

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

State of Wisconsin,

Plaintiff-Respondent,

vs.

Appeal Nos. 2015AP43
2015AP44

John Duewell,
Defendant-Appellant.

Milwaukee County Circuit Court
Case Nos. 2012CF1462
2012CF1524

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION
AND POST-CONVICTION DECISION AND ORDER ENTERED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE
WILLIAM W. BRASH III PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

- I. Whether the types of alcohol contained in carburetor cleaner (methanol and isopropanol) qualified as an “intoxicant” as that term was used in Wis. Stat. § 346.63 prior to passage of 2013 Act 83, which for the first time expressly defined the term “intoxicant”?

The trial court held that Mr. DUEWELL’s “chemical huffing” of carburetor cleaner in each case “was the equivalent of being under the influence of an intoxicant,” and denied his post-conviction motion to vacate each conviction, dismiss each case with prejudice, and discharge the defendant from DOC supervision. (B33:3; App. 1-4)¹.

¹ “A” followed by a number will refer to the court record entry for Milwaukee case 2012CF1462. “B” followed by a number will refer to the court record entry for Milwaukee case 2012CF1524.

STATEMENT ON ORAL ARGUMENT

Mr. Duewell would welcome the occasion to argue this case to the Court if given the opportunity. Oral argument may aid the Court in focusing on the contested issues and relevant facts and in deciding those issues in this appeal.

STATEMENT ON PUBLICATION

Mr. Duewell believes the Court's opinion in the instant case will merit publication because it will apply established rules of law to a factual situation significantly different from that in published opinions and it will decide a case of substantial and continuing public interest.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal of criminal convictions and sentences.

John Duewell was charged with operating a motor vehicle while intoxicated under Wis. Stat. § 346.63(1)(a) in two cases- the first in Milwaukee County Case No. 2012CF1462 for conduct occurring on November 5th, 2011 (A2), and the second in Milwaukee County Case No. 2012CF1524 for conduct occurring on January 14th, 2012. (B2). In each case, the government's theory of intoxication was Mr. Duewell's inhaling, or "huffing," B-12 Chemtool Carburetor Choke and Throttle Body Cleaner (hereafter "carburetor cleaner"), specifically the methanol and isopropanol it contains. *See* A2:2; B2:2; B38:3 (prosecutor discussing that carburetor cleaner is the intoxicant at issue); B39:3-4 (prosecutor stating that the complaints set forth the facts of the cases and discussing Mr. Duewell's "affinity for carburetor choke and throttle body cleaner" with reference to a bottle of it being found on his lap with a rag soaked in it for one case); B30:1² (confirming that the particular substances in the carburetor cleaner it believed qualified as "intoxicants" were methanol in case ending 1462, and methanol and isopropanol in case ending 1524). The government never relied on any other theory for Mr. Duewell's impaired driving, such as consumption of any alcoholic beverage, use of controlled substances, or abuse of any other drug.

Based on impaired driving due to inhalation of carburetor cleaner, the trial court accepted Mr. Duewell's guilty plea in each case on September 13th, 2013.

See B38:17 (for 1462 case); B38:30 (for 1524 case). It then imposed a global

² This document is also contained in the record at A19:1. For documents that appear in both records, only the "B" citation (corresponding to the record in Milwaukee case 2012CF1524) will be used from this point forward.

sentence of 18 months of initial confinement and 36 months of extended supervision, \$1,200 in fines, 4 years of DOT license revocation, and 4 years of ignition interlock device. (A17; App. 5-6; B26; App. 7-8). Mr. Duewell has served the initial confinement portion of his sentence and is currently on extended supervision.

On October 7th, 2014, Mr. Duewell filed a post-conviction motion seeking to vacate each conviction, dismiss each case with prejudice, and discharge the defendant from DOC supervision. (B28). The basic argument raised in his motion was that carburetor cleaner did not qualify as an “intoxicant” under § 346.63(1)(a) at the time Mr. Duewell huffed it in each case; therefore he did not commit a crime by driving while under its influence and the trial court was without subject matter jurisdiction to convict him and enter judgments against him. *See id.* at 3-8.³ After eliciting a response from the government (B30) and allowing Mr. Duewell to reply (B32), the trial court entered an order denying Mr. Duewell’s motion on December 17th, 2014. (B33; App. 1-4).

