STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, DONALD J. HASSIN, JR., AND MICHAEL J. APRAHAMIAN, JUDGES

BRIEF FOR PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

Cases

Page

Page

Page

Page

Statutes

Other Authorities

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, DONALD J. HASSIN, JR., AND MICHAEL J. APRAHAMIAN, JUDGES

BRIEF FOR PLAINTIFF-RESPONDENT

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument because it would add nothing to the arguments in the briefs, which fully explore all relevant aspects of the issues presented. The opinion should be published because it will clarify an ambiguous statute.

ARGUMENT

I. The statute that makes it a felony to kill someone while operating a vehicle after revocation of the driver's operating privilege can and should be construed so that knowledge of the revocation is not duplicated as an element of both the base offense and of a penalty enhancer.

The state agrees with the defendant, Ernesto E. Lazo Villamil, that Wis. Stat. § 343.44(2)(ar)4. (2013-14), which makes it a Class H felony to cause the death of another person while operating a motor vehicle when the driver knows that his operating privilege has been revoked, is ambiguous. Therefore, this statute needs clarification by the court.

The primary purpose of statutory construction is to discern the intent of the legislature. *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612; *State v. Champion*, 2002 WI App 267, ¶ 9, 258 Wis. 2d 781, 654 N.W.2d 242, *modified on other grounds, State v. Harbor*, 2011 WI 28, ¶¶ 47, 52 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828.

To determine what the legislature really meant, the language it used in the questionable provision is interpreted, not in isolation, but in the context in which it is used as part of the whole, and in relation to the language of surrounding or closely related provisions. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457; *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130; *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Provisions involving the same subject matter should be construed in a way that harmonizes them, and gives each of them full force and effect. *Schaefer*, 308 Wis. 2d 279, ¶ 55.

When the words within a statute or the structure of the statute or the interaction of two statutes make the meaning of a provision so ambiguous that reasonably well-informed people could understand it in different ways, extrinsic aids such as the history and purpose of the statute can be used to determine what the legislature actually intended. *Orion*, 290 Wis. 2d 421, ¶ 17; *DOC v. Schwarz*, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d 703; *Citizens Concerned*, 270 Wis. 2d 318, ¶ 7.

The analysis of a bill by the Legislative Reference Bureau, which is printed with and displayed on the bill when it is introduced in the legislature, is indicative of the intent of the legislature when it enacts that bill into law. *State v. Freer*, 2010 WI App 9, ¶ 22, 323 Wis. 2d 29, 779 N.W.2d 12; *Schwarz*, 279 Wis. 2d 223, ¶ 22; *Schilling v. Crime Victims Rights Bd.*, 2005 WI 17, ¶ 25 n.9, 278 Wis. 2d 216, 692 N.W.2d 623; *Champion*, 258 Wis. 2d 781, ¶ 11.

The LRB's analysis of 2011 Assembly Bill 80 (26:ex.C),[1] which was enacted into law as 2011 Wisconsin Act 113, notes that under the law as it existed at that time, "a person who, in the course of a 'knowing' OWS [operating while suspended] violation or OAR [operating after revocation] violation, causes . . . death to another person is guilty of a Class A misdemeanor."

Under the former statutory scheme, both operating while suspended and operating after revocation required knowledge of license status as an element of the base offenses. Wis. Stat. § 343.44(1)(am), (b) (2009-10). The seriousness of these base offenses was increased to a Class A misdemeanor if, "in the course of a violation of sub. (1)(am) or (b)," a person "cause[d] the death of another person." Wis. Stat. § 343.44(2)(h) (2009-10).

[1] Available at http://docs.legis.wisconsin.gov/2011/related/proposals/ab80.

So under the former statutory scheme there was no problem of duplication because knowledge was an element only of the base offenses, but not an element of the penalty enhancer. The penalty for knowing operation was increased solely because of the death.

The LRB advised that Assembly Bill 80 "creat[ed] new penalties for OWS, OAR, and OWL [operating without a license] violations in which the person, in the course of the violation, causes great bodily harm or death."

