

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 23, 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.

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

**No. 97-0808-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SHAWN D. DULEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed.*

SNYDER, P.J. Shawn D. Duley appeals from his conviction for operating a motor vehicle after revocation (OAR) in violation of § 343.44(1), STATS.<sup>1</sup> Because Duley's driving record showed that he had been convicted of violating this statutory section on five other occasions within the past five years,

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<sup>1</sup> This subsection was amended by 1995 Wis. Act 113, § 196. The changes are not pertinent to our analysis here.

and that at the time of the current offense Duley's operating privileges were suspended due to his accumulation of more than twelve demerit points, including nine points for speeding and imprudent speed, the State sought the imposition of criminal penalties. *See* § 343.44(2)(e)1. The trial court found that the criminal penalties were applicable; Duley now appeals. We conclude that the trial court was correct in its analysis and affirm.

The instant offense which underpins this appeal occurred on June 7, 1995. As of that time, Duley had twelve other active suspensions within the previous five years which were based solely upon his failure to pay past fines and forfeitures. Each of these suspensions was for a five-year period. Duley continued to operate his vehicle in spite of the suspensions; he was convicted on February 21, 1994, of speeding and imprudent speed. These two convictions resulted in the imposition of five and four demerit points respectively. Following this, on both July 7, 1994, and August 15, 1994, he was assessed eight demerit points after being convicted of operating after suspension. On August 26, 1994, the Department of Transportation (DOT) suspended Duley's operating privileges for one year based on his accumulation of more than twelve demerit points within a one-year period. *See* § 343.32(2)(c), STATS.

The DOT then revoked Duley's operating privileges for five years on November 1, 1994, due to his status as a habitual traffic offender.<sup>2</sup> The instant offense occurred during these concomitant periods of suspension and revocation.

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<sup>2</sup> The record does not contain a copy of this revocation order. However, it does contain an amended "Order of Revocation" dated February 10, 1995, which recites the dates of four operating after suspension convictions and one operating after revocation conviction. The five offenses occurred between June 27, 1994, and November 24, 1994. Designation as a habitual traffic offender requires only that the person have accumulated four or more convictions for separate and distinct offenses within a five-year period. *See* § 351.02(1), STATS.

Duley argues that because his habitual traffic offender status is attributable solely to four operating after suspension convictions, which were in place because of his failure to pay assessed fines and forfeitures, he should not have been subject to criminal penalties for this most recent infraction. *See* § 343.44(2)(e)1, STATS. Instead, he argues that the civil penalties outlined in subd. (2)(e)2 should apply.

The issue before us revolves around the correct application of a statute to undisputed facts. This presents a question of law which this court decides de novo. *See State v. Michels*, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). We begin with the pertinent portions of § 343.44(2)(e), STATS. It provides:

1. Except as provided in subd. 2., for a 5<sup>th</sup> 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.

The court addressed the issue of when the criminal penalties apply in *State v. Biljan*, 177 Wis.2d 14, 20, 501 N.W.2d 820, 823 (Ct. App. 1993):

[I]f a revocation or suspension in effect at the time the defendant is cited for OAR or OAS was imposed *for other than, or in conjunction with, the defendant's failure to pay a fine or forfeiture, the defendant's failure to pay a fine or forfeiture is not the sole basis for the revocation or suspension*; therefore [the civil penalty provisions do] not apply. [Emphasis added.]

In *Biljan*, the defendant appealed from a judgment convicting him of OAR. *See id.* at 18, 501 N.W.2d at 822. He argued that civil penalties should be imposed because the sole basis for his revocation was his failure to pay a fine or forfeiture. *See id.* However, the court concluded that because a basis for the defendant's violation included a suspension for failure to post a security deposit, the criminal penalties were applicable. *See id.* The *Biljan* court stated, "Because [the defendant's] failure to pay a fine or forfeiture was not the sole basis for his suspension, the judgment is affirmed." *Id.*

In Duley's case, at the time of the instant offense he was subject to concomitant suspension and revocation. While the revocation was due to his status as a habitual traffic offender and was based solely on his failure to pay fines and forfeitures for his numerous OAS infractions, he was also subject to a one-year suspension that was based on the accumulation of more than twelve demerit points. Nine of those points were due to speeding violations; accordingly, the suspension was "imposed ... in conjunction with" the applicable OAS convictions which resulted from Duley's failure to pay fines and forfeitures. Therefore, under the holding of *Biljan*, we conclude that Duley is subject to criminal penalties for this latest infraction.

Duley argues that because the nine demerit points were not enough by themselves to merit the suspension of his operating privileges, and because the sixteen points he was assessed during the same period for failure to pay fines and forfeiture were enough, standing alone, to warrant the suspension, the suspension was solely based on his failure to pay fines and forfeitures. Therefore, he reasons that he should not have been subject to criminal sanctions. We disagree.

*Biljan* instructs that the failure to post a security deposit, denominated under § 344.13, STATS., is a separate offense which authorizes separate punishment from a revocation or suspension that is imposed for a failure to pay fines or forfeitures. *See Biljan*, 177 Wis.2d at 20-21, 501 N.W.2d at 823. Noting that § 344.14(1m), STATS., authorizes impoundment of the offender's vehicle as a separate punishment for this infraction, the court concluded that this "further demonstrates the legislature's intent to treat failure to post a security deposit as a separate offense." *Biljan*, 177 Wis.2d at 21, 501 N.W.2d at 823.

The offenses of speeding and imprudent speed are separate offenses from the failure to pay fines and forfeitures. The fact that at the time of the one-year suspension Duley had also accumulated enough demerit points that his license could have been suspended solely for the OAS violations is not material. That does not negate the fact that during that same twelve-month period Duley was also convicted of two separate traffic offenses. Those offenses are wrapped into the one-year suspension and form the basis for the imposition of criminal penalties pursuant to § 343.44(2)(e)1, STATS.

*By the Court.*—Judgment affirmed.

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

