

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 6, 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. 96-2085-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ERNEST L. SMITH,

Defendant-Respondent.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

DEININGER, J.¹ The State appeals from an order dismissing a criminal complaint against Ernest Smith. He had been charged with sixth-offense operating a motor vehicle after his operating privileges were revoked (OAR), in violation of § 343.44(1) and (2)(e)1, STATS. The trial court dismissed the criminal complaint and directed the prosecution to proceed as a forfeiture violation under § 343.44(2)(e)2. The State argues that § 343.44(2)(e)2 does not apply because: (1) the instant charge is based on a revocation of Smith's

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

operating privileges due to his habitual traffic offender (HTO) status; and (2) Smith's HTO status was not based exclusively on previous suspensions for failure to pay forfeitures (FPF). We conclude, however, that § 343.44(2)(e)2 does apply on these facts, and we affirm the order dismissing the criminal complaint.

BACKGROUND

At the outset, it should be noted that Smith would have us affirm the trial court based on the court's "factual finding" that "the only revocations in effect at the time of this offense were for failures to pay fines." We previously ordered a copy of Smith's official Department of Transportation (DOT) driving record stricken from the appendix to the State's brief. We also ordered the State to make no references to the official DOT driving record in its brief, and we denied the State's motion to supplement the appeal record with the DOT driving record. These previous orders were based on the fact that the official DOT driving record had not been introduced into evidence in the trial court. We do not allow parties to develop the evidentiary record on appeal.

The disposition of this appeal, however, is not so simple as Smith would have it. We have reviewed the record, which includes: the briefs filed by the State and Smith in the trial court, a transcript of the arguments by counsel, and the trial court's bench decision on Smith's motion to dismiss the complaint. Even though Smith's official DOT driving record is not a part of the record, it is clear that Smith conceded, and the trial court considered, the facts which follow.

On June 6, 1995, DOT determined that Smith was a habitual traffic offender and ordered a five-year revocation of his operating privileges. On that date, Smith had accumulated three convictions for operating after suspension (OAS) where the underlying suspensions were for failure to pay fines or forfeitures.² He also had been convicted of OAR on May 1, 1995, the offense which apparently triggered the HTO determination.³ The revocation

² The convictions for OAS-FPF occurred on July 14, October 18, and December 7, 1994.

³ See § 351.02(1)(a)4, STATS., (HTO status applies to a driver accumulating four or more convictions of OAS/OAR within five-year period). Smith stated in his trial court brief that the June 6, 1995, HTO determination was also based on an October 26, 1995, conviction for

underlying the May 1, 1995, OAR conviction was based on Smith's driving record.⁴

Thus, on December 23, 1995, the date of the instant offense, the following were in effect: several suspensions for FPF, and the June 6, 1995, HTO revocation. There were no other revocations or suspensions in effect.⁵ The trial court was aware of these facts, and it considered them in reaching its decision, stating: "[w]ell, the HTO, he could have had those obligations without the failure to pay fines and he wouldn't be HTO. Without the failure to pay fines he's not HTO;" and "[n]ow, granted, part of that HTO, part of that driving record back some years included some -- or at least one on OWI revocation⁶ but that revocation had terminated and it is not in effect at the time of this offense."

The trial court's statement that "there was only in effect suspensions or revocations for failure to pay fine" represents the court's legal conclusion from the facts before it, not a factual finding by the trial court. Based on this conclusion, the trial court granted Smith's motion to dismiss the criminal complaint and ordered that "Mr. Smith's case be treated as a forfeiture violation."

(. . . continued)

OAR. This cannot be since the HTO determination preceded that conviction.

⁴ The driving record revocation was imposed by DOT on September 27, 1994, for one year. Smith had accumulated demerit points from his July 14, 1994, conviction for OAS-FPF (8), and from an August 3, 1994, conviction for inattentive driving (6).

⁵ The one-year revocation for driving record expired on September 27, 1995. Smith had not reinstated his privileges following the expiration of that revocation, and thus he could have been charged with OAR on that basis alone. Section 343.44(1), STATS. For purposes of determining whether civil or criminal penalties apply under § 343.44(2), however, the failure to reinstate following this revocation is disregarded. *State v. Muniz*, 181 Wis.2d 928, 933, 512 N.W.2d 252, 253-54 (Ct. App. 1994) (failure to reinstate after demerit point suspension expired does not render instant OAR criminal). It could be argued that the holding in *Muniz* is contrary to certain language in *State v. Biljan*, 177 Wis.2d 14, 21-22, 501 N.W.2d 820, 823 (Ct. App. 1993). We rely on *Muniz*, however, since it is the more recent case and it is more directly on point with the present facts. The State has not argued that the driver record revocation was still in effect.

⁶ This is not correct. The record does not indicate any prior revocations for OMVWI. The court appears to be referring to the driving record revocation discussed above which expired on September 27, 1995.