The trial court agreed that the term “intoxicant” was not defined by Wis. Stat. § 346.63(1)(a) until after Mr. Duewell was convicted, but found that “a general dictionary definition” did exist, which “the court would have applied to this case because it is clear from a description of the defendant’s behavior that his chemical huffing was the equivalent of being under the influence of an

³ As mentioned above, the state has never argued that Mr. Duewell violated § 346.63(1)(a) in any manner other than huffing carburetor cleaner. Also, neither the state nor the trial court found that Mr. Duewell was precluded from making this argument because he pled guilty pursuant to a plea agreement. *See* B33:2-3. Any such claim would be meritless because subject matter jurisdiction is non-waivable and can be raised despite entry of a guilty plea. *See Mack v. State*, 93 Wis.2d 287, 294, 286 N.W.2d 563, 566 (1980).

intoxicant.” *Id.* at 3. It should be noted the trial court did not specify any particular “general dictionary definition” it would have applied in this case. Ultimately, the trial court stated that it was confident that its determination that Mr. DUEWELL “was operating [a motor vehicle] while intoxicated from a substance which contained alcohol,” would stand on appeal. *See id.* This appeal now follows.

ARGUMENT

I. Prior to passage of 2013 Act 83, Wisconsin’s drunk driving law did not define the term “intoxicant,” and it did not cover inhaling or huffing substances such as carburetor cleaner. As such, Mr. DUEWELL did not commit the crimes of operating a motor vehicle while under the influence of an intoxicant, the circuit court did not have subject matter jurisdiction over those charges, and the judgments it issued against Mr. DUEWELL are void *ab initio*.

A. Standard of Review

Matters of statutory interpretation and applying a statute to a set of facts are questions of law that this Court will review *de novo*. *See State v. Bodoh*, 226 Wis.2d 718, 724, 595 N.W.2d 330, 333 (1999).

B. Argument

This case hinges on the statutory interpretation of the term “intoxicant” under Wis. Stat. § 346.63(1)(a) prior to passage of 2013 Act 83. If the term includes a person huffing or inhaling carburetor cleaner, then Mr. DUEWELL is guilty of each crime as currently convicted; if not, then he did not commit the crime he was charged with, the trial court lacked subject matter jurisdiction, and the judgments it issued against him are void *ab initio*. *See Mack v. State, supra*

fn. 3; *see also State v. Briggs*, 218 Wis.2d 61, 68-69, 579 N.W.2d 783, 787 (Ct. App. 1998); *State v. Cvorovic*, 158 Wis.2d 630, 634, 462 N.W.2d 897, 898 (Ct. App. 1990).

Crimes in Wisconsin “are exclusively statutory, and the task of defining criminal conduct is entirely within the legislative domain.” *State v. Baldwin*, 101 Wis.2d 441, 447, 304 N.W.2d 742, 746 (1981). Criminal statutes must be strictly construed in favor of the defendant unless such a construction conflicts with the manifest intent of the legislature. *See State v. Olson*, 106 Wis.2d 572, 585, 317 N.W.2d 448 (1982); *see also United States v. Bass*, 404 U.S. 336, 347 (1971). Because there are “no constrictive offenses,” before an individual “can be punished, it must be shown that his case is plainly within the statute.” *Fasulo v. United States*, 272 U.S. 620, 629 (1926). Only the legislature can define crimes, and because of the constitutional due process right to adequate notice of what constitutes a crime, criminal liability exists only when the legislature “plainly and unmistakably” says it does. *See Bass* at 348-49 (internal citation omitted).