In creating new penalties for these violations, the bill attempted to change the former statutory scheme by transferring the element of knowledge from the base offense to the penalty enhancer.[2] The language of the enhanced offense of operating while suspended clearly shows that this is what the legislature intended.

The LRB analysis points out that the bill eliminated "knowing" OWS as a violation. The present statute defining OWS as a base offense expressly states that a "person's knowledge that his or her operating privilege has been suspended is not an element of the offense." Wis. Stat. § 343.44(1)(a). Thus, the offense of operating while suspended is committed when a person whose operating privilege has been suspended operates a motor vehicle. Wis. Stat. § 343.44(1)(a).

---

[2] The question whether the provisions of Wis. Stat. § 343.44(2) create separate aggravated offenses or merely enhance the penalties for the base offense need not be resolved on this appeal. For the purpose of analyzing the issues on this appeal, it is easier to think of these provisions as penalty enhancers because that is more consistent with interpreting the ambiguous language used in the statute. The same problems would be presented, and solved, if these provisions were treated as separate offenses because they would purport to incorporate the elements of the base offense.

With respect to the penalty enhancers for the present strict liability offense of OWS, the LRB stated,

> If the person causes the death of another in the course of the . . . OWS violation, the person: 1) must forfeit not less than $7,500 nor more than $10,000 if the person did not know . . . that his or her operating privilege was suspended; or 2) is guilty of a Class H felony if the person knew.

The statute ultimately created by Assembly Bill 80 says the same thing in a little different way.

> Any person who violates sub. (1)(a) and, in the course of the violation, causes the death of another person is required to forfeit not less than $7,500 nor more than $10,000, except that, if the person knows at the time of the violation that his or her operating privilege has been suspended, the person is guilty of a Class H felony.

Wis. Stat. § 343.44(2)(ag)3.

Under the present scheme, therefore, there are now two cumulative penalty enhancers for OWS. *See generally State v. Quiroz*, 2002 WI App 52, ¶¶ 7-15, 251 Wis. 2d 245, 641 N.W.2d 715, *modified on other grounds, State v. Cross*, 2010 WI 70, ¶ 40, 326 Wis. 2d 492, 786 N.W.2d 64 (discussing cumulative penalty enhancers).

The first enhancer is causing death. The penalty for the base offense of OWS is increased if the person causes a death when driving while suspended. Knowledge is not an element of either the base offense or the first penalty enhancer.

Knowledge is the second enhancer. If the penalty for the base offense of OWS may be increased because the person caused a death when driving while his operator's license was

suspended, the penalty for OWS causing death can be additionally increased to a felony if the driver knew that his license was suspended.

This enhancement strategy is logical, easy to understand, and creates no statutory problems.

The LRB analysis indicates that the same enhancement strategy was intended to apply when a driver was operating after revocation of his driver's license.

With respect to the penalty enhancers for the offense of OAR, the LRB stated,

> If the person causes the death of another in the course of the OAR violation, the person: 1) must be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year or both if the person did not know that his or her operating privilege was revoked; or 2) is guilty of a Class H felony if the person knew.

The statute ultimately created by Assembly Bill 80 says the same thing in a little different way.

> Any person who violates sub. (1)(b) and, in the course of the violation, causes the death of another person shall be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year in the county jail or both, except that, if the person knows at the time of the violation that his or her operating privilege has been revoked, the person is guilty of a Class H felony.

Wis. Stat. § 343.44(2)(ar)4.[3]

This indicates that, like the companion penalty scheme for OWS, knowledge of a license revocation is not required to punish a fatal OAR violation as a misdemeanor, but is required to punish a fatal OAR violation as a felony.

A memo of the Wisconsin Legislative Council (26:ex.B),[4] which is also indicative of legislative intent, *Champion*, 258 Wis. 2d 781, ¶¶ 11, 14, concurs with the LRB's analysis.

The WLC memo indicates that under 2011 Wisconsin Act 113 (2011 Assembly Bill 80), the penalty structure for both OWS and OAR offenses was intended to be identical. There was an initial penalty enhancer for "committing an OWS/OAR/OWL violation and causing the death of another," and an additional penalty enhancer for "***knowingly*** committing an OWS/OAR/OWL violation and causing the death of another" (emphasis in original).

