

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 4, 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. 01-3282
STATE OF WISCONSIN

Cir. Ct. No. 01CV2050

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

**GARY A. MICHELS AND
ONE 1957 TRIUMPH VIN: TS158961,
ITS TOOLS AND APPURTENANCES,**

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County:
MAXINE A. WHITE, Judge. *Reversed and cause remanded with directions.*

¶1 CURLEY, J.¹ Gary A. Michels appeals from the trial court's order forfeiting his rights to his 1957 Triumph automobile and transferring title to the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

State of Wisconsin pursuant to WIS. STAT. § 346.65(6) (1997-98).² Michels contends: (1) Section 346.65(6), as applied to his 1957 Triumph, violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, as well as Article I, § 8 of the Wisconsin Constitution, because the vehicle seized by the State was not the vehicle used in the related OWI violation; and (2) Section 346.65(6), as applied to his 1957 Triumph, violates Article I, § 12 of the Wisconsin Constitution by allowing forfeiture of estate. This court concludes that § 346.65(6) was unconstitutionally applied to Michels because it permitted the seizure of a vehicle that was not used to commit the related OWI offense. Accordingly, this court reverses and remands the matter with directions. Because resolution of this issue is dispositive of the appeal, this court will not address Michels' argument based on forfeiture of estate. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, then this court need not decide the other issues raised).

I. BACKGROUND.

¶2 On October 11, 1998, Michels was arrested for operating a motor vehicle while intoxicated, third offense. On October 13, 1998, Michels was charged with operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited blood alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). On March 24, 1999,

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Michels pled guilty to the charge of operating a motor vehicle while intoxicated, third offense.

¶3 On the date of his arrest, Michels was driving a 1996 Ford Explorer, which was one of three vehicles that he owned. On February 24, 1999, in direct violation of WIS. STAT. § 346.65(6)(k), Michels transferred the title to his Explorer.³ Subsequent to Michels' guilty plea to his third violation of WIS. STAT. § 346.63(1), the State sought forfeiture of Michels' vehicle pursuant to WIS. STAT. § 346.65(6). However, because the vehicle used in the commission of the offense was no longer titled to Michels, the State sought forfeiture of Michels' 1957 Triumph automobile.

¶4 On February 20, 2001, the Triumph was seized by the Shorewood Police Department. On March 9, 2001, the State commenced a forfeiture action pursuant to WIS. STAT. § 346.65(6). On August 27, 2001, the trial court granted the State's forfeiture motion. The order was stayed pending appeal.

³ WISCONSIN STAT. § 346.65(6)(k) states:

[N]o person may transfer ownership of any motor vehicle that is subject to immobilization or seizure or to equipping with an ignition interlock device under this subsection or make application for a new certificate of title under s. 342.18 for the motor vehicle unless the court determines that the transfer is in good faith and not for the purpose of or with the effect of defeating the purposes of this subsection. The department may cancel a title or refuse to issue a new certificate of title in the name of the transferee as owner to any person who violates this paragraph.

II. ANALYSIS.

¶5 A party may either challenge the constitutionality of a statute on its face, or a party may challenge the constitutionality of a statute as applied to that party under the facts presented in a particular case. *State v. Konrath*, 218 Wis. 2d 290, 304, 577 N.W.2d 601 (1998). Michels does not challenge the constitutionality of WIS. STAT. § 346.65(6) on its face. Rather, Michels contends that any application of § 346.65(6) that allows forfeiture of a vehicle that was not involved in the underlying criminal offense is violative the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article I, § 8 of the Wisconsin Constitution.⁴ Thus, Michels challenges the constitutionality of § 346.65(6) as

⁴ The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution states, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(continued)

applied to the specific facts of his case. A constitutional challenge, such as Michels', presents a question of law that this court reviews *de novo*. See *id.* at 302.

¶6 The statute in question, WIS. STAT. § 346.65(6)(a)1, states, in relevant part:

[T]he court may order a law enforcement officer to seize a motor vehicle ... owned by the person whose operating privilege is revoked under s. 343.305(10) or who committed a violation of s. 346.63(1)(a), (b) or (2)(a)1 ... if the person whose operating privilege is revoked ... or who is convicted ... has 2 prior suspensions, revocations or convictions.

Michels argues that this statute is unconstitutional, as applied to his case, because it permits the forfeiture of *any* motor vehicle owned by an individual who is convicted of a third or subsequent violation of WIS. STAT. § 346.63(1). He concludes that because his 1957 Triumph has no nexus to the underlying OWI offense, the forfeiture is punitive and negates the legislative intent of establishing a civil remedial forfeiture.

¶7 The Double Jeopardy Clause is only applicable if the proceeding is essentially criminal in character, *i.e.*, the forfeiture was intended as “punishment.” See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984).