The statute at issue in this appeal, Wis. Stat. § 346.63(1)(a), limits when an individual may be convicted of driving or operating a motor vehicle to several occurrences, only one of which is relevant to this appeal: while one is under the influence of an “intoxicant.”⁴ Appropriately, statutory interpretation “begins with the language of the statute,” which is “given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *State ex rel. Kalal v. Circuit*

⁴ This is the only crime Mr. Duewell was charged with in each complaint (A2; B2), that the trial court discussed during its plea colloquy with him (B38:17; B38:30), and entered judgments of conviction for. (A17; App. 5-6; B26; App. 7-8).

Court for Dane County, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 663, 681 N.W.2d 110, 124. Other aspects of the statute’s text also help to discern the meaning of its language, including the context in which it is used (not in isolation but as part of a whole) and its relation to the language of surrounding or closely-related statutes. *See id.* at ¶ 46. Common, ordinary, and accepted meanings of words can be ascertained by reference to dictionary definitions. *See id.* at ¶ 53 (using *The American Heritage Dictionary of the English Language* to define the term “refuse.”). If the meaning of the statute’s language is plain, then further inquiry ceases and resort to extrinsic sources to interpret the text is unnecessary and disfavored. *See id.* at ¶¶ 45, 54.

Here, the trial court recognized that “a general dictionary definition existed” for the term “intoxicant,” but failed to identify any such definition or explain how any such definition covers methanol or isopropanol. (B33:3; App. 3). There is little doubt that any general dictionary definition of “intoxicant” covers alcoholic beverages, based on the following widely read and relied upon dictionaries (emphasis added for each entry):

1. “A substance (*esp. liquor*) that deprives a person of the ordinary use of the senses or of reason.” *Black’s Law Dictionary* (10th ed. 2014).
2. “An agent that intoxicates, especially *an alcoholic beverage*.” *The American Heritage Dictionary of the English Language* (5th ed. 2014).
3. “An intoxicating agent, *as alcoholic liquor* or certain drugs.” *Webster’s Unabridged Dictionary* (Deluxe Edition 2001).

4. “Intoxicate: (*of alcoholic drink or a drug*) cause (someone) to lose control of their faculties or behavior.” *Oxford Dictionary of English* (3rd ed. 2010).

These dictionary definitions establish that the ordinary, accepted and common meaning of “intoxicant”- at least when referencing alcohol rather than a drug or other substance- is alcohol contained in an alcoholic beverage or liquor, and not any other type of non-consumable alcohol such as methanol or isopropanol.

Other aspects of the statute’s text confirm that the definition of “intoxicant” as that term is used in § 346.63(1)(a) is focused only on alcohol that can be drunk and consumed, and not on other types of alcohol. These include all of the following:

1. The legislature knows how to distinguish between different types of alcohol when it finds it significant to do so, and knows how to clearly identify which types it is specifically referencing when it drafts a statute. For example, Wis. Stat. § 346.63(1)(b)- the very next statutory subsection after § 346.63(1)(a)- prohibits a person from driving or operating a motor vehicle while the person has a “prohibited alcohol concentration.” The term “alcohol” is given a special definition under Wis. Stat. § 340.01(1q)⁵ that specifically means “any substance containing any form of alcohol including, but not limited to, ethanol, methanol, propanol, and isopropanol.” The fact that the legislature used the general term “intoxicant” in § 346.63(1)(a) and not “alcohol,” but chose to use “alcohol” in the

⁵ Wis. Stat. § 340.01 defines words and phrases for Chapters 340 to 349 of the Wisconsin Statutes, along with Chapter 351 and Wis. Stat. § 23.33.

very next subsection, is significant and signals that it intended the terms to have different meanings. *See Wisconsin Patients Compensation Fund v. Physicians Ins. Co. of Wisconsin, Inc.*, 2000 WI.App 248, ¶ 10, 239 Wis.2d 360, 369, 620 N.W.2d 457, 461. Had the legislature wanted § 346.63(1)(a) to cover alcohols other than drinking alcohol, it would have plainly said so but it did not. This bolsters the conclusion that “intoxicant” under § 346.63(1)(a) retains its common, ordinary, and accepted general dictionary definition, and does not refer to the special technical definition of “alcohol” under § 340.01(1q). *See Kalal* at ¶ 45.

