

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 22, 1997

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. 96-0523-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE M. MILLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Affirmed.*

ANDERSON, J. Eddie M. Miller appeals from a judgment of conviction for a fifth offense operating after revocation. Miller argues that his conviction is invalid because he has never been issued a driver's license from Wisconsin or any other jurisdiction. We disagree and affirm the judgment of conviction.

Miller filed a motion to dismiss the criminal traffic complaint on the grounds that it failed to state probable cause because he has never had an

operator's license. The trial court denied the motion. In lieu of the presentation of evidence, the facts were submitted to the circuit court by stipulation. The essential facts are that Miller has never held a valid driver's license issued by Wisconsin and when he was stopped on May 10, 1994, his operating privilege was revoked. Based on these facts, the circuit court found Miller guilty.¹

The issue before us concerns a matter of statutory construction presenting a question of law. We review such questions de novo, without giving deference to the trial court's ruling. *In re T.L.*, 151 Wis.2d 725, 730-31, 445 N.W.2d 729, 731 (Ct. App. 1989). Similarly, the application of a statute to undisputed facts also presents a question of law. *City of Milwaukee v. Greenberg*, 157 Wis.2d 326, 329, 459 N.W.2d 588, 590 (Ct. App. 1990), *rev'd on other grounds*, 163 Wis.2d 28, 471 N.W.2d 33 (1991).

Section 343.44(1), STATS., the operating after revocation statute, provides in part:

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 highway in this state during such suspension or revocation or thereafter before filing proof of financial responsibility or before he has obtained a new license in this state or his operating privilege has been reinstated under the laws of this state.... [Emphasis added.]

¹ Appellate counsel for Miller originally submitted a no merit report pursuant to § 809.32, STATS., which we rejected because the question of whether a person who has never had an operator's license could be charged and convicted of operating after revocation appeared to be a question of first impression.

This statute does not refer to an operating or driving license. Rather, it refers to an operating privilege.

Section 340.01(40), STATS., defines operating privilege, in part, as follows:

“Operating privilege” means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; *in the case of a resident of this state who is not so licensed, it means the **privilege** to secure a license under ch. 343;* [Emphasis added.]

Although Miller was not licensed at the time of the instant offense, he nonetheless carried the privilege to secure a license. Pursuant to § 343.44(1), STATS., one whose operating privilege, whether executed or not, has been revoked and who has failed to obtain a license is liable for prosecution for operating after revocation.

Despite the clear and unambiguous language of the statutes, Miller finds ambiguity when he reads § 343.44, STATS., in conjunction with § 343.05(3)(a) and (6), STATS. These subsections provide:

- (3) NONCOMMERCIAL VEHICLES. Except as provided in sub. (4):
 - (a) No person may operate a motor vehicle which is not a commercial motor vehicle upon a highway in this state unless the person possesses a valid operator's license issued to the person by the department which is not revoked, suspended, canceled or expired.
- (6) OTHER OFFENSES; PENALTIES. Section 343.44 and the penalties thereunder shall apply in lieu of this section to any

person operating a motor vehicle upon a highway in this state with an operator's license which is revoked or suspended.

From these two statutory sections, Miller constructs two arguments. First, he argues that it is the legislature's intent that individuals not holding an operator's license² are subject solely to the penalties in § 343.05, STATS.; if the legislature wanted such individuals to be subject to § 343.44, STATS., it never would have created § 343.05. Second, he reasons that according to § 343.05(6), because he has never possessed an operator's license, § 343.44 does not apply.

In making this argument, Miller implicitly assumes that his only problem is that he does not have an operator's license; he ignores his real problem: his privilege to secure an operator's license has been revoked. If Miller's assumption was correct, his argument would be correct. If he operated a motor vehicle without an operator's license, he would be prosecuted under § 343.05, STATS. However, he operated a motor vehicle after his privilege to secure a license had been revoked; therefore, he can only be prosecuted under § 343.44, STATS.

Under the licensing scheme of the Motor Vehicle Code there are two categories of residents. The first category includes those residents who are

² Section 340.01(41g), STATS., defines an "operator's license" [as] the authorization granted to a person by this state, another jurisdiction or certain countries to operate a motor vehicle, including a driver's license, temporary or restricted license or an instruction permit."

licensed to operate a motor vehicle and the second category includes those residents who are not licensed. Miller is in the latter category and in his case “operating privilege” is the privilege to apply for and receive an operator’s license. Because his right to secure an operator’s license has been revoked, § 343.05, STATS., does not apply.

We conclude that the statutes are unambiguous and the trial court properly denied Miller’s motion to dismiss the action and correctly found him guilty of operating after revocation.

By the Court. – Judgment affirmed.

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