

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case Nos. 2015AP43-CR, 2015AP44-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN STEVEN DUEWELL,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION
RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE
WILLIAM W. BRASH, III, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX
OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. A guilty plea waives all nonjurisdictional defects preceding the entry of the plea. Here, John Steven Duewell pled guilty to operating while intoxicated as articulated in the criminal complaint yet he now claims he was not under the influence of an intoxicant under the legal definition of intoxicant. Did Duewell waive this claim by pleading guilty to the crime?

2. No person may operate a motor vehicle under the influence of an intoxicant to a degree that renders him incapable of safely driving. Here, Duewell inhaled carburetor cleaner, which caused his speech to slur, difficulty walking, and his eyes to be bloodshot and glossy. Was he under the influence of an intoxicant to the degree that he could not safely drive?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

Duewell's statement of the case and statement of facts are sufficient to frame the issues for review. The State will include additional relevant facts in the argument section of this brief.

ARGUMENT

I. Duewell waived his claim.

A. Legal principles.

A guilty plea, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects preceding the entry of the plea, including alleged violations of constitutional rights. *State v. Bangert*, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986); *State v. Lasky*, 2002 WI App 126, ¶ 11, 254 Wis. 2d 789, 646 N.W.2d 53.

B. Duewell's guilty plea waived his claim.

Duewell wants his convictions vacated because, he argues, carburetor cleaner is not an intoxicant so he was not under the influence of an intoxicant. Duewell's brief at 9. Duewell's guilty plea waived all non-jurisdictional defects preceding the entry of the plea.

Duewell believes that he did not waive his claim because his plea cannot waive the court's subject matter jurisdiction.¹ Duewell's brief at 8. A guilty plea does not waive jurisdictional defects, but Duewell's claim is not a jurisdictional claim. The court has subject matter jurisdiction over all allegations of criminal conduct in violation of Wisconsin Statutes. *State v. Powers*, 2004 WI App 156, ¶ 7, 276 Wis. 2d 107, 687 N.W.2d 50. The court only lacks subject matter jurisdiction when the crime charged is a nonexistent crime. *Id.*

Operating while intoxicated is not a nonexistent crime because the statute applies to people who may be prosecuted and convicted for the conduct that the statute criminalizes. *See id.* Duewell's claim is not that operating while intoxicated is not a crime, but that he did not commit that crime. The issue is not a question of subject matter jurisdiction, but whether Duewell operated a vehicle while intoxicated.

Duewell acknowledged at the plea hearing that he was withdrawing his motion to the operating while intoxicated charge (38:7-8, 25-26). Duewell does not make a jurisdictional claim, and his guilty plea waived his nonjurisdictional claims. This court should refuse to address the merits of Duewell's claim.

II. The State properly charged Duewell because he was under the influence of an intoxicant when he drove.

A. Standard of review.

This court must interpret the meaning of "intoxicant" in Wis. Stat. § 346.63(1)(a). Statutory interpretation and the application of a statute to specific facts are questions of law that this court reviews independently but benefitting from the analysis of the circuit court and court of appeals. *State v. Matasek*, 2014 WI 27, ¶ 10, 353 Wis. 2d 601, 846 N.W.2d 811.

¹The circuit court accepted Duewell's assertion that his claim was jurisdictional (2015AP44-CR 33:2-3). But this court can decide on different grounds than the circuit court relied on. *See State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

B. Legal principles.

“[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This court examines the language of the statute. *Matasek*, 353 Wis. 2d 601, ¶ 12. The context and structure of the statutory language is important to meaning. *Id.* This court interprets words according to their common and approved usage, and interprets technical words and phrases according to their technical meaning. *Id.*

This court gives effect to each word in order to avoid surplusage, and to avoid absurd, unreasonable, or implausible results. *Id.* ¶ 13. It also considers the purpose of the statute, and avoids results that are clearly at odds with the legislature’s purpose. *Id.*

No one can drive or operate a motor vehicle while:

[u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; ... [t]he person has a detectable amount of a restricted controlled substance in his or her blood[, or t]he person has a prohibited alcohol concentration.