2. Other Wisconsin Statutes that define the term “intoxicant” do so only in reference to alcoholic beverages, and not other types of alcohol. For example, Wis. Stat. § 350.01(9) defines “intoxicant” under the “Snowmobiles” chapter as “any alcoholic beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, or any combination thereof.” Also, Wis. Stat. § 939.22(42) defines “under the influence of an intoxicant” for criminal statute chapters 939 to 948 and 951 as meaning “the actor’s ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961 [or various combinations thereof].”⁶ These closely-related statutes to § 346.63(1)(a) define the term “intoxicant” for alcohol as only for alcoholic beverages, and not other non-consumable, non-drinkable types of alcohol. This confirms that only drinkable, consumable alcohol is covered by § 346.63(1)(a)’s use of that identical term. *See Kalal* at ¶ 46

⁶ 2013 Act 83, passed in December 2013 and discussed further below, inserted the term “hazardous inhalant” into both of these statutes. Prior to passage of the Act, neither statute mentioned the term “hazardous inhalant.”

(the relation of the language in question to language of closely-related statutes help to discern its meaning).

3. Wisconsin Standard Criminal Jury Instruction 2663 defined Wis. Stat. § 346.63(1)(a)'s phrase "under the influence of an intoxicant" as meaning a "defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." It does not reference any other type of alcohol. It should go without saying that this standard jury instruction has been used and relied upon in thousands, if not tens of thousands, of jury trials since it was drafted in 1966. Jury instructions are meant to convey accurate statements of the law to lay jurors, *see Nommensen v. American Continental Ins. Co.*, 2001 WI 112, ¶ 36, 246 Wis.2d 132, 629 N.W.2d 301, and the fact that this instruction references only alcoholic beverages strongly supports the notion that § 346.63(1)(a)'s use of the term "intoxicant" covers only drinkable, consumable alcohol, and not other types like methanol and isopropanol.

4. Perhaps the strongest indication that § 346.63(1)(a)'s use of the term "intoxicant" covers only alcoholic beverages and not other types of alcohol is the fact that its surrounding and closely-related statutes did not define that term whatsoever until the passage of 2013 Act 83 in December of that year. Section 8 of that Act created for the first time a definition of "intoxicant" for Chapters 340 to 349 of the statutes as simply including "hazardous inhalants." Wis. Stat. § 340.01(25d).⁷ This is the most convincing evidence that prior to passage of the

⁷ Section 7 of the Act in turn created Wis. Stat. § 340.01(20r), which defines "hazardous inhalant" as "a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that does not comply with any cautionary labeling... or in a manner that is not intended by the manufacturer of the substance, and that is intended to induce

Act, the legislature did not believe that § 346.63(1)(a) covered someone who inhaled or huffed a substance like carburetor cleaner. The legislature must have believed that it only covered someone who was intoxicated due to consumption of an alcoholic beverage because that was (and is) the ordinary, common, and accepted meaning of “intoxicant.” Statutory language is read to give reasonable effect to every word in order to avoid surplusage. *See Kalal* at ¶ 46. If § 346.63(1)(a)’s use of the term “intoxicant” already covered non-drinking alcohols like methanol and isopropanol that were huffed, inhaled, or some other way ingested by an individual, then Act 83’s creation of §§ 340.01(25d) and (20r) (see footnote 7 above) was unnecessary and would make not only certain words, but those entire subsections, surplusage.

5. Lastly, the government has cited no authority- in the statute’s text, in case law, or otherwise⁸- that finds methanol and isopropanol to be “intoxicants” under Wis. Stat. § 346.63(1)(a). The reason it does not do so is because it cannot. As already discussed in detail, the statute’s text did not define the term “intoxicant” before 2013 Act 83. No Wisconsin appellate case, published or unpublished, even contains the word “isopropanol” in it, much less decides whether it is an “intoxicant” under § 346.63(1)(a). The term “methanol” appears in two cases⁹, but neither decide the question of whether it counts as an

intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.”

⁸ For example, the government has stated previously that methanol and isopropanol “are classified as intoxicants in the scientific community,” *see* B30:2, but cites to no authority for this proposition.