ANALYSIS

The proper application of a statute to undisputed facts is a matter of law which we decide without deference to the trial court's opinion. *State v. Michaels*, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). The statute at issue in this appeal is § 343.44(2)(e), STATS., which provides:

1. Except as provided in subd. 2., for a 5th or subsequent conviction under this section or a local ordinance in conformity with this section within a 5-year period, a person may be fined not more than \$2,500 and may be imprisoned for not more than one year in the county jail.
2. If the revocation or suspension that is the basis of a violation was imposed solely due to a failure to pay a fine or a forfeiture, or was imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating sub. (1), the person may be required to forfeit not more than \$2,500. This subdivision applies regardless of the person's failure to reinstate his or her operating privilege.

The State argues that this case is governed by *State v. Kniess*, 178 Wis.2d 451, 504 N.W.2d 122 (Ct. App. 1993). In that case, we held that an HTO revocation which was "imposed for reasons other than Kniess's failure to pay a fine or forfeiture" could form the basis for criminal prosecution under § 343.44(2)(e)1, STATS. *Kniess*, 178 Wis.2d at 456, 504 N.W.2d at 124. In that case, however, "none" of the "barrage of traffic crimes and violations" which resulted in the HTO status were based on failing to pay a fine or forfeiture. *Id.* at 455, 504 N.W.2d at 124 (emphasis supplied).

Smith, on the other hand, has relied on *State v. Taylor*, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992). In *Taylor*, we held that where an HTO revocation is based *solely* on suspensions for failure to pay fines or forfeitures, the HTO revocation cannot form the basis for a criminal prosecution for OAR. Only a civil prosecution under § 343.44(2)(e)2, STATS., is permissible in that circumstance. *Id.*, at 528-30, 489 N.W.2d at 666-67.

The problem, of course, is that the facts in this case lie squarely between *Taylor* and *Kniess*. Here, Smith's HTO status is based in part on OAS offenses stemming solely from FPF suspensions, and in part on an OAR offense based on a revocation for other than FPF. Thus, the question on this appeal is: which penalties apply to an OAR conviction based on an HTO revocation, where the HTO stems in part from FPF suspensions and in part from a revocation for other than FPF?

We conclude that the trial court correctly applied § 343.44(2)(e)2, STATS., to these facts. The rationale of our holding in *State v. Taylor*, 170 Wis.2d at 530, 489 N.W.2d at 667, is that HTO is not an offense; it is a status. We held in *Taylor*, that if HTO status is based solely on FPF suspensions, it cannot convert noncriminal conduct into criminal conduct.

[O]ur decision in *Taylor* rested upon the fact that the legislature chose not to denominate habitual traffic offender status as a separate offense. Thus, in *Taylor*, there was no intervening revocation or suspension that was imposed for an offense separate from a failure to pay a fine or forfeiture.

State v. Biljan, 177 Wis.2d 14, 20-21, 501 N.W.2d 820, 823 (Ct. App. 1993).

Like *Taylor*, Smith was without a driver's license on the date of the instant offense because his driving privileges were suspended for FPF and because DOT had conferred upon him the status of HTO. Unlike *Kniess*, whose HTO status was related *in toto* to "a barrage" of non-FPF-related offenses, Smith's HTO status stems in large measure from his prior OAS-FPF convictions. We conclude that § 343.44(2)(e)2, STATS., applies to the instant offense because "the revocation or suspension that is the basis of [the instant] violation was imposed ... solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating [§ 343.44](1)."

The State argues that we must conclude here, as we did in *Biljan* and *Kniess*, that "there is a sufficient causal relationship between the suspension [in effect] which is independent of [Smith's] failure to pay a fine or forfeiture." *Biljan*, 177 Wis.2d at 20, 501 N.W.2d at 823. We cannot do so. But for the three prior OAS-FPF convictions, Smith would have not been declared an HTO on

June 6, 1995. Without the FPF-related convictions, he would have had only one HTO criterion offense, instead of four.⁷

Since Smith's other suspensions and revocations had expired, leaving in effect only his suspensions for FPF and his HTO revocation stemming in large part from FPF-related offenses, the instant offense must be prosecuted as a civil forfeiture action.⁸

By the Court.—Order affirmed.

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

⁷ Except for his FPF-related offenses, Smith might not have had even the one remaining HTO criterion offense—the May 1, 1995, conviction for OAR based on a driving record revocation. It appears that his driving record revocation was also based in part on a prior OAS-FPF conviction.

⁸ We note that the criminal versus civil penalty provisions of § 343.44(2), STATS., have been the subject of numerous published and unpublished opinions of this court in recent years. See the cases above and *State v. Anderson*, 178 Wis.2d 103, 503 N.W.2d 366 (Ct. App. 1993); *State v. Bankston*, No. 94-1745-CR, unpublished slip op. (August 10, 1995); *State v. Graham*, No. 95-1520, unpublished slip op. (July 31, 1996); *State v. Grulich*, No. 95-2549-CR, 2551-CR and 2552-CR, unpublished slip op. (January 24, 1996). It could well be argued that the language of the statute has created confusion among prosecutors, defense attorneys and trial courts over the proper application of these statutes to specific driver histories. It could also be argued that our opinions have not assisted in dispelling this confusion. We believe that the penalty provisions of § 343.44, STATS., would benefit from legislative attention.