So in accord with the LRB, the WLC also indicated that, like the penalty scheme for OWS, knowledge of a license revocation is not required to punish a fatal OAR violation that causes death as a misdemeanor, but is required to punish a fatal OAR violation as a felony.

While this enhancement strategy for OAR seems equally logical on its face, the problem is that, unlike the base offense of OWS, the legislature did not repeal the element of knowledge in the base offense of OAR, so that the offense of operating after revocation is still committed if a person whose operating

---

[3] 2015 Assembly Bill 128 does not propose to reduce the penalty for causing death while knowingly driving after revocation back to a misdemeanor. This offense remains a Class H felony under the bill.

[4] At http://docs.legis.wisconsin.gov/2011/related/lcactmemo/act113.pdf.

privilege has been revoked *knowingly* operates a motor vehicle. Wis. Stat. § 343.44(1)(b).

This omission presents three apparent anomalies.

The first problem is that, if the words of the LRB's analysis of the statute, and of the statute itself, are taken literally, the first enhancer could never apply because a "person [cannot] cause[] the death of another in the course of the OAR violation . . . if the person did not know that his or her operating privilege was revoked." Under the statute as written, a driver does not commit an OAR violation if he does not know that his operating privilege has been revoked. So a literal interpretation of the statute would make the statute absurd.

The second problem is that if knowledge is an element of both the base offense of OAR and a penalty enhancer for committing an OAR violation, the penalty is enhanced simply because the defendant committed the base offense. This would also make the statute absurd.

The third problem is that if the felony penalty enhancer for OAR is invalid, a person who kills someone while knowingly operating after suspension may be convicted of a felony, but a person who kills someone while knowingly operating after revocation may be convicted of nothing more than a misdemeanor, if that.

Statutes must be interpreted to avoid absurd results. *Orion*, 290 Wis. 2d 421, ¶ 16; *Citizens Concerned*, 270 Wis. 2d 318, ¶ 6; *Champion*, 258 Wis. 2d 781, ¶ 10. There are two ways this directive can be accomplished.

A. These problems can be corrected by interpreting the word "violate" to refer only to the act that is necessary to violate the base statute prohibiting operation after revocation.

There is an exception to the usual plain language rule when applying a statute literally would lead to absurd or unreasonable results. *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447 (1967).

Even if the language of a statute is clear and unambiguous, the plain language of a statute should not be construed in a manner that leads to absurd or unreasonable results. *State v. Edwards*, 2003 WI App 221, ¶ 12, 267 Wis. 2d 491, 671 N.W.2d 371; *Ricco v. Riva*, 2003 WI App 182, ¶ 35, 266 Wis. 2d 696, 669 N.W.2d 193. *See Orion*, 290 Wis. 2d 421, ¶ 16; *Citizens Concerned*, 270 Wis. 2d 318, ¶ 6; *Champion*, 258 Wis. 2d 781, ¶ 10.

A court will always reject an unreasonable construction of a statute where a reasonable construction is possible. *State v. Yellow Freight Sys., Inc.*, 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981); *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 124, 248 N.W.2d 885 (1977).

Under the words of the statute, the penalty for OAR may be increased if a person "violates sub. (1)(b)," the subsection creating the base offense of OAR. Wis. Stat. § 343.44(2)(ar)4.

Under the usual meaning of the word "violate," i.e., to break the law, Webster's Third New International Dictionary 2554 (unabridged ed. 1986), a person would violate § 343.44(1)(b) when all the elements of the base offense were satisfied by *knowingly* operating a motor vehicle when the person's operating privilege was revoked. Interpreting the word "violate" in this way to require knowledge, as well as

revocation and operation, for there to be a violation is what leads to all the problems with the statute.

But all those problems are solved if the word "violate" is interpreted more narrowly to include only the actus reus, but not the mens rea, of the base OAR offense, so that it includes only operating a vehicle after the person's operator's license has been revoked, but not knowledge of the revocation.

