COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1080-CR **Cir. Ct. No. 01CT000120**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY J. DOUDNA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Billy Doudna appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, second offense, contrary to WIS. STAT. § 346.63(1)(b), for an offense that occurred on March 7, 2001. He had previously been convicted on October 5,

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

1992, of operating a motor vehicle while intoxicated (OWI) for an offense that occurred on July 26, 1992. At the time of that offense and conviction, WIS. STAT. § 346.65(2)(b) (1991-92) provided:

> (2) Any person violating s. 346.63(1):
>
> (a) Shall forfeit not less than $150 no more than $300, except as provided in pars. (b) to (e).
>
> (b) Shall be fined not less than $300 nor more than $1,000 and imprisoned for not less than 5 days nor more than 6 months if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 2 in a 5-year period, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

¶2 WISCONSIN STAT. § 346.65(2)(b) was amended effective January 1, 1999, to its present version, which provides:

> (2) Any person violating s. 346.63 (1):
>
> ….
>
> (b) Except as provided in par. (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of 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, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

The trial court in this case applied § 346.65(2)(b) (2001-02) in sentencing Doudna and considered his 1992 conviction, rejecting Doudna's constitutional challenges. Doudna contends on appeal that the trial court erred because the application of § 346.65(2)(b) violates his right to substantive due process, is an ex post facto law, violates the guarantee of equal protection and subjects him to double jeopardy. We reject each claim and affirm.

¶3 Whether undisputed facts violate a constitutional standard presents a question of law, which we review de novo. ***State v. Foust***, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶4 Regarding Doudna's substantive due process challenge, he contends that once five years had passed from the date of his first conviction, and WIS. STAT. § 346.65(2)(b) remained unchanged during that time, he acquired a "vested right" not to have that prior offense counted for purposes of increasing a penalty for a subsequent offense. This vested right, he asserts, constitutes a liberty interest and therefore as a matter of substantive due process, the State may not enact legislation that deprives him of that liberty interest without a rational basis. He asserts that there is no rational basis in "retroactively" imposing a "ten-year look-back" rather than a "five-year look-back" period, because the State cannot demonstrate that a person in his situation, who has gone nine years since his last OWI violation, is less likely to get a second OWI if he continues driving sober for an additional one year.

¶5 Doudna's theory of a vested right is based on a line of cases considering whether legislation that affects civil causes of actions and remedies should be given retroactive application. *See, e.g.,* ***Landgraf v. USI Film Products***, 511 U.S. 244, 255-56 (1994) (holding that new provisions in Title VII authorizing the recovery of compensatory damages should not be applied retroactively); ***Martin v. Richards***, 192 Wis. 2d 156, 212, 531 N.W.2d 70 (1995) (holding that retroactive application of the cap on noneconomic damages in WIS. STAT. § 655.017 is unconstitutional under the due process clause of the United States and Wisconsin Constitutions). In ***Martin***, the court considered whether retroactively applying the cap on damages would impair the vested right of the plaintiffs to a cause of action. ***Id.*** at 197. The court stated that retroactive

legislation enjoys a presumption of constitutionality and the challenger bears the burden of overcoming that presumption. ***Id.*** at 200. To determine whether a retroactive statute comports with due process, the court "must weigh the public interest served by the retroactive statute against the private interests that are overturned by it. Implicit within this analysis is the consideration of the unfairness created by the retroactive legislation." ***Id.*** at 201.

¶6 We are not persuaded by Doudna's brief argument that under the prior version of WIS. STAT. § 346.65(2)(b) he had acquired an interest akin to that at stake in the cases on which he relies. His argument is not sufficiently developed for such a complex issue. However, even if we assume without deciding that the analytical framework in ***Martin*** applies, we conclude that Doudna has not overcome the presumption of constitutionality. The public interest served by increasing the time period within which an OWI offense increases the penalty for driving while intoxicated is a significant one: deterring persons from driving while intoxicated and thus preventing the injuries and death caused by intoxicated drivers. *See* ***City of Waukesha v. Gorz***, 166 Wis. 2d 243, 247-48, 479 N.W.2d 221 (Ct. App. 1991). That interest, we conclude, far outweighs the interest of Doudna in having the five-year look-back period remain unchanged. We see no unfairness to Doudna. When the look-back period was amended effective January 1, 1999, Doudna was on notice at that time that if he were convicted of a second OWI offense, within ten years of the first offense, the first offense would be counted to increase the penalty. There is no reasonable argument that he had a justifiable expectation that after October 5, 1997, his first offense could never be considered in assessing a penalty for a subsequent offense.