Wis. Stat. § 346.63(1).

C. Duewell operated his vehicle under the influence of an intoxicant.

On November 5, 2011, Duewell was driving 35 miles per hour in a 50 mile-per-hour zone (2015AP43-CR 2:2). He had bloodshot and glossy eyes, slurred speech, seemed confused, moved very slow, and had trouble understanding and following directions (2015AP43-CR

2:2). Duewell had .023 g/100 mL of Methanol and .049 g/100 mL of Acetone in his blood (2015AP43-CR 2:2). He also had 6.2 nanograms per milliliter of a tetrahydrocannabinol (THC) metabolite, Carboxy-THC (2015AP44-CR 30:5).² He operated his vehicle under the influence of an intoxicant.

On January 14, 2012, Duewell stopped his vehicle in the middle of the road way (2:2). He stumbled out of the vehicle and walked unsteadily, the front of his pants were wet as if he had urinated in his pants, his speech was so slurred that it was almost incomprehensible (2:2). His blood contained methanol, acetone, toluene, and isopropanol (2:2). He also had Carboxy-THC in his blood in the amount of 9.3 ug/L (2:2). Again, he operated his vehicle under the influence of an intoxicant.

At the time of Duewell's intoxicated driving, the legislature had not defined "intoxicant" in Wis. Stat. § 340.01 (2009-10). The general meaning of the word intoxicant, the legislative purpose, related statutes, and the legislative history, each point to the conclusion that carburetor cleaner was an intoxicant under Wis. Stat. § 340.01 (2009-10).

Since the legislature did not define intoxicant, this court should interpret its meaning from the dictionary definition. *See Kalal*, 271 Wis. 2d 633, ¶¶ 44, 53. The dictionary definition of intoxicant is "something that intoxicates." *See Intoxicant*, <http://www.merriam-webster.com/dictionary/intoxicant> (last visited June 8, 2015). Intoxicate means "of alcohol, a drug, etc. : to make (someone) unable to think and behave normally : to excite or please (someone) in a way that suggests the effect of alcohol or a drug." *See Intoxicate*, <http://merriam-webster.com/dictionary/intoxicate> (last visited June 8, 2015).

Duewell had alcohol in his blood that made him unable to think or behave normally. He was under the influence of an intoxicant under the definition of the word intoxicant. Duewell had

² All references to the appellate record are to Case No. 2015AP44-CR unless otherwise noted.

“B-12, Chemtool Carburetor Choke and Throttle Body Cleaner” in his vehicle (2:2). This product contains mineral spirits, petroleum distillate, acetone, methanol, methyl ethyl ketone, 2-butoxyethanol, xylene, hexane, and toluene. See *What is HEST?*, <http://www.berrymanproducts.com/about/what-is-hest/> (last visited June 8, 2015). It contains alcohol in the form of methanol and acetone. Not only had Duewell ingested carburetor cleaner that contained alcohol, but he also had a measurable amount of alcohol in his blood. He inhaled an intoxicant under the dictionary definition of intoxicant.

The dictionary definition is consistent with the legislative purpose of Wis. Stat. § 346.63(1) (2009-10). The legislature intended the intoxicated driving statute to apply to all substances that intoxicate, not only alcohol. This court avoids results that are clearly at odds with the legislature’s purpose. See *Kalal*, 271 Wis. 2d 633 ¶ 13. The legislature “enacted a stringent operating while intoxicated law which is designed to achieve the goal of maximum highway safety in this state.” *State v. Henry*, 111 Wis. 2d 650, 655, 332 N.W.2d 88 (Ct. App. 1983). Intoxicants encompass a class of substances more broad than alcohol. The purpose of the statute requires a broad interpretation of intoxicant.

This law was to achieve maximum safety by first discouraging individuals from initially getting behind the wheel of a motor vehicle while under the influence of alcohol and, secondly, by facilitating the removal of the intoxicated drivers from Wisconsin highways if they do drive while intoxicated. Wisconsin appellate courts have historically construed these types of laws liberally so as to effectuate the legislative purpose which led to their passage.