A word in a statute may or may not extend to the outer limits of its definitional possibilities, *Abuelhawa v. United States*, 556 U.S. 816, 820 (2009), and may have different meanings in different contexts. *State v. Swiams*, 2004 WI App 217, ¶ 16, 277 Wis. 2d 400, 690 N.W.2d 452. The court should apply the meaning that is most congruent with the purpose of the statute. *Swiams*, 277 Wis. 2d 400, ¶ 16.

So the court should interpret § 343.44(2)(ar)4. with a narrow meaning of "violation," as if the provision read,

> Any person who [commits the acts necessary to] violates sub. (1)(b) and, in the course of [committing the acts necessary for] the violation, causes the death of another person shall be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year in the county jail or both, except that, if the person knows at the time of [committing the acts necessary for] the violation that his or her operating privilege has been revoked, the person is guilty of a Class H felony.

Interpreting the statute in this way avoids the absurdities caused by a too literal interpretation of its terms, and makes perfect sense of the penalty enhancing scheme for OAR in the same way that the penalty enhancing scheme for OWS makes sense.

If a person causes a death while operating a vehicle after his operating privilege was suspended, he is guilty of a forfeiture violation if he did not know that his operating privilege was suspended, and is guilty of a felony if he knew.

If a person causes a death while operating a vehicle after his operating privilege was revoked, he is guilty of a misdemeanor violation if he did not know that his operating privilege was revoked, and is guilty of a felony if he knew.

Interpreted in this way, the statute actually does what the LRB indicated it was intended to do.

B. The problems can be corrected by finding that the knowledge element of the base offense of operating after revocation has been impliedly repealed.

Repeal of a statute by implication is not favored. *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 392, 294 N.W.2d 15 (1980); *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290 N.W.2d 303 (1980).

A court's first response to an ambiguous statute should be to construe it to avoid conflicts, and to harmonize provisions that conflict. *State v. Matthew A.B.*, 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999).

Older and newer statutory provisions should be construed together to give effect, not only to the parts of the old law not inconsistent with the new one, but to the older law as whole, subject only to restrictions on or modifications of its meaning where that appears to have been the legislative purpose. *Zawistowski*, 95 Wis. 2d at 264.

The state's first suggestion in this case, as discussed above, avoids conflict and harmonizes the law. Interpreting the word "violate" more narrowly so that it includes only the act of operating a vehicle after the person's operator's license has been revoked, but not knowledge of the revocation, avoids the absurd results of a different interpretation of the word, and also gives full effect to all the parts of the older law and to the older law as a whole.

But if a statutory conflict cannot be avoided or harmonized, and a provision of the older law remains so manifestly inconsistent with and repugnant to a newer provision that they cannot reasonably stand together, the provision of the older law will be deemed to have been repealed by implication. *Matthew A.B.*, 231 Wis. 2d at 706; *Heaton*, 97 Wis. 2d at 392-93.[5]

If the word "violate" is not given the limiting construction suggested by the state, there is a patent inconsistency between the older provision creating the base offense of OAR and the newer provision creating the penalty enhancers for the offense of OAR.

To violate the base provision making OAR an offense, the defendant must know that his operating privilege has been revoked. Wis. Stat. § 343.44(1)(b). But the first penalty enhancer

---

[5] *Lamie v. United States*, 540 U.S. 526 (2004), on which Lazo Villamil relies, is inapplicable in this case because the Supreme Court held that the federal statute under consideration there was awkward and ungrammatical, but not ambiguous and not absurd when given its plain meaning. The federal statute did not contain any inconsistent and repugnant provisions. And the point of correcting the drafting error was not to give effect to the intent of the legislature but only to give effect to the result preferred by a court. The same is true of *State v. Richards*, 123 Wis. 2d 1, 365 N.W.2d 7 (1985), where the defendant asked the court to rewrite the elements of a plain unambiguous statute solely for policy reasons.

for this offense applies when, in the course of the OAR violation requiring knowledge of the revocation, the defendant did not know that his operating privilege was revoked. Wis. Stat. § 343.44(2)(ar)4; LRB Analysis of 2011 Assembly Bill 80.

Provisions that purport to operate together as a unit when the defendant has knowledge and does not have knowledge of the revocation are completely inconsistent with and repugnant to each other. A person cannot both know and not know at the same time.