¶7 Doudna next contends that application of WIS. STAT. § 346.65(2)(b) violates the ex post facto provisions of the federal and state constitutions, U.S.

CONST. art. I, § 9-10; WIS. CONST. art. I, § 12, by increasing the penalty for conduct after its commission by depriving him of a defense. The fundamental aspect of ex post facto analysis is the focus on changes in the law relative to the time of the defendant's allegedly illegal behavior. ***State v. Schuman***, 186 Wis. 2d 213, 217, 520 N.W.2d 107 (Ct. App. 1994). The focus arises from the clause's animating principle, namely that persons have a right to fair warning of the conduct that gives rise to criminal penalties. ***Id.***

¶8 We do not agree with Doudna that ***Schuman*** is distinguishable and, instead, we conclude that ***Schuman*** disposes of Doudna's argument that the statutory amendment retroactively punishes him more severely for his prior offense. In ***Schuman***, we rejected the contention that a statutory amendment including convictions under tribal law as prior convictions under WIS. STAT. § 346.65(2) increased the penalty for the prior OWI tribal conviction. ***Id.*** We concluded the amendment simply increased the punishment for the present offense and was not a violation of the ex post facto clause because the offender had fair warning by the enactment of the amendment that he or she would be more severely punished because of the prior tribal offense. ***Id.***

¶9 As we understand Doudna's argument that the statutory amendment deprived him of a defense, they are based on his analysis that he had a vested interest under the prior version. As we have already explained, we are not persuaded by this argument.

¶10 With respect to Doudna's equal protection claim, we do not agree that the classification in WIS. STAT. § 346.65(2)(b) is a suspect classification requiring higher scrutiny nor that a fundamental right is involved. *See* ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 630, 291 N.W.2d 608 (Ct. App. 1980).

Therefore, the correct standard is whether the classification created by the statute—persons with an OWI conviction within the last ten years—is rationally related to a legitimate governmental interest. ***Reginald D. v. State***, 193 Wis. 2d 299, 309-10, 533 N.W.2d 181 (1995). The classification created by the current statute distinguishes between persons who have had a prior conviction within ten years and those who have not. There is no doubt that protecting against the injuries and death caused by intoxicated drivers is a legitimate government interest, and we conclude that increasing penalties for persons who have had a subsequent conviction within the past ten years is rationally related to achieving that interest. Doudna is in error in demanding that the State "prove" that the ten-year "look-back" for increasing the penalty will serve the important State interest at stake. Rather, courts are to presume the State acted within its constitutional power, and if we can locate some reasonable basis for the classification, we uphold the legislation. ***Proegler***, 95 Wis. 2d at 631.

¶11 Finally, we reject Doudna's argument that as a result of the statutory amendment he is subjected to multiple punishments in violation of the double jeopardy clauses of the federal and state constitutions.[2] Doudna does not sufficiently develop an argument explaining why the statutory amendment constitutes multiple punishments for the same offense. As we held in ***Schuman***, the increased penalty based on prior offenses is neither a new jeopardy nor an additional penalty for the earlier offense, but a stiffened penalty for the latest offense, which is considered an aggravated offense because it is a repetitive one. ***Schuman***, 186 Wis. 2d at 218, citing ***Gryger v. Burke***, 334 U.S. 728, 732 (1948).

[2] U.S. CONST. amend. V; WIS. CONST. art. I, § 8, cl. 1.

By the Court.—Judgment affirmed.

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