

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2192-CR

Cir. Ct. No. 2005CM266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANETTE I. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Janette I. Wilson appeals a judgment entered on a jury verdict finding her guilty of operating a motor vehicle while

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

under the influence of an intoxicant (OWI), third offense, and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offense, contrary to WIS. STAT. §§ 346.63 and 346.65. During its deliberations, the jury asked the court if it needed to determine Wilson's exact blood alcohol content (BAC) to answer a special jury question found on the verdict form for the operating a motor vehicle with a PAC count. In response, the court informed the jury that it could determine that the BAC was greater than a certain amount without determining the exact figure. Ultimately, the jury returned a verdict on the PAC count that found that Wilson's BAC was "greater than 0.08%."

¶2 On the OWI count, the court sentenced Wilson to 120 days in jail and fined her \$2,119.50. Because the jury did not find that Wilson's BAC was greater than .17, the court did not impose an additional penalty for the count of operating with a PAC. *See* WIS. STAT. § 346.65(2)(g).² Wilson, appearing pro se, filed a motion for postconviction relief alleging ineffective assistance of counsel. After a *Machner*³ hearing, the circuit court denied her motion. Wilson appeals.

¶3 Wilson's brief is difficult to follow and lacks any citation to authority. As best as we can make out, she argues that the trial court improperly

² WISCONSIN STAT. § 346.65(2)(g) provides, in relevant part:

1. If a person convicted had an alcohol concentration of 0.17 to 0.199, the applicable minimum and maximum fines under [the penalty provisions for operating a motor vehicle while under the influence of an intoxicant (OWI)] are doubled.

2. If a person convicted had an alcohol concentration of 0.20 to 0.249, the applicable minimum and maximum fines under [the penalty provisions for OWI] are tripled.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

instructed the jury after it began its deliberations, which led to her being convicted for the wrong offense.⁴ Specifically, it appears that Wilson claims that, because of the erroneous jury instruction, the jury found her guilty of “operating with BAC .08 or more” instead of “operating with a BAC level of .08 or less,” allowing the court to sentence her to 120 days in jail instead of forty-five days. The State argues that Wilson waived this argument because she failed to raise it before the circuit court. See *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985) (party raising an issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court). Assuming without deciding that Wilson did not waive this argument, we reject it.

¶4 It appears that Wilson misunderstands both the purpose of the jury’s question regarding the PAC count and the effect of her conviction for operating with a PAC. The jury’s question had nothing to do with whether she would be found guilty of “operating with BAC .08 or more” or “operating with a BAC level of .08 or less.” The purpose of the jury’s question was to determine whether Wilson’s guilt on the PAC count would increase her fine on the OWI count. If the jury found that her PAC was greater than .17, the fine would double; if it found her PAC was greater than .20, it would triple. See WIS. STAT. § 346.65(2)(g).

⁴ Wilson also appears to argue that her counsel rendered ineffective assistance for failing to object when the court instructed the jury after the beginning of deliberations. Even assuming her trial counsel performed deficiently, Wilson suffered no prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As we explain, the judge’s instruction on the PAC count dealt only with the amount of her fines, not whether she was guilty on the PAC count and, ultimately, the jury’s determination that her BAC was merely “greater than 0.08%” resulted in her receiving no penalty on the PAC count. As a result, Wilson was not prejudiced by any presumed failure on her attorney’s part to object to the jury instruction.

¶5 As it happened, the jury found Wilson guilty of operating with a PAC, and determined that her BAC was merely “greater than 0.08%.”⁵ The result of this determination was that she received no additional penalty for her conviction on the PAC count. Accordingly, her complaint that the court’s jury instruction on this count somehow did her some injustice is unsupported. We conclude that any error made by the court in issuing its jury instruction was harmless. *See State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 465-66, 647 N.W.2d 189 (an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error).

¶6 Finally, Wilson contends that she received seventy-five additional days in jail because of the instruction on the PAC count, but offers no evidence or a coherent argument to support this claim. We note that the trial court’s sentence of 120 days in jail is well within the penalty range for third-offense OWI of no less than thirty days and no more than one year in jail. WIS. STAT. § 346.65(2)(am)3.

By the Court.—Judgment affirmed.

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

⁵ This was a fortunate result for Wilson because the criminal complaint indicates that her blood test revealed a BAC of .204.