Finally, Article I, § 8 of the Wisconsin Constitution states, in relevant part:

No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Accordingly, this court must first determine whether the forfeiture of Michels' 1957 Triumph constituted "punishment," making the forfeiture subject to the prohibitions of the Double Jeopardy Clause. See *United States v. Usery*, 518 U.S. 267, 277 (1996). This court conducts its analysis within the framework of the two-part test set forth in *Usery*: (1) First, a court must consider whether the legislature intended the statute to be a remedial civil sanction; and (2) If a court determines that the statute in question was intended to be remedial rather than punitive, it must determine whether the effect of the application of the statute in the instant case is so punitive so as to negate the legislative intent. See *Konrath*, 218 Wis. 2d at 307; see also *State v. McMaster*, 206 Wis. 2d 30, 43, 556 N.W.2d 673 (1996).

¶8 The first issue has already been resolved. In *Konrath*, the supreme court determined that "WIS. STAT. § 346.65(6) constitutes a remedial in rem civil forfeiture proceeding." *Konrath*, 218 Wis. 2d at 308. Therefore, this court need only decide the second issue – whether the seizure of Michels' 1957 Triumph constitutes punishment rather than a remedial sanction.

¶9 In *Konrath*, the supreme court addressed a similar challenge. *Konrath* argued that WIS. STAT. § 346.65(6) violated the Double Jeopardy Clause because it permitted the seizure of *any* motor vehicle owned by an individual subject to the statute. See *id.* at 312. However, because the vehicle forfeited by *Konrath* was the actual vehicle used in the criminal offense, the court concluded that § 346.65(6), as applied to *Konrath*, was not unconstitutional "because it is a proceeding to seize and forfeit the property used in the commission of the crime, namely, operating the motor vehicle while under the influence of an intoxicant." *Id.* at 313. In its analysis, the court noted that "an in rem civil forfeiture proceeding is characterized by the nexus between the property and the crime." *Id.*

¶10 While dealing with a factually distinct situation, in that Konrath's vehicle was the actual vehicle used in the commission of the crime, the court also addressed the instant situation:

We emphasize that our analysis regarding the second prong of *Usery* is based upon the facts presented in this case. Although we conclude the Wisconsin Legislature intended seizure and forfeiture under WIS. STAT. § 346.65(6) to be remedial, the actual effect of the proceeding may arguably be punitive in a situation where the targeted motor vehicle is not the motor vehicle that was used in the crime.

Id. at 310-11 n.18. Although clearly dicta, the court's analysis is persuasive.

¶11 Civil forfeitures “have historically been limited to the property actually used to commit an offense and no more.” *United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998). “A forfeiture that reaches beyond this strict historical limitation is *ipso facto* punitive....” *Id.* Here, there is not an adequate nexus between the motor vehicle and the offense to justify the forfeiture as a civil remedial sanction. Therefore, although Michels' 1957 Triumph could facilitate a future violation of the law, because it was not the actual means by which the offense in question was committed, this court concludes that the forfeiture of this vehicle is a punishment and, therefore, subject to the Double Jeopardy Clause.⁵ *See id.* at 333. Accordingly, because the seizure of Michels' 1957 Triumph is so punitive as to be criminal in nature, this court concludes that it is a second

⁵ This interpretation of WIS. STAT. § 346.65(6) (1997-98) is supported by the legislature's subsequent amendments to the statute. The 1997-98 version states that “the court may order a law enforcement officer to seize *a motor vehicle*.” Section 346.65(6)(a)1 (1997-98) (emphasis added). Whereas, the 1999-2000 version states that “[t]he court may order a law enforcement to seize *the motor vehicle used in the violation*.” Section 346.65(6)(a)1 (1999-2000) (emphasis added).

punishment unauthorized by WIS. STAT. § 346.65(6) and violative of the Double Jeopardy Clause.

¶12 Finally, this court pauses to note that the State was not rendered helpless by Michels' transfer of title to his 1996 Ford Explorer. Pursuant to WIS. STAT. § 346.65(6)(k), "no person may transfer ownership of any motor vehicle that is subject to immobilization or seizure or to equipping with an ignition interlock device under this subsection or make application for a new certificate of title." Furthermore, the Department of Motor Vehicles has the authority to "cancel or refuse to issue a new certificate of title in the name of the transferee" where this prohibition has been violated. Section 346.46(6)(k). Therefore, the State's proper remedy was to seek cancellation of the transfer of title to Michels' 1996 Ford Explorer and then move for seizure of that vehicle pursuant to § 346.65(6). The record is unclear as to why the State did not exercise this authority.

¶13 Based on the foregoing, the trial court is reversed and the cause is remanded with directions to vacate the order forfeiting Michels' 1957 Triumph.

By the Court.—Order reversed and cause remanded with directions.

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

