

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2011

A. John Voelker
Acting 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. 2010AP3112-CR

Cir. Ct. No. 2009CT157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCIS A. MALSBUY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 REILLY, J.¹ Francis A. Malsbury appeals from a judgment of conviction for second-offense operating while intoxicated (OWI) pursuant to WIS.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

STAT. § 346.63(1)(a). Malsbury argues that his conviction should actually be for a first-offense OWI, as the prior conviction was for reckless driving in the state of Washington. The State counters that because Malsbury's Washington conviction was originally charged as driving under the influence (DUI) and later amended to reckless driving with OWI-like penalties, the conviction counts for purposes of Wisconsin's OWI laws. We agree with the State and affirm Malsbury's conviction.

FACTS

¶2 In 1999, Malsbury was charged with DUI in the state of Washington. Malsbury pled not guilty, and the DUI charge was later amended to reckless driving. Malsbury was subsequently convicted of reckless driving after he pled guilty to the amended charge. Malsbury's sentence included two years of probation, a fine, and a suspended jail sentence. Additionally, Malsbury was ordered to undergo an alcohol assessment, attend a victim impact panel, and attend alcohol information school.

¶3 In 2009, a Wisconsin municipal court convicted Malsbury of OWI. After the Wisconsin Department of Transportation consulted Malsbury's driving record and discovered his Washington conviction, the State vacated the municipal court conviction and filed an amended complaint charging Malsbury with a second-offense OWI.² The State argued that Malsbury's reckless driving conviction counted as a previous OWI conviction because in Washington, a

² The Department of Transportation originally notified the Walworth County District Attorney's office that Malsbury was convicted in Washington for failure to take a test. The State later conceded that this information was erroneous, but continued to prosecute Malsbury for a second-offense OWI.

conviction for reckless driving that was originally charged as a DUI counts as a DUI conviction for sentencing enhancement purposes.

¶4 The circuit court ruled that the Washington conviction counted as a prior OWI offense in Wisconsin because Washington law classifies the conviction as a prior offense for sentencing purposes under its DUI law. Malsbury was subsequently found guilty of a second-offense OWI pursuant to WIS. STAT. § 346.63(1)(a). He appeals.

STANDARD OF REVIEW

¶5 This appeal requires us to interpret Wisconsin and Washington statutes. The interpretation and application of a statute is a question of law subject to de novo review. *WIREDATA, Inc. v. Village of Sussex*, 2008 WI 69, ¶45, 310 Wis. 2d 397, 751 N.W.2d 736.

DISCUSSION

¶6 The issue in this appeal is whether Malsbury's reckless driving conviction in Washington counts as a previous conviction for purposes of Wisconsin's OWI law. Wisconsin has an accelerated penalty structure for OWI offenses such that each successive OWI conviction results in greater penalties. WIS. STAT. § 346.65(2). When determining the penalty for OWI, Wisconsin courts count:

Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her

blood, as those or substantially similar terms are used in that jurisdiction's laws.

WIS. STAT. § 343.307(1)(d).

¶7 We hold that Malsbury's Washington reckless driving conviction counts as a prior conviction for purposes of Wisconsin's accelerated OWI penalty structure. Our decision is guided by Washington's DUI penalty structure, which counts a conviction for reckless driving as a "prior offense" when the conviction was originally charged as DUI. See WASH. REV. CODE ANN. § 46.61.5055(14)(v) (West 2011). Malsbury's sentence has all the characteristics of an OWI-type conviction: he was ordered to undergo an alcohol assessment, attend a victim impact panel, and attend alcohol information school. Finally, for purposes of OWI sentence enhancement, Wisconsin counts "[c]onvictions under the law of another jurisdiction that prohibits a person from ... using a motor vehicle while intoxicated ... [or] with an excess or specified range of alcohol concentration." WIS. STAT. § 343.307(1)(d).

¶8 Our holding is consistent with the purpose of Wisconsin's OWI laws. As the Wisconsin Supreme Court stated, WIS. STAT. § 343.307(1)(d) was meant to "apply broadly to prior out-of-state conduct." *State v. Carter*, 2010 WI 132, ¶42, 330 Wis. 2d 1, 794 N.W.2d 213. We will construe the OWI laws "to facilitate the identification of drunken drivers and their removal from the highways." *State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980). Additionally, "the purpose of general repeater statutes is to increase the punishment of persons who fail to learn to respect the law after suffering the initial penalties and embarrassment of conviction." *State v. Banks*, 105 Wis. 2d 32, 49, 313 N.W.2d 67 (1981). Counting Malsbury's reckless driving conviction in Washington as a previous conviction furthers the goal of Wisconsin's OWI laws.

CONCLUSION

¶9 Malsbury's conviction for a second-offense OWI pursuant to WIS. STAT. § 346.63(1)(a) is affirmed.

By the Court.—Judgment affirmed.

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

