

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 5, 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. 96-1342-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JEROME M. WYWIAL,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

ROGGENSACK, J. The defendant, Jerome M. Wywial (Wywial), appeals the denial of his motion to dismiss one count of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and his conviction. On appeal<sup>1</sup>, Wywial contends that the initiation of a criminal OMVWI prosecution subsequent to the imposition of an administrative suspension of his driving privileges violates the Double Jeopardy Clause of the Fifth Amendment

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

of the United States Constitution. Wywial's argument is contrary to controlling precedent. Accordingly, the decision of the trial court is affirmed.

## BACKGROUND

On October 5, 1994, Wywial was stopped after the officer observed his vehicle weaving in and out of his lane of travel. The officer noted Wywial smelled strongly of alcohol, his eyes were blood shot, his speech was slow and he admitted having had six or seven beers. When he exited the car, he staggered. Wywial agreed to take a preliminary breath screening test, which registered 0.21. He was arrested for OMVWI and operating a motor vehicle with a prohibited blood alcohol concentration, in violation of §§ 346.63(1)(a) and (b), STATS.

After he failed a chemical test for intoxication with a reading of 0.20 at the Rock County Jail, Wywial was served with a Notice of Intent to Suspend Operating Privilege; and his driver's license was administratively suspended pursuant to § 343.305, STATS.

Based on the occurrences of October 5th, Wywial was charged in a criminal complaint. He filed a Motion to Dismiss the Complaint, on double jeopardy grounds because of the administration suspension. The trial court denied the motion. Wywial then pled no contest to the OMVWI. The court adjudged him guilty; sentenced him to jail; imposed a fine; suspended his license; and ordered an alcohol assessment.

## DISCUSSION

### **Scope of Review.**

Wywial argues that the administrative suspension of his operating privileges is a "punishment"; and therefore, prosecution of the OMVWI constitutes placing him twice in jeopardy of punishment for the same offense, in violation of the Double Jeopardy Clause. His contention requires analysis of

both the Fifth Amendment of the United States Constitution<sup>2</sup> and Wisconsin's Implied Consent Law, § 343.305, STATS. Because the question involves the application of constitutional principles to undisputed facts, the issue will be reviewed *de novo*. *State v. Pheil*, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

### Double Jeopardy.

The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The 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 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). Wywial argues that he was subjected to multiple punishments for the same offense, contrary to the third prong of double jeopardy analysis.

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 (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, Wywial'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.

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<sup>2</sup> 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, 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 (1984), and because the defendant does not raise the Wisconsin constitutional issue, this analysis is limited to the federal clause.

*By the Court.*--Judgment affirmed.

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