STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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 REPLY BRIEF

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I. Mr. Duewell did not waive his claim on appeal.

The government argues that Mr. Duewell does not raise a jurisdictional claim on appeal because allegations that an individual drove while intoxicated are criminal in nature and Wisconsin circuit courts have subject matter jurisdiction over all allegations of criminal conduct. *See* Govt. Br. at 3. Therefore, the government reasons, Mr. Duewell is simply arguing he did not commit the crime of driving while intoxicated rather than arguing the crime alleged is non-existent and that any such argument was waived by his pleading guilty. *See id*. The government confuses the difference between the law governing this case and the application of the undisputed facts of this case to the law. It is plain that Wisconsin statutes outlaw driving while under the influence of an intoxicant, *see* Wis. Stat. § 346.63(1)(a), and therefore if Mr. Duewell drove while under the influence of an intoxicant then the circuit court clearly had jurisdiction over him. But here the fact that the government's theory of intoxication has always been based on Mr. Duewell inhaling or "huffing" carburetor cleaner is not in dispute. *See* Def. Br. at 7; *see also* Govt. Br. at 2 (stating "Duewell's statement of the case and statement of facts are sufficient to frame the issues for review."). Therefore, Mr. Duewell does raise a jurisdictional claim by arguing that carburetor cleaner (prior to passage of 2013 Act 83) is not an "intoxicant" as that term is used in § 346.63(1)(a) and therefore it was indeed a nonexistent crime to drive under its "influence" when Mr. Duewell did in late 2011 and early 2012. If driving after inhaling carburetor cleaner was not a crime during those times, then the trial court

had no jurisdiction to convict him of either charge. Contrary to what the government asserts, Mr. Duewell raises a "jurisdictional claim," and his guilty plea could not and did not waive this claim nor this Court's ability to address the merits of the claim. *See* Def. Br. at 9-10.

II. The government engages in dubious statutory interpretation methods to argue that Wis. Stat. § 346.63(1)(a)'s use of the term "intoxicant" prior to passage of 2013 Act 83 included alcohols other than the type found in alcoholic beverages or liquor. Its argument that the term included non-consumable types of alcohol must be rejected.

The government recites that one dictionary defines "intoxicate" as meaning "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* Govt. Br. at 5. But that still does not answer what "alcohol" is covered by § 346.63(1)(a)'s use of the term "intoxicant." The government fails to address Mr. Duewell's argument raised in his opening brief that the ordinary, accepted and common meaning of the terms "intoxicant" or "intoxicate," when used in the context of alcohol rather than a drug or other substance, is liquor or an alcoholic beverage and not other types of non-consumable alcohol such as methanol or isopropanol.[1] *See* Def. Br. at 11-12 (citing four widely read and relied upon dictionaries, not just one). Because the government makes no real attempt to refute or distinguish Mr. Duewell's dictionary definitions and arguments related to those, they may be deemed

[1] The government argues that the carburetor cleaner Mr. Duewell inhaled contained "alcohol in the form of methanol and acetone." Govt. Br. at 6. This is partially correct-while methanol is a type of alcohol (albeit not meant for human consumption), acetone is not a type of alcohol.

conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979). Further, even the government's own choice of dictionary defines "alcohol" primarily in terms of alcoholic beverages: "the substance in liquors (such as beer, wine or whiskey) that can make a person drunk : drinks containing alcohol." *See* www.merriam-webster.com/dictionary/alcohol (last visited July 8th, 2015). Hence, this Court can confidently find that the ordinary, accepted and common meaning of "intoxicant" when used in reference to alcohol is only that contained in an alcoholic beverage or liquor, and not other types of non-consumable alcohol.

None of the government's remaining statutory interpretation arguments are convincing nor take away from the ordinary, accepted and common dictionary definitions already discussed:

1. The government asserts that the "legislative purpose" of Wis. Stat. § 346.63(1) is to cover "all substances that intoxicate, not only alcohol," but fails to cite any authority for this. *See* Govt. Br. at 6. It then cites *State v. Henry*, 111 Wis.2d 650, 332 N.W.2d 88 (Ct. App. 1983) for the proposition that the legislature "enacted a stringent operating while intoxicated law which is designed to achieve the goal of maximum highway safety in this state." *Id*. at 655. While this may very well be true, the government fails to mention that the primary authority relied upon by the *Henry* Court for this finding was focused on drunken drivers, not drivers that are intoxicated by any and all substances. *See id.* at 655-56, *citing State v. Neitzel*, 95 Wis.2d 191, 193-94, 289 N.W.2d 828, 830 (1980) (stating "the clear policy of the [implied consent] statute is to facilitate the

identification of *drunken drivers* and their removal from the highways…") (emphasis added). *Henry* also cited to *State v. Pawlow*, 98 Wis.2d 703, 298 N.W.2d 220 (Ct. App. 1980), which found that Wisconsin's implied consent statute was designed to "facilitate the taking of tests for intoxication and not inhibit the ability of the state to remove *drunken drivers* from the highway." *See id*. at 704-05, *citing Scales v. State*, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974) (emphasis added). The emphasis in *Henry*, *Neitzel*, *Pawlow* and *Scales* to "drunken drivers" reinforces that when the legislature used the term "intoxicant" in Wis. Stat. § 346.63(1)(a)- at least in the context of alcohol- it was referencing alcohol contained in alcoholic beverages or liquor, and not other types of alcohol like that found in carburetor cleaner.