The second penalty enhancer for the base offense requiring knowledge of the revocation applies when the defendant knows that he has been revoked. Wis. Stat. § 343.44(2)(ar)4; LRB Analysis of 2011 Assembly Bill 80.

These provisions are paradoxically inconsistent and repugnant because both require knowledge of the same thing. It is incongruous to convict a defendant of an offense because he knows his driver's license has been revoked, and then to enhance the penalty for committing this offense because he has the knowledge necessary to convict him in the first place.

Because the later provision enhancing the penalties for a violation of the earlier provision creating the offense of operating after revocation is inconsistent with the requirement of knowledge in the base offense, the later provision should be deemed to have impliedly repealed the element of knowledge of revocation in the older base offense.

An older provision will also be deemed to have been impliedly repealed when, even absent an express repeal, the intent of the legislature to repeal by implication clearly appears. *Heaton*, 97 Wis. 2d at 393.

Repeal of the element of knowledge in the base offense of operating after revocation is implied by the clear legislative intent to maintain parallelism between the offenses of operating while suspended and operating after revocation. *See* LRB Analysis of 2011 Assembly Bill 80; WLC Memo regarding 2011 Wisconsin Act 113.

There was parallelism between these offenses prior to 2011 Wisconsin Act 113. The base offenses of OWS and OAR both required knowledge of the license suspension or revocation for conviction. Wis. Stat. § 343.44(1)(am), (b) (2009-10). The penalty for both knowing offenses was increased if the defendant caused a death while operating a vehicle after being suspended or revoked. Wis. Stat. § 343.44(2)(h) (2009-10).

As discussed above, the legislature intended to shift the element of knowledge from the base offenses of OWS and OAR to the penalty enhancers for both offenses.

They succeeded with respect to OWS because they deleted the element of knowledge from the base offense of OWS and added it to the penalty enhancer. Wis. Stat. § 343.44(1)(a), (2)(ag)3.

But they failed with respect to OAR because, while they added knowledge to the penalty enhancer, Wis. Stat. § 343.44(2)(ar)4., they did not delete it from the base offense of OAR. Wis. Stat. § 343.44(1)(b). So instead of a transfer of the element of knowledge, there was a duplication.

Nothing whatever in the legislative history of Act 113 remotely suggests that the legislature actually intended to duplicate the element of knowledge in both the base offense of OAR and the felony penalty enhancer for that offense.

To the contrary, the WLC memo states that "2011 Wisconsin Act 113 repeals all existing penalties for knowingly committing an OWS, OAR or OWL violation, and creates new penalties." This strongly suggests that the legislature thought it had eliminated all the penalties for knowingly operating while suspended and knowingly operating after revocation, thereby eliminating knowledge as an element of the base offenses of OWS and OAR, and shifted the element of knowledge to the new penalty enhancers for these offenses.

The memo further states that there is one penalty enhancer for "committing an OWS/OAR/OWL violation and causing the death of another," and another more severe enhancer for "***knowingly*** committing an OWS/OAR/OWL violation and causing the death of another" (emphasis in original). This strongly suggests the legislature thought that the base offenses of OWS and OAR were fungible and that neither an OWS violation nor an OAR violation required knowledge as an element. Knowledge was now an element only in the penalty enhancer for both offenses.

Furthermore, it is hard to understand how the LRB could have stated in its analysis that the penalty for causing a death in the course of an OAR violation could be enhanced when the person did not know his operating privilege had been revoked if the LRB thought that a base OAR violation continued to require knowledge as an element. Enhancing a penalty when a defendant who committed an OAR violation did not have knowledge would make sense only if the LRB believed that knowledge was not required to violate the base OAR provision.

So although Act 113 did not facially repeal the old penalty for knowingly operating after revocation, it appears that the legislature was under the impression that it did. It appears that the failure to delete the word making knowledge an element of the base offense of OAR was just an oversight.

This oversight, which creates inconsistency and repugnancy in the statutory scheme for punishing persons who cause a death while operating a vehicle after their operating privilege has been revoked, can be corrected by finding that the element of knowledge in the base offense of OAR has been impliedly repealed.