Id.

Duewell’s interpretation is contrary to this legislative purpose. Duewell argues that the statute only covered drinking alcohol and not alcohol that is inhaled. Duewell’s brief at 12. He bases his argument partially on the fact that Wis. Stat. § 346.63(1)(a)(2009-10) uses the word intoxicant, but Wis. Stat. § 346.63(1)(b)(2009-10) uses the word alcohol. Duewell’s brief at 12.

In Wis. Stat. § 346.63(1)(a) (2009-10), the legislature intended to criminalize driving under any intoxicant, including alcohol. But in Wis. Stat. § 346.63(1)(b) (2009-10), it criminalized only driving with a prohibited alcohol concentration. Section 346.63(1)(a) is simply broader than § 346.63(1)(b). There is no conflict between the two subsections. Wisconsin Stat. § 346.63(1)(a) criminalizes driving under the influence of any intoxicant, including any kind of alcohol that intoxicates.

The legislature defined alcohol in all of Wis. Stat. Chapter 346 as “any substance containing any form of alcohol including, but not limited to, ethanol, methanol, propanol and isopropanol.” Wis. Stat. § 340.01(1q). To accept Duewell’s argument this court must conclude that “intoxicant” in (1)(a) means some types of alcohol, but not all types — an absurd result. This court cannot interpret statutes in a way that leads to absurd results. *See Kalal*, 271 Wis. 2d 633, ¶ 13.

Duewell’s interpretation of the law would undercut the clear legislative purpose. Duewell does not argue that carburetor cleaner did not intoxicate him. He was intoxicated. Duewell committed the crime of driving while intoxicated. The legislature intended to criminalize these actions.

Duewell asserts that the definition of intoxicant in other statutes supports his conclusion that only alcoholic beverages are covered. Duewell’s brief at 13. But instead the related statutes support the opposite conclusion. The legislature defined intoxicant within other statutes, but had not adopted those definitions as it relates to intoxicated driving. *See* Wis. Stat. §§ 23.33(1)(i), 30.50(4e), 85.53(1)(c), 350.01(9), and 939.22(42). Each of those other statutes defined intoxicant as an alcohol beverage, controlled substance, and controlled substance analog. *Id.* By not defining intoxicant the same as the other state statutes, the legislature intended intoxicant to have a different meaning under the operating while intoxicated statutes. *See Kalal*, 271 Wis. 2d 633, ¶ 46. That meant that driving under the influence of any intoxicants was prohibited.

The legislature criminalizes abuse of hazardous substances, including inhaling substances with the intent to induce intoxication. Wis. Stat. § 941.316(1). Reading the related statutes in conjunction

with Wis. Stat. § 346.63 show that intoxicant means all substances that cause a person to act intoxicated.

The legislative history also supports the dictionary definition of intoxicant. Duewell argues that 2013 Wisconsin Act 83 changed the law to criminalize his behavior, and that prior to its passage hazardous substances were not intoxicants. Duewell's brief at 14. In 2013, the legislature added a definition of intoxicant to Wis. Stat. § 340.01. It stated "'Intoxicant' includes a hazardous substance." 2013 Wis. Act 83, § 8 (creating Wis. Stat. § 340.01(25d)).

'Hazardous' inhalant means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law, or in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.

Wis. Stat. § 340.01(20r) (2013-14).

Prior to passage of 2013 Wisconsin Act 83, an unpublished authored court of appeals decision created ambiguity. *See State v. Torbeck*, 2012AP522-CR (Aug. 1, 2012) (R-Ap. 101-08). The court in *Torbeck* affirmed a circuit court's dismissal of an operating while intoxicated charge because the defendant consumed 1-Difluoroethane (DFE) and concluded that DFE is not an intoxicant within the meaning of Wis. Stat. § 346.63(1)(a). *Torbeck*, 2012AP522-CR, ¶ 1 (R-Ap. 102). Because the statutes did not define intoxicant, the court adopted a dictionary definition of intoxicant. *Id.* ¶ 7 (R-Ap. 105). It concluded that DFE was not an intoxicant because it was neither alcohol nor a drug. *Id.* Although not binding precedent, this opinion could be cited for persuasive authority and could have created confusion. Wis. Stat. § 809.23(3)(b).

