COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0137-CR **Cir. Ct. No. 01-CT-333**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYL W. HOVIND, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Daryl W. Hovind, Jr., appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while intoxicated,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

third offense. Hovind contends the circuit court erred by including his prior conviction in California for operating a vehicle with an alcohol concentration of .08% or greater as a prior conviction for purposes of penalty enhancement under WIS. STAT. § 346.65(2)(c).

¶2 The facts in this case are undisputed. On December 12, 2001, Hovind was convicted of operating a motor vehicle while intoxicated as a third offense. Hovind had one prior Wisconsin conviction for operating a motor vehicle while intoxicated. Hovind was also convicted in California in 1995 of operating a vehicle with an alcohol concentration of .08% or greater. The California statute states: "It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." CAL. VEHICLE CODE § 23152 (Deering 1995).

¶3 Hovind contends that the circuit court should not have included his California conviction because California's OWI statute is not "substantially similar" to Wisconsin's OWI statute, as required by WIS. STAT. § 343.307(1)(d). The application of a statute to undisputed facts is a question of law that we review independently of the trial court's determinations. ***State v. White***, 177 Wis. 2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993). When construing a statute, the first resort is to the language of the statute itself. ***State v. Waalen***, 130 Wis. 2d 18, 24, 386 N.W.2d 47 (1986). A "statute must be interpreted on the basis of the plain meaning of its terms." ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986). Only when statutory language is ambiguous may a reviewing court examine other construction aids, such as legislative history, context, and subject matter. ***Waalen***, 130 Wis. 2d at 24. A statute is ambiguous if reasonable persons could disagree as to its meaning. ***Williquette***, 129 Wis. 2d at 248.

¶4 WISCONSIN STAT. § 343.307(1) sets forth the criteria used to determine whether prior conduct may be used to calculate a defendant's prior OWI convictions. Section 343.307(1)(d) includes as prior convictions:

> Convictions under the law of another jurisdiction that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof, or with an excess or specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws.

¶5 Hovind argues that WIS. STAT. § 343.307(1)(d) requires that the out-of-state statute be "substantially similar" to Wisconsin's operating while intoxicated statute. However, the plain language of § 343.307(1)(d) requires nothing of the sort.

¶6 As the State argues, and this court agrees, WIS. STAT. § 343.307(1)(d) requires that the other state have a statute prohibiting operating a vehicle while impaired. "Substantially similar" emphasizes that the out-of-state statute need only prohibit conduct similar to the list of prohibited conduct in § 343.307(1)(d).

¶7 Hovind argues that his conviction under a California statute prohibiting operation of a vehicle with a blood alcohol content greater than .08% is not substantially similar to Wisconsin's statute that prohibits operating a vehicle with a blood alcohol content greater than .10%. This court addressed this argument in ***White***, where we held that WIS. STAT. § 343.307(1) does not mandate that "other state statutes must require the same elements of the offense to be proved as Wisconsin's OWI statute. The current statute only requires other state

statutes to prohibit the use of a motor vehicle while intoxicated." ***White***, 177 Wis. 2d at 126.

¶8 We conclude that California's statute falls under WIS. STAT. § 343.307(1)(d) as it prohibits operation of a motor vehicle with an excess blood alcohol concentration. Therefore, the circuit court properly considered Hovind's California conviction for purposes of calculating Hovind's penalty enhancement.

By the Court.—Judgment affirmed.

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