COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1036-CR **Cir. Ct. No. 02-CT-847**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Mark Johnson appeals a conviction for operating a motor vehicle while intoxicated, second offense. He argues that because he was not convicted of a first offense at the time he was cited for the second offense, the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

criminal penalties he received for his second offense are "jurisdictionally void." Because prior offenses are relevant at the penalty stage, not the charging stage, this court affirms the judgment.

Background

¶2 On June 22, 2001, Johnson was cited for OWI as a first offense. On October 5, 2001, he was again cited for OWI-first because the June case had not yet been adjudicated. On March 15, 2002, Johnson was convicted on the June offense. On June 14, 2002, the district attorney reissued the October citation as a second offense, for which Johnson was convicted on November 13, 2002.

¶3 Johnson points out that any OWI charge beyond the first is considered criminal, not civil. When he was cited in October, he had no underlying OWI conviction. Thus, he argues, he cannot be given a criminal sentence for the October violation because at the time of the offense the violation was only for a civil infraction. Further, he claims this gives rise to an ex post facto violation. He also argues that a prior conviction is a necessary component of a criminal OWI charge that must be submitted to the jury and that an OWI charge and an operating with a prohibited alcohol concentration charge are the same.

Discussion

¶4 WISCONSIN STAT. § 346.63(1)(a) prohibits an individual from operating a motor vehicle while under the influence of an intoxicant. WISCONSIN STAT. § 346.65(2) contains the penalties for a violation of § 346.63(1) and

includes various penalty levels based on the number of an individual's total prior convictions as counted under WIS. STAT. § 343.307(1).[2]

¶5 Johnson complains that at the time he was given his second citation for OWI, he had not been convicted on the first citation. Thus, there was no factual basis for making the second citation a criminal offense. Moreover, when Johnson received his second citation, it started with a simple forfeiture as a penalty, but when he was convicted on his first citation, the second citation was amended to be a criminal offense. This, he argues, is an ex post facto violation.

¶6 In ***State v. Banks***, 105 Wis. 2d 32, 48, 313 N.W.2d 67 (1981), the supreme court concluded that the penalty provisions of WIS. STAT. § 346.65 apply regardless of the sequence of the offenses. This is because prior convictions are elements for penalty enhancement only, not the offense itself. ***State v. McAllister***, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). Moreover, ***Banks*** rejected the ex post facto challenge. ***Banks***, 105 Wis. 2d at 51. While Johnson contends that ***Banks*** is "an old case" and "things have changed," this court cannot overrule or modify a supreme court holding. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

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[2] WISCONSIN STAT. § 346.65(2)(a) details the penalty for a first offense. Section 346.65(2)(b) contains the penalty if an individual's "convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1) within a 10-year period, equals 2 …." Section 346.65(2)(c) provides the penalty for a total of three convictions in a lifetime, § 346.65(2)(d) sets forth the penalty for four lifetime convictions, and § 346.65(2)(e) states the penalty for five or more lifetime convictions.

WISCONSIN STAT. §§ 940.09 and 940.25 are irrelevant to this discussion, and WIS. STAT. § 343.307(1)(a) provides that convictions under WIS. STAT. § 346.63(1) or a local ordinance in conformity therewith are convictions that will be counted under the penalty statutes.

¶7 Johnson argues that OWI and PAC are the same offense. Because proving a PAC violation can require proving prior offenses, Johnson reasons that proving an OWI violation likewise requires proof of a prior offense at the time of a subsequent offense.

¶8 OWI and PAC, however, are not the same offense. Although only one conviction is allowed when both PAC and OWI are charged, they may be charged separately and each requires proof of a fact that the other does not. ***State v. Bohacheff***, 114 Wis. 2d 402, 410-11, 338 N.W.2d 466 (1983); *see also* WIS. STAT. § 346.63(1)(c).

¶9 Moreover, prior convictions as an element of a PAC violation are relevant primarily to the State's evidentiary burden. WISCONSIN STAT. § 340.01(46m) defines "Prohibited alcohol concentration." For an individual who has zero or one prior conviction as counted under WIS. STAT. § 343.307(1), the applicable prohibited concentration is .10%. If an individual has two prior convictions, the prohibited concentration is .08%. If an individual has three or more prior convictions, the prohibited concentration is .02%.

¶10 Thus, if the State apprehends an individual with five prior convictions and a .12% blood-alcohol concentration, the State has no pressing need to prove the five prior convictions to prove a PAC violation, because .12% is impermissible under any circumstances. But if the individual with five prior convictions is apprehended with a blood-alcohol concentration of .05%, it is then incumbent upon the State to prove those prior convictions because only then has the individual committed a PAC violation.

¶11 Finally, Johnson argues that in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), the United States Supreme Court required that any element that

enhances a penalty be submitted to the jury for determination of its proof beyond a reasonable doubt. However, Johnson's argument is premised on the mistaken belief that prior convictions are an element of an OWI offense, which they are not. Moreover, the ***Apprendi*** court specifically stated, "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime … must be submitted to a jury, and proved beyond a reasonable doubt." ***Id.*** at 490 (emphasis added). ***Apprendi*** does not aid Johnson; he essentially ignores the ***Apprendi*** exception.[3]

By the Court.—Judgment affirmed.

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

[3] Additionally, he claims that under ***Apprendi***, if the prior conviction is one that causes criminal liability to attach, it must then under that circumstance be submitted to the jury. ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). This argument is made without citation to legal authority and is therefore rejected. *See* WIS. STAT. § 809.19(1)(e); ***State v. Shaffer***, 96 Wis. 2d 531, 545-56 n.3, 292 N.W.2d 370 (Ct. App. 1980). Nowhere does this exception to the exception appear in ***Apprendi***.