⁹ *See Ramsden v. Hawkinson Gas Serv. Co., Inc.*, 63 Wis.2d 455, 460, 217 N.W.2d 322, 324 (1974) and *Abbott Laboratories v. Norse Chemical Corp.*, 33 Wis.2d 445, 460, 147 N.W.2d 529, 537 (1967).

“intoxicant” under § 346.63(1)(a). When considered along with the textual aides detailed above that all establish that “intoxicant” covers only drinkable, consumable alcohol under § 346.63(1)(a), the government’s inability to cite to any authority that holds it includes methanol or isopropanol is especially troubling.

Ultimately, the government’s prosecution of Mr. DUEWELL under § 346.63(1)(a) missed the mark and is illegal in two ways: first, had the exact same charges been brought against him based on the exact same conduct occurring after December 2013, then there is no doubt he violated the statute. This is because newly created Wis. Stat. § 340.01(25d) expressly states that an “intoxicant” under § 346.63(1)(a) includes a “hazardous inhalant,” which in turn is defined under § 340.01(20r) and which perfectly describes the conduct Mr. DUEWELL engaged in for each case. But the *ex post facto* clause of the Wisconsin Constitution forbids any law or prosecution that “punishes as a crime an act previously committed, which was innocent when done.” *State v. Thiel*, 188 Wis.2d 695, 703, 524 N.W.2d 641, 644 (1994). Accordingly, the government jumped the gun when prosecuting Mr. DUEWELL under § 346.63(1)(a) for conduct it did not cover when Mr. DUEWELL engaged in it for each case, and therefore he cannot be punished for it under § 346.63(1)(a).

Second, the government below argued that it “had an additional charge which was supported by the evidence” that it could bring against Mr. DUEWELL, specifically operating a motor vehicle with a “prohibited alcohol concentration” under § 346.63(1)(b). (B30:3). But its threat to file possible charges under an

entirely different provision hinders- not helps- its argument that the term “intoxicant” under § 346.63(1)(a) covers methanol and isopropanol. That it could possibly charge Mr. Duewell under another statutory provision, and that it perhaps may obtain a conviction under that provision has absolutely no bearing on whether Mr. Duewell’s conduct fulfills the definition of being under the influence of an intoxicant under the one he was actually charged with: § 346.63(1)(a). That is a question only of statutory interpretation discussed at length here, and the government’s arguments to the contrary are without merit, including its focus on potential charges under other statutory provisions.

CONCLUSION

The government has conceded throughout this case that its theory of Mr. Duewell driving under the influence of an “intoxicant” was his inhaling or huffing carburetor cleaner, particularly the methanol and isopropanol it contains. But it tries to fit the square peg of prosecution for an inhalation case into the round hole of a conviction under § 346.63(1)(a), which doesn’t fit for three main reasons: first, before December 2013, § 346.63(1)(a)’s term “intoxicant” did not cover dangerous inhalants but rather only alcoholic beverages; second, Mr. Duewell engaged in the conduct underlying each conviction before then and punishing him for that now would violate the *ex post facto* law; and third, that the government regrets charging him under the statutory provision it chose has no bearing on the question presented here. Accordingly, Mr. Duewell did not commit a crime under § 346.63(1)(a) when he engaged in the conduct he was charged and convicted for,

the trial court was therefore without subject matter jurisdiction, and the judgments it issued are void *ab initio*. This Court must therefore vacate both of his convictions, order each case dismissed with prejudice, and order Mr. Duewell discharged from DOC supervision effective immediately.

Respectfully submitted this 22nd day of April, 2015 at Milwaukee, Wisconsin.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,473 words.

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CERTIFICATION FOR APPENDIX CONTENTS

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I hereby certify, pursuant to Wis. Stat. 809.19(12)(f), that the electronic copy of the brief, excluding the appendix, if any, filed in this case is identical to the text of the paper copy of the brief filed in this case.

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Wis. Stat. 809.80(4)(a), that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, P. O. Box 1688, Madison, WI 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on the 22nd day of April, 2015. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

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