In response to specific contentions in the appellant's brief, since Wis. Stat. § 343.44(2)(ar)4. can be construed to remove the ambiguity and clarify the intent of the legislature in either of two different ways, the rule of lenity is not applicable. *Freer*, 323 Wis. 2d 29, ¶ 26. A statute must be construed to effectuate the intent of the legislature, not to placate the desires of the defendant.

This statute was never unconstitutionally vague because, even without judicial explanation, it gives persons of ordinary intelligence a reasonable opportunity to know what is prohibited so they may conform their conduct to the proscription. *See State v. Courtney*, 74 Wis. 2d 705, 709 & n.2, 247 N.W.2d 714 (1976).

An average person would understand that if his operating privilege is revoked and he knows it is revoked, he cannot drive anyway and kill someone while he is driving. The duplication of the element of knowledge in both the base offense and the penalty enhancer does not diminish this understanding of what is prohibited. If anything, it emphasizes that a person who knows his operating privilege has been revoked should not be operating a vehicle at all, and certainly should not be causing a death while he is driving when he knows he should not be behind the wheel.

In any event, a statute will not be declared unconstitutionally vague when it can be given a reasonable and practical meaning by the ordinary process of statutory

construction. *State v. Trigueros*, 2005 WI App 112, ¶ 13, 282 Wis. 2d 445, 701 N.W.2d 54; *State v. Lo*, 228 Wis. 2d 531, 535-36, 599 N.W.2d 659 (Ct. App. 1999); *State v. Smith*, 215 Wis. 2d 84, 91-92, 572 N.W.2d 496 (Ct. App. 1997).

This court should construe the statute that makes it a felony to kill someone while driving after revocation so that knowledge of the revocation is not an element of the base offense of OAR, but only of the second penalty enhancer for causing a death while knowingly driving after revocation.

II. Lazo Villamil has no basis to complain about his sentence.

A. Lazo Villamil is not entitled to resentencing because the circuit court did not consider the statutory sentencing guidelines for an OAR offense.

Lazo Villamil forfeited any right to complain on appeal that the circuit court did not consider the statutory sentencing guidelines for an OAR offense because he did not ask the court to consider these guidelines when he was sentenced. *See Nickel v. United States*, 2012 WI 22, ¶¶ 21-22, 339 Wis. 2d 48, 810 N.W.2d 450; *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511; *State v. Nielsen*, 2001 WI App 192, ¶ 11, 247 Wis. 2d 466, 634 N.W.2d 325.

Defendants should not be allowed to sit silent and hold their objection in reserve when they are sentenced, to stay silent if they are unsatisfied with their sentence, and to pull out their trump card and object for the first time after they have been sentenced only when they are dissatisfied with the disposition.

A reviewing court will not find that a lower court erroneously exercised its discretion where the defendant did not ask the court to exercise its discretion. *State v. Gollon*, 115 Wis. 2d 592, 604, 340 N.W.2d 912 (Ct. App. 1983).

In any event, the circuit court would not have been required to consider the guidelines set forth in Wis. Stat. § 343.44(2)(b) even if Lazo Villamil had asked the court to consider them when he was sentenced.

Although this statute states that the court "shall" consider these guidelines when imposing sentence for an offense involving operating after revocation, the word "shall" can be either mandatory or directory. *Warnecke v. Estate of Warnecke*, 2006 WI App 62, ¶ 12, 292 Wis. 2d 438, 713 N.W.2d 109; *State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991).

There is a presumption that the word "shall" is mandatory. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 16, 262 Wis. 2d 720, 665 N.W.2d 155; *R.R.E.*, 162 Wis. 2d at 707. But this is not a mandatory presumption, and "shall" will be construed as directory if necessary to give effect to the intent of the legislature. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707.

There is no per se rule to determine which way the word is used. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707. The determination is made by ascertaining the intent with which the legislature used the word in the statute. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707.

In determining whether the legislature intended "shall" to be mandatory or directory, the court can consider the objectives intended to be accomplished by the statute and the potential consequences of each interpretation. *Warnecke*, 292

Wis. 2d 438, ¶ 12; *Marberry*, 262 Wis. 2d 720, ¶ 17; *R.R.E.*, 162 Wis. 2d at 708.

