

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 21, 2002**

Cornelia G. Clark  
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. 01-3141-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CM-494**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DAWN L. BOGUMILL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Dawn Bogumill appeals a judgment of conviction for third offense operating after revocation, contrary to WIS. STAT. §§ 343.44(1)

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise noted.

and 343.44(2g)(c).<sup>2</sup> Bogumill argues, as she did in the trial court, that § 343.44(2g)(c) is unconstitutional because it has the effect of Bogumill being treated differently from similarly situated people.

¶2 Bogumill has two prior OAR convictions that were related to failure to pay fines or forfeitures. Because her current revocation arose out of an operating while intoxicated conviction, the penalties under WIS. STAT. § 343.44(2g) apply. Bogumill argues that § 343.44(2g)(c) is unconstitutional because she is being treated the same as someone whose two previous OAR convictions were OWI-related. Nonetheless, she is also treated the same as other individuals with two fine-related OAR convictions and a current OWI-related OAR charge. Accordingly, this court affirms the judgment.

#### BACKGROUND

¶3 Bogumill was charged with third offense operating after revocation, theft and obstructing an officer after driving away without paying for gasoline on February 24, 2000. In January 2000, Bogumill's driver's license had been revoked for seven months as a result of an OWI conviction. Bogumill also had two prior non-criminal OAR convictions resulting from her failure to pay a fine or forfeiture.

¶4 Bogumill filed a motion to dismiss the charges, alleging that WIS. STAT. § 343.44(2g)(c) was unconstitutional because it denied her equal protection

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<sup>2</sup> WISCONSIN STAT. § 343.44(2g)(c) provided: "For a 3<sup>rd</sup> conviction under this section or a local ordinance in conformity with this section within a 5-year period, the person shall be fined not less than \$1,000 nor more than \$2,000 and shall be imprisoned for not less than 30 days nor more than 9 months."

of the law. She argued that the statute resulted in her being treated differently from other similarly situated individuals and that there was no rational basis for the inequity. The trial court denied Bogumill's motion to dismiss because it determined that § 343.44(2g)(c) did not deny Bogumill equal protection. Bogumill then pled no contest to the charges and the trial court entered judgment.<sup>3</sup>

#### DISCUSSION

¶5 “To attack a statute on grounds that it denies equal protection of the law, a party must show that the statute unconstitutionally treats members of similarly situated classes differently.” *Tomczak v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998). There is a strong presumption of constitutionality, and every presumption favoring the validity of the law must be indulged. *Id.* Moreover, the party challenging the statute must prove the law unconstitutional beyond a reasonable doubt. *Id.*

¶6 The constitutionality of a statute is a question of law this court reviews without deference to the trial court. *State v. Trepanier*, 204 Wis. 2d 505, 509, 555 N.W.2d 394 (Ct. App. 1996). “Where the State is not discriminating based upon a suspect classification, the classification need only bear a rational relationship to a legitimate government interest.” *Id.* at 509-10. Here, Bogumill does not assert that the classification involved in the operating after revocation statute affects either a fundamental right or a suspect class. “Simply because a statutory classification results in some inequity does not provide a basis for

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<sup>3</sup> Neither party challenges Bogumill's conviction for obstructing an officer.

holding it to be unconstitutional.” *Id.* at 510. Unless the law is “patently arbitrary,” it must be upheld. *Id.*

¶7 Bogumill argues that the trial court determined that Bogumill was treated differently from similarly situated people. While this is a reasonable inference from the citations to the record that Bogumill provides, those cites do not conclusively establish such a determination. Ultimately, the court determined, “I don’t know that we meet the criteria here to say that there are separate classes of people” and “I can’t find that that is a denial of equal protection or that Ms. Bogumill is being treated differently ....”

¶8 This court disagrees with how Bogumill characterizes those who are similarly situated. As indicated, Bogumill *is* similarly situated to those who have two prior fine-related OARs and are then charged with a third offense where the revocation arose out of an OWI conviction. Bogumill has not demonstrated that other individuals who are actually similarly situated are treated differently.

¶9 Further, the classifications of individuals in WIS. STAT. § 343.44 are reasonable. Wisconsin has developed a five-part guide for examining the reasonableness of a statute’s classifications.<sup>4</sup> *Trepanier*, 204 Wis. 2d at 511.

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<sup>4</sup> *State v. Trepanier*, 204 Wis. 2d 505, 511, 555 N.W.2d 394 (Ct. App. 1996), sets forth the guidelines:

- (1) All classification must be based upon substantial distinctions which make one class really different from another.
- (2) The classification adopted must be germane to the purpose of the law.
- (3) The classification must not be based upon existing circumstances only. ... It must not be so constituted as to preclude addition to the numbers included within a class.

(continued)

Each class is defined by the nature, number and order of prior offenses. Several classes may receive the same punishment, but the members of each class are treated the same.

¶10 The classifications relate to the purpose of WIS. STAT. § 343.44. The rational basis for the statutory scheme is to punish repeat offenders with progressive harshness to deter future violations. Another overarching basis is to deter alcohol-related offenses and impose more severe punishment for operating after a revocation resulting from an OWI conviction. As the trial court stated, “I think the legislature’s intent was to look at the cumulative effect and to try to deter ... people from committing alcohol-related offenses at any point; but certainly as time goes on and they continue to have other offenses, those alcohol-related offenses are intended to enhance other penalties wherever they fall.”

¶11 Any person could be convicted twice of fine-related OAR and then be charged with a third OAR for a revocation stemming from an OWI conviction. As the State points out, “The classifications established by the law applied equally to every member of each of the classes and the classes were established in a fashion so that additional individuals could fall within the classes.” Every member of each class, those whose number, type and order of OAR convictions is the same, is treated equally. Finally, the legislature determined that the number, type and order of OAR convictions should determine an individual’s punishment.

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(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

¶12 Because Bogumill is treated the same as similarly situated individuals and the classifications in WIS. STAT. § 343.44 satisfy the *Trepanier* requirements, her challenge to the constitutionality of § 343.44(2g) fails. *See Trepanier*, 204 Wis. 2d at 509-10.

*By the Court.*—Judgment affirmed.

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

