

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 27, 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. 96-1956-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES A. TOAL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed.*

ROGGENSACK, J. Charles A. Toal appeals the denial of his motion to dismiss charges of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and with a prohibited alcohol concentration (PAC), and his judgment of conviction on the PAC charge. Toal contends that the initiation of a criminal OMVWI/PAC prosecution subsequent to the imposition of an administrative suspension of driving privileges violates the Double Jeopardy Clause of the Fifth Amendment of the United States

Constitution. Toal's argument is contrary to controlling precedent. Accordingly, the decision of the trial court is affirmed.¹

BACKGROUND

On May 7, 1995, at approximately 10:45 p.m., Toal was stopped and arrested for operating a motor vehicle while under the influence of an intoxicant and while having a prohibited alcohol concentration, contrary to §§ 346.63(1)(a) and (b), STATS. A breath test administered at 11:24 p.m. showed an alcohol concentration of 0.21%. As a result, Toal's driver's license was administratively suspended pursuant to § 343.305(7), STATS. Subsequently, Toal was charged with violations of §§ 346.63(1)(a) and (b). After the trial court denied his motion to dismiss on double jeopardy grounds, Toal pled no contest to the PAC count, and the court imposed an \$800.00 fine plus costs and a 20-day jail sentence. This appeal followed.

DISCUSSION

Scope of Review.

Toal argues that the administrative suspension of his operating privileges constituted a "punishment" to which double jeopardy attached, precluding a criminal OMVWI/PAC 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, our review is *de novo*. *State v. Pheil*, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

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

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, *cert. denied*, 114 S.Ct. 2712 (1994), and because the defendant does not raise the Wisconsin

Double Jeopardy.

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. amend. V. 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, 114 S.Ct. 2712 (1994). Toal 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, (1989). However, this court 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* is controlling precedent. Therefore, Toal'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. The judgment of the trial court is affirmed.

CONCLUSION

Toal's criminal prosecution for OMVWI/PAC is not barred by the Double Jeopardy Clause of the Fifth Amendment, despite the prior administrative suspension of his driving privileges for the same incident.

By the Court. — Judgment affirmed.

(..continued)

constitutional issue, this analysis is limited to the federal clause.

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