Here, the potential consequences, i.e., absurd results, show that the legislature intended these guidelines to be directory only.

The guidelines apply to all OAR offenses, including the base forfeiture offense of simply operating a vehicle after the revocation of a driver's license. Wis. Stat. § 343.44(1)(b). But they do not apply to any OWS offenses, including the Class H felony of killing someone while knowingly operating with a license that has been suspended.

Requiring a court to apply the guidelines to an OAR forfeiture when the guidelines do not apply at all to an OWS felony makes no sense.

Moreover, these guidelines do not apply to any other offense committed when the defendant causes a death, including the more serious offenses of intentional homicide, reckless homicide, felony murder, homicide by intoxicated use of a vehicle or homicide by negligent operation of a vehicle. Wis. Stats. §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.09, 940.10 (2013-14).

Requiring a court to apply the guidelines to an OAR causing death when the guidelines do not apply at all to any other crimes where death is caused makes no sense.

Indeed, these guidelines do not apply to an infinite variety of offenses that are crimes, every one of which is more serious by definition than the forfeiture offense of OAR, or to an infinite variety of offenses that are felonies, every one of which is more serious by definition than the misdemeanor offenses of OAR.

Requiring a court to apply the guidelines to an OAR forfeiture or misdemeanor when the guidelines do not apply at all to any other crimes makes no sense.

Logically, guidelines with such limited application must be intended to be directory only, so that the court was not required to consider them, and did not erroneously exercise its discretion by not considering them when sentencing Lazo Villamil.

B. The circuit court properly exercised its discretion in sentencing the defendant.

Although the circuit court's sentencing rationale is a bit sparse, the court said enough to make valid points.

First, it is clear that the purpose of the sentence was to protect the community. The court said that the purpose of the statute violated by Lazo Villamil was to protect the community from people who did not have a valid driving privilege because their license had been revoked (44:21). The court said it had to respond to the needs of the community (44:22).

The court may choose to base the sentence on any one or number of factors. *State v. Grady*, 2007 WI 81, ¶ 31, 302 Wis. 2d 80, 734 N.W.2d 364; *State v. Odom*, 2006 WI App 145, ¶ 7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given each factor is within the discretion of the sentencing court. *Grady*, 302 Wis. 2d 80, ¶ 31; *Odom*, 294 Wis. 2d 844, ¶ 7; *State v. Klubertanz*, 2006 WI App 71, ¶ 18, 291 Wis. 2d 751, 713 N.W.2d 116. The court need not discuss all these factors on the record, but only those considered relevant in the particular case. *Grady*, 302 Wis. 2d 80, ¶ 42; *Klubertanz*, 291 Wis. 2d 751, ¶ 18.

The court primarily relied on Lazo Villamil's prior record of traffic offenses, including two prior convictions of operating while intoxicated and a previous offense of operating after revocation (44:21-22).

Operating after revocation when the defendant's license was revoked for OWI is itself a penalty enhancer. Wis. Stat. § 343.44(2)(ar)2. Here, the court relied on the fact that Lazo Villamil's prior driving convictions had no impact on him (44:22). He drove. He broke the law. He was arrested. He was convicted. He went to jail. He drove again. He broke the law again.

It can be inferred from the court's statements that it believed Lazo Villamil was dangerous because he had no respect for the law or for the consequences of violating it. He needed serious rehabilitation to convince him that he needed to take the law seriously.

The court also stated that this was a serious offense, and alluded to the fact that, besides the victim who was killed, another victim driving a different car had been injured (44:22). Injuring a person while driving after revocation is another penalty enhancer, Wis. Stat. § 343.44(2)(ar)3, that can certainly be considered even when it is not separately charged. *State v. Straszkowski*, 2008 WI 65, ¶ 36, 310 Wis. 2d 259, 750 N.W.2d 835; *Elias v. State*, 93 Wis. 2d 278, 284-85, 286 N.W.2d 559 (1980).

The court's sentencing rationale was adequate to sustain the imposition of the maximum sentence as a proper discretionary act.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: November 18, 2015.

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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 5,641 words.

Dated this 18th day of November, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

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 18th day of November, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General