COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1125-CR **Cir. Ct. No. 02CT000039**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY L. COX,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

¶1 DEININGER, P.J.[1] Terry Cox appeals a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI), as a third offense. She claims that the trial court erred in sentencing her as a third-

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

time OMVWI offender because one of the prior convictions that the court relied on did not occur until after she had committed the present offense. We conclude that, because Cox had two prior OMVWI convictions at the time of sentencing, the trial court properly sentenced her as a third-time offender. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 A state trooper arrested Cox on November 14, 2001, and the State subsequently charged her in Dane County with OMVWI and operating with a prohibited alcohol concentration (PAC), both alleged to be third offenses. The two prior OMVWI offenses that the State relied on in charging Cox with a third offense were convictions in the state of Illinois occurring in the years 1999 and 2000. While this prosecution was pending, Cox was convicted of OMVWI in Sauk County on October 7, 2002, and she was sentenced as a third-offender. The State subsequently amended the complaint in this action to allege that the present offense was punishable as a fourth offense.

¶3 In response to Cox's motion challenging the number of prior convictions that could be used to enhance her sentence in the present case, the trial court disallowed one of the Illinois convictions because it had apparently been set aside after a period of supervision. The court concluded, however, that the October OMVWI conviction in Sauk County, although it occurred after Cox had committed the present offense, could be counted as a prior conviction for sentencing purposes. After a "stipulated trial," the court found Cox guilty of both OMVWI and operating with a PAC. The court then dismissed the PAC charge and sentenced Cox for a third OMVWI offense, imposing, among other things, an eighty-day sentence to the county jail.

¶4 Cox appeals the judgment of conviction, contending that she should have been sentenced for a second OMVWI offense, not for a third offense.

DISCUSSION

¶5 Cox relies on the supreme court's decision in ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), and this court's decision in ***State v. Skibinski***, 2001 WI App 109, 244 Wis. 2d 229, 629 N.W.2d 12, to argue that the number of her prior convictions constituted an element of the PAC offense with which she was charged. She contends, therefore, that the State was required to prove at trial that she had two prior convictions at the time she committed this offense, which she claims the State could not do. The chief problem with Cox's argument is that the judgment of conviction that she appeals makes no reference to a PAC offense; it shows only a conviction for third-offense OMVWI.[2]

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[2] Cox argues that the fact that she was convicted and sentenced only for OMVWI is of no consequence because she was also prosecuted for the companion PAC offense, thereby rendering the ***Alexander*** analysis applicable to her case. The State responds that it did not prosecute Cox for violating the lower PAC threshold applicable to third-offenders (0.08), but with violating the higher (0.1) limit applicable to first and second offenders, and thus, the number of her prior offenses was not an element of the PAC charge.

We do not address these arguments because, as noted, the judgment and sentence before us is for a third OMVWI offense, for which the appropriate penalty is determined by the number of prior convictions at the time of sentencing. We note, however, that even if Cox had been prosecuted for a third or subsequent PAC offense to which the lower threshold applies, requiring the State to prove the number of her prior convictions existing at the time she committed the present offense, that number could well be different and lower than the number of prior convictions counted at sentencing for penalty enhancement purposes. That is, in Cox's case, she may have been a second-offender for purposes of proving she committed a PAC offense, but she became a third-offender for sentencing purposes on either the present OMVWI or the present PAC offense because of the intervening Sauk County conviction. In short, WIS. STAT. §§ 340.01(46m) and 346.65(2) serve different purposes and are applicable at different times. *See* ***State v. Ludeking***, 195 Wis. 2d 132, 140, 536 N.W.2d 392 (Ct. App. 1995), *partially overruled on other grounds by* ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997).

¶6 We are releasing today our opinion in ***State v. Matke***, No. 03-2278-CR (WI App Dec. 9, 2004), which we have recommended for publication. The appellant in ***Matke*** made virtually the same argument regarding his sentence for a repeat OMVWI offense that Cox makes in this appeal. We recognize that, because it has not yet been ordered published, our opinion in ***Matke*** cannot be cited as precedent. *See* WIS. STAT. RULE 809.23(3). We therefore incorporate by reference paragraphs 4 through 15 of the ***Matke*** opinion as our analysis in this opinion. For the convenience of the parties, we include in our mailing distribution of this opinion, a copy of our opinion in ***Matke***.

¶7 Based on the analysis in ***Matke*** that we have incorporated here by reference, we conclude that the trial court did not err in sentencing Cox for a third OMVWI offense.

CONCLUSION

¶8 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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