

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2003

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. 02-1752-CR

Cir. Ct. No. 01-CT-285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER R. GIECK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County:
JAMES O. MILLER, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Jennifer Gieck appeals an order denying her motion to dismiss a criminal complaint charging her with operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited blood alcohol concentration (PAC), each as a third offense. She claims the facts alleged were insufficient to establish that either count was her third offense

because her first and second convictions occurred after the date of the present incident. We conclude that the allegation that the present counts would be third offenses is relevant only as a penalty enhancer which needs to be established at sentencing, and not as an element of the crimes which needed to be in existence at the time of the offenses. We therefore affirm.

¶2 Gieck was arrested for OWI on October 31, 1999, and testing revealed that she had a blood alcohol concentration of 0.187. At the time of her arrest, she had two other drunk driving cases pending. After convictions had been entered in those cases, the State charged Gieck with third offenses of OWI and PAC, contrary to WIS. STAT. § 346.63(1)(a) and (b) (2001-02).¹

¶3 Unlike WIS. STAT. § 340.01(46m), which sets a lower prohibited blood alcohol limit for persons with two or more prior qualifying drunk driving convictions, prior offenses are not listed as elements of the offense under either of the statutes under which Gieck was charged.² Rather, the penalties for the offenses may be increased under WIS. STAT. § 346.65 based on the number of prior convictions. Under *State v. Banks*, 105 Wis. 2d 32, 47-48, 313 N.W.2d 67 (1981), prior convictions relied upon as penalty enhancers under WIS. STAT. § 346.64 need to be in existence at the time of sentencing, not the time of the offense. We conclude *Banks* controls the outcome here.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The State concedes that the lower prohibited alcohol limit for third offenders does not apply to the instant prosecution because Gieck did not have two prior convictions at the time this offense was allegedly committed.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

