

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 21, 2004**

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 Nos. 04-0310-CR  
04-0311-CR**

**Cir. Ct. Nos. 02CF000121  
02CF000349**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MARK W. ALBERS,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Mark Albers appeals judgments of conviction for operating a motor vehicle while intoxicated (OWI), fifth and sixth offenses. His second OWI conviction was charged as a civil forfeiture, and he was not represented by an attorney. However, Albers argues he should have been charged

criminally; that his right to an attorney applied; and that he did not knowingly, voluntarily and intelligently waive that right. He therefore collaterally attacks his second OWI conviction based on violation of his right to counsel and maintains that the conviction cannot be used as a prior conviction for sentence enhancement purposes. We affirm the judgments.

## BACKGROUND

¶2 In February and April 2002, Albers was arrested for operating a motor vehicle while intoxicated. Based on Albers' driving record, separate complaints charged Albers with fifth and sixth OWI offenses. In both cases, Albers moved to collaterally attack the validity of his second OWI conviction.

¶3 Albers noted his first two OWI convictions were based on arrests that occurred six weeks apart. He agreed that the first conviction, which occurred shortly after he was arrested for the second offense, was properly handled as a civil forfeiture. However, Albers' second offense was also handled as a forfeiture. Albers argued that because the second offense should have been charged criminally, he should have been afforded the constitutional right to counsel. He reasoned that because he was not represented by counsel, and did not knowingly, intelligently and voluntarily waive counsel, the second conviction was constitutionally defective and could not be used for sentencing enhancement purposes in connection with his current cases.

¶4 In the fifth and sixth offense cases, the trial courts found that Albers was convicted of OWI forfeitures in both his first and second offense cases. Because the second case was handled as a forfeiture, the courts concluded that they were to look to the procedural and due process guarantees that attached to forfeiture cases. Because there is no constitutional right to counsel in forfeiture

cases, the courts concluded the second conviction could not be collaterally attacked.<sup>1</sup>

¶5 The fifth and sixth offense cases were later consolidated. After the parties submitted the cases to the court on stipulated facts, the court found Albers guilty of both OWI's. Albers appeals.

## DISCUSSION

¶6 The State concedes that Albers' second OWI should have been charged as a crime rather than a civil forfeiture. *See generally State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981). However, we must determine whether Albers may now collaterally attack that conviction. This is a question of law that we review de novo. *State v. Woods*, 117 Wis. 2d 701, 715-16, 345 N.W.2d 457 (1984). A defendant may collaterally attack a prior conviction used to enhance a sentence only on the ground that the defendant's constitutional right to counsel was violated in the prior conviction. *Custis v. United States*, 511 U.S. 485 (1994); *State v. Hahn*, 2000 WI 118, ¶25, 238 Wis. 2d 889, 618 N.W.2d 528, *reconsideration denied*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902.

¶7 In Wisconsin, defendants are entitled to counsel only for offenses punishable by imprisonment. *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791 (1977). Where a defendant's conviction is not punishable by imprisonment, the fact that he or she was not represented by counsel does not invalidate the conviction. *See id.* Thus, the only way Albers may collaterally

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<sup>1</sup> In case No. 04-0310-CR, the court also relied on the concept that Albers obtained a benefit by receiving two forfeiture OWI's: he did not face jail time for the second incident.

attack his second OWI conviction is by showing that his right to counsel was violated. He cannot collaterally attack the validity of the conviction itself.

¶8 We acknowledge that Albers should have been charged criminally for his second offense. Had he been charged with a crime, he could have been punished by imprisonment and therefore would have had the right to counsel. However, as it was, Albers was charged only with a civil forfeiture and, to his benefit, was not facing imprisonment. As such, he had no right to counsel and no right was violated by his not being represented by an attorney. Consequently, Albers has no grounds to collaterally attack that conviction.

*By the Court.*—Judgments affirmed.

Not recommended for publication in the official reports.