2. The government next tries to discredit Mr. Duewell's argument that the difference in statutory language between § 346.63(1)(a) (using the statutorily undefined term "intoxicant") and § 346.63(1)(b) (using the statutorily defined term "alcohol" under § 340.01(1q)) is significant and signals that the legislature intended the terms to have different meanings. *See* Def. Br. at 12-13. The government argues § 346.63(1)(a) is "simply broader" than § 346.63(1)(b) and that to accept Mr. Duewell's argument "this court must conclude that 'intoxicant' in (1)(a) means some types of alcohol, but not all types – an absurd result." Govt. Br. at 7. But this is exactly what this Court must conclude because it is a well-established cannon of statutory construction that when the legislature uses similar yet different terms in a statute, "particularly within the same section, it is presumed that the legislature intended such terms to have different

meanings." *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. The difference in wording here matters and cannot be ignored or wished away by the government. Had the legislature wanted § 346.63(1)(a) to cover all types of alcohol and not just alcoholic beverages and liquors, then it could have easily used the term "alcohol" as it did in § 346.63(1)(b). But it did not, and so the terms are presumed to have different meanings and this does not lead to absurd results. For all the reasons argued in Mr. Duewell's opening brief and in this reply, § 346.63(1)(a)'s use of the term "intoxicant" does not include alcohols other than that found in alcoholic beverages and liquor.

3. The government argues that because § 346.63(1)(a) did not adopt the definition of "intoxicant" used by other statutes, the legislature intended the term to have a different and much broader meaning for that statute (the government cites two statutes Mr. Duewell cited in his brief along with three additional statutes that define "intoxicant" for alcohol only in terms of an alcoholic beverage). *See* Govt. Br. at 7, citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110. The government misconstrues *Kalal's* holding for why examining the language of closely-related statutes is important when engaging in statutory interpretation of another statute's undefined term. It is to help discern meaning for the term in question, not to conclude that because those closely-related statutes do not directly govern or expressly apply to the statute in question that they are of no interpretive use. *See id.* at ¶ 46. Far from establishing that § 346.63(1)(a)'s use of

the term "intoxicant" includes any and all intoxicants, the government's citation of three additional statutes that define "intoxicant" only in terms of an alcoholic beverage establishes that the legislature would have intended "intoxicant" under § 346.63(1)(a) to have the same meaning.

4. The government next argues that passage of 2013 Act 83, which for the first time expressly defined "intoxicant" under § 346.63(1)(a) as including "hazardous inhalants," was "not to criminalize behavior that had not previously been criminalized, but to clarify which behavior fell under § 346.63." Govt. Br. at 8. It argues that this "clarification" was necessary due to an unpublished Court of Appeals case decided in 2012, but it cites no actual legislative history to establish this is why the legislature passed 2013 Act 83. As the government acknowledges, unpublished opinions are not binding on any court in the state, and have no precedential effect. *See* Wis. Stat. § 809.23(3)(b). Additionally, courts do not need to distinguish or even discuss an unpublished opinion, and parties have no duty to research or cite them. *See id*. It is highly unlikely the legislature passed 2013 Act 83 merely to "clarify" what behavior § 346.63 already covered. To believe that would necessarily mean that the legislature enacted several new statutory subsections that were redundant to existing law and were mere surplusage because the term "intoxicant" already covered huffing hazardous inhalants. This assertion again strikes against well-established and long followed principles of statutory construction because statutory language is read to give reasonable effect to every word in order to avoid surplusage. *See Kalal* at ¶ 46.

Once again the government's argument contravenes sound statutory interpretation and should be rejected by this Court.

5. Lastly, the government fails to address the argument raised by Mr. Duewell that the standard jury instruction used in cases involving § 346.63(1)(a) defines the 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." *See* Def. Br. at 14. Because this instruction has been used in thousands if not tens of thousands of drunk driving trials since it was drafted in 1966, and because jury instructions are meant to convey accurate statements of the law to lay jurors, *see id.*, this Court may consider it as further evidence that the legislature intended the term "intoxicant" under § 346.63(1)(a) to cover only alcoholic beverages and liquor, not other types of non-consumable alcohol. Because the government fails to rebut this argument whatsoever, it may be deemed conceded. *See Charolais* at 109.

Mr. Duewell was charged twice with committing an act that when done was not a crime. His convictions are therefore faulty and invalid in two ways: first, the trial court was without jurisdiction to convict him in the first place because his conduct did not constitute a crime at the time, and therefore the judgments of conviction the trial court entered are both void *ab initio*. Second, the *ex post facto* law prohibits punishing an individual for an act that was not a crime at the time it was done. *See* Def. Br. at 16. This Court must therefore vacate each conviction, order each case dismissed with prejudice, and order Mr. Duewell discharged from DOC supervision effective immediately.

Respectfully submitted this 10th day of July, 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 2,036 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 10th day of July, 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.

Respectfully submitted this 10th day of July, 2015 at Milwaukee, Wisconsin.

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