on the scene and got a reading between .20 and .23. After Kieffer failed a chemical test for intoxication less than three hours later, his operating license was administratively suspended pursuant to § 346.305, STATS. Subsequently, Kieffer was charged in a criminal complaint with violations of §§ 346.63(1)(b) and (7), STATS. The trial court denied suppression and double jeopardy motions by Kieffer, adjudged him guilty and fined him.

Kieffer argues that the administrative suspension of his operating privileges constituted a "punishment" to which double jeopardy attached, precluding a criminal OMVWI/BAC prosecution. His contention requires analysis of both the Fifth Amendment² and Wisconsin's Implied Consent Law, § 343.305, STATS. Because the question involves the application of constitutional principles to undisputed facts, the issue is reviewed *de novo*. *State v. Pheil*, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. This Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a

² Article I, sec. 8 of the Wisconsin Constitution also provides that "no person for the same offense may be put twice in jeopardy of punishment." However, because Wisconsin interprets its double jeopardy clause in accordance with the rulings of the United States Supreme Court, *State v. Kurzawa*, 180 Wis.2d 502, 522, 509 N.W.2d 712, 721, ___ U.S. ___, 114 S.Ct. 2712, 129 L.Ed.2d 839 (1994), and because the defendant does not raise the Wisconsin constitutional issue, this analysis is limited to the federal clause.

conviction; and (3) protection against multiple punishments for the same offense. *State v. Kurzawa*, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, cert. denied, ___ U.S. ___, 114 S.Ct. 2712, 129 L.Ed.2d 839 (1994). Kieffer argues that he was subjected to multiple punishments for the same offense, contrary to the third protection afforded by the Double Jeopardy Clause.

A civil penalty may constitute "punishment" when the penalty serves the goals of punishment, such as retribution or deterrence. *United States v. Halper*, 490 U.S. 435, 448, 109 S.Ct. 1892, 1901-02, 104 L.Ed.2d 487 (1989). However, the Wisconsin Court of Appeals has already determined that § 343.305, STATS. is remedial in nature because it was enacted to keep drunken drivers off the road. *State v. McMaster*, 198 Wis.2d 542, 548, 543 N.W.2d 499, 501, petition for review granted, 546 N.W.2d 468 (1996). In other words, the primary purpose of the implied consent law is to protect innocent drivers and pedestrians, rather than to punish drunken drivers. *Id. McMaster* represents the current state of Wisconsin law, and is binding on this court. Therefore, Kieffer's criminal prosecution for operating a motor vehicle while intoxicated, after the administrative suspension of his operating privileges, did not constitute multiple punishments, and did not violate the Double Jeopardy Clause.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4., STATS.