The legislature passed 2013 Wis. Act 83, not to criminalize behavior that had not previously been criminalized, but to clarify which behavior fell under Wis. Stat. § 346.63.

The common definition of intoxicant, the legislative purpose behind the operating while intoxicated statute, the related statutes, and the legislative history, all support the conclusion that intoxicant in Wis. Stat. § 346.63 (2009-10) meant any substance that intoxicates. Duewell inhaled an alcohol that caused him to be intoxicated. He drove under the influence of an intoxicant and was properly convicted.

D. If this court concludes that carburetor cleaner is not an intoxicant, Duewell's successful attack on his conviction constitutes a breach of his plea agreement.

1. Standard of review.

Whether particular conduct constitutes a material and substantial breach of a plea agreement is a question of law. *State v. Naydihor*, 2004 WI 43, ¶ 11, 270 Wis. 2d 585, 678 N.W.2d 220. This court reviews questions of law *de novo* and reviews the circuit court's determination of facts under the clearly erroneous standard. *Id.*

2. Legal principles.

Contract principles guide this court when it determines the rights of the parties to a plea agreement and whether there has been a material and substantial breach. *State v. Deilke*, 2004 WI 104, ¶ 12, 274 Wis. 2d 595, 682 N.W.2d 945. “[M]aterial and substantial” is a singular concept. *Id.* ¶ 12 n.8. In order for a court to vacate a plea agreement, the breach must be material and substantial. *Id.* ¶ 13.

“A breach of a plea agreement does not give rise to a *per se* right to withdraw a plea.” *State v. Bangert*, 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986). A breach must not be merely technical. *Id.* at 290. A breach must deprive the party of a substantial and material bargained for benefit. *Id.* A material and substantial breach allows a plea agreement to be vacated or an accused to be resentenced. *Naydihor*, 270 Wis. 2d 585, ¶ 10.

A material breach in contract law releases the non-breaching party from performance of the contract. *Deilke*, 274 Wis. 2d 595, ¶ 13 n.9. A material breach can be one that deprives the non-breaching

party of a benefit that party reasonably expected. *Id.* “A material and substantial breach” of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party. *Id.* ¶ 14.

Determination of whether a breach was material and substantial requires careful examination of the facts. *State v. Williams*, 2002 WI 1, ¶ 53, 249 Wis. 2d 492, 637 N.W.2d 733.

3. If this court vacates Duewell’s conviction, the parties should be returned to their positions prior to Duewell’s plea.

The State entered into a plea agreement where it dismissed two counts of operating after revocation (38:13, 26). If Duewell succeeds on appeal, the parties should be restored to their bargaining positions before Duewell’s plea, and the operating after revocation charges should be reinstated.

As in *Deilke*, if this court accepts Duewell’s argument Duewell would accomplish through indirect means what he could not have done directly. *See Deilke*, 274 Wis. 2d 595, ¶ 24. He retains all of the benefits of the plea agreement (*e.g.*, being subject to fewer charges, less-than-maximum fines and jail time). But he is also in a better position because his operating while intoxicated conviction would be vacated. *See id.* The State, on the other hand, retains only some of the benefits of the original agreement (*e.g.*, not having to take the case to trial), but it is left in a far worse position. *See id.* If Duewell succeeds on appeal, he materially and substantially breached the plea agreements.

CONCLUSION

The State requests that this court affirm the order of the circuit court denying Duewell's postconviction motion and his judgments of conviction.

Dated this 25th day of June, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,836 words.

Dated this 25th day of June, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of June, 2015.

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Assistant Attorney General

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

Dated this 25th day of June, 2015.

Christine A. Remington
Assistant Attorney General

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WITH WIS. STAT. § (RULE) 809.19(13)

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I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 25th day of June, 2015.

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