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DISTRICT III

March 11, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1290-CR State of Wisconsin v. James J. Schelfhout
(L. C. #2011CT661)

Before Mangerson, J.[1]

James Schelfhout appeals a judgment of conviction for operating while intoxicated, fourth offense. Schelfhout argues the circuit court erred by denying his collateral attack of one of his prior countable offenses. Based upon our review of the briefs and record, we conclude

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

this case is appropriate for summary disposition and summarily affirm. *See* WIS. STAT. RULE 809.21.

In 2011, the State charged Schelfhout with fourth-offense OWI. One of the countable offenses that formed the basis of the fourth-offense charge was a 1996 revocation for Schelfhout's violation of the implied consent law. *See* WIS. STAT. § 343.307(1)(f) (revocation resulting from implied consent law violation is a countable offense); *see also* WIS. STAT. § 346.65(2)(am)4. (implied consent law revocation counted to determine penalty for OWI).

Schelfhout moved to collaterally attack the 1996 revocation on the basis that he was denied his right to counsel. The circuit court denied Schelfhout's collateral attack, reasoning an implied consent law violation was civil in nature and, as a result, Schelfhout had no Sixth Amendment right to counsel in that proceeding.

On appeal, Schelfhout recognizes that a violation of the implied consent law is a civil matter, that "a Sixth Amendment right to counsel certainly *does not* attach to a civil matter," and that "a 'refusal' counts as a 'prior conviction'" for purposes of the OWI law. He nevertheless argues the circumstances in this case are such that public policy should preclude his 1996 revocation from being treated as a countable offense. Specifically, Schelfhout contends the related OWI charge from 1996 was amended to a reckless driving citation and, as a result, we should not count the 1996 revocation resulting from that incident.

We reject Schelfhout's argument. First, the fact that the 1996 OWI charge was amended to reckless driving does nothing to change the fact that Schelfhout violated the implied consent law. A revocation resulting from an implied consent law violation is independent from an OWI charge—the offenses fall under two different statutory schemes and the State's ability to pursue

one is not dependent on the continued validity of the other. *See* WIS. STAT. §§ 343.305, 346.63; *see also* ***State v. Brooks***, 113 Wis. 2d 347, 356, 359-60, 335 N.W.2d 354 (1983) ("Those who refuse may still be convicted of OWI after a trial, but even if they are not, they face revocation … for the refusal.").

Second, as Schelfhout recognizes, WIS. STAT. §§ 343.307(1)(f) and 346.65(2)(am)4. plainly provide that a revocation resulting from an implied consent law violation is a countable offense when determining an OWI penalty. Schelfhout cites no legal authority that would allow the circuit court to ignore the plain language of the statutes and disregard a countable offense for a public policy reason. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address arguments unsupported by legal authority).

Finally, and most importantly, Schelfhout's collateral attack of his revocation is based on a public policy argument. Matters of public policy are best left to the legislature. Our jurisprudence is clear that a defendant may only collaterally attack a prior conviction on the basis that he or she was denied the right to counsel. *See, e.g.*, ***State v. Hahn***, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528. Because Schelfhout appropriately concedes he has no Sixth Amendment right to counsel in a civil revocation proceeding, he cannot collaterally attack his 1996 revocation.

Therefore,

IT IS ORDERED that the court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals