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STATE OF WISCONSIN

IN SUPREME COURT

DISTRICT II

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Petitioner,

v.

ERNESTO LAZO VILLAMIL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming, in Part, a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

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RESPONSE BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Should the element of knowledge be impliedly repealed from Wis. Stat. § 343.44(2)(ar) 4 in order to resolve the ambiguity?

The court of appeals did not address the state's proposed statutory construction. Rather, the court of appeals held that the statutory language applies as it is written, which is to provide for either a misdemeanor or felony offense for committing an operating after revocation causing death.

2. Does Wis. Stat. § 343.44(2)(b) obligate sentencing courts to consider the enumerated sentencing factors in the exercise of sentencing discretion?

The court of appeals held that the use of the word "shall" in Wis. Stat. § 343.44(2)(b) was purposefully chosen to require courts to consider the enumerated factors, and that accordingly, the sentencing court's failure to consider those factors was an erroneous exercise of discretion warranting a new sentencing hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Considering this Court's decision to grant both petitions for review, oral argument and publication are warranted.

ARGUMENT

I. This Court Cannot Resolve the Ambiguity Created By the Redundancy of Wis. Stat. § 343.44(2)(ar)4.

A. The statute is ambiguous.

The parties agree that the plain reading of Wis. Stat. § 343.44(2)(ar)4 is ambiguous. (State's Br. at 7-8). The parties also agree that the enhanced penalty in Wis. Stat. 343.44(2)(ar)4, which purports to increase the penalty from a misdemeanor to a felony for causing the death of another during the course of operating after revocation when the person "knew" his or her driving privileges were revoked, is repetitive; thereby creating the ambiguity. (State's Br. at 8-10).

The state contends that the legislative history shows a clear intention to repeal the knowledge element from the base offense of operating after revocation. (State's Br. at 20-21). While Lazo Villamil acknowledges that the legislative counsel act memo (26: Exh. B)[1] indicates an intention to repeal all existing penalties for knowingly operating after revocation (OAR), operating while suspended (OWS), and operating without a license (OWL), the legislative history is not as clear as the state contends.

For instance, the state asserts that the base offenses of OWS and OAR both required knowledge prior to 2011. (State's Br. at 21). However, pursuant to Wis. Stat. § 343.44(1)(a), OWS did not require knowledge for one to be in violation. (Wis. Statutes 2009-2010). The penalty for violating Wis. Stat. § 343.44(1)(a) was a civil forfeiture. Wis.

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

Stat. § 343.44(2)(a). (Wis. Statutes 2009-2010). Interestingly, the statute did not provide any penalty for knowingly committing OWS, contrary to Wis. Stat. § 343.44(1)(am).

OAR, on the other hand, required knowledge as a base offense. Wis. Stat. § 343.44(1)(b) (Wis. Statutes 2009-2010). The base penalty was a forfeiture, however, that penalty increased depending on either the number of offenses committed in a period of time, and/or the reason for the revocation. Wis. Stat. § 343.44(2)(b).

The 2011 legislative counsel act memo shows an intent to provide the same penalties committing OAR or OWS. For example, according to the memo, OAR/OWS/OWL causing great bodily harm would result in a forfeiture of $5,000-$7,500 and a revocation of operating privileges. (26: Exh. B). That penalty then increases if the person did so knowingly. (26: Exh. B). Likewise, the memo indicates that if in the course of committing OAR/OWS/OWL a death is caused, the penalty is a forfeiture of $7,500-$10,000 and a revocation of operating privileges. (26: Exh. B). That penalty is further increased if the offense is committed knowingly. (26: Exh. B).

Interestingly, however, in its final form, the statute provided different penalties for OWS and OAR. Wis. Stat. § 343.44(2)(ag) provides:

> 1. Except as provided in subds. 2. and 3. any person who violates sub. (1) (a) shall be required to forfeit not less than $50 nor more than $200.
>
> 2. Any person who violates sub. (1) (a) and, in the course of the violation, causes great bodily harm to another person is required to forfeit not less than $5,000 nor more than $7,500, 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 I felony.

3. 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.

The penalties for OAR pursuant to Wis. Stat. § 343.44(2)(ar) on the other hand provide:

1. Except as provided in subds. 2. to 4., any person who violates sub. (1) (b) shall forfeit not more than $2,500.

2. Except as provided in subds. 3. And 4., any person who violates sub. (1) (b) shall be fined not more than $2,500 or imprisoned for not more than one year in the county jail or both if the revocation identified under sub. (1) (b) resulted from an offense that may be counted under s. 343.307(2).

3. Any person who violates sub. (1) (b) and, in the course of the violation, causes great bodily harm to another person shall be fined not less than $5,000 nor more than $7,500 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 I felony.

4. 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.

The penalty structure is not symmetric, and the statue as written deviates from the memo. Accordingly, the legislative history is not as clear as the state characterizes it. Although the legislative counsel act memo indicates an intention to repeal all knowledge elements, it is presumed that because it ultimately did not do so, that it intended to maintain that element as a component of the base offense. *See* ***Ball v. District No. 4***, 117 Wis. 2d 529, 345 N.W.2d 389(1984), ***In re Commitment of West***, 2011 WI 83, ¶ 61, *citing* ***Shill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, ¶ 103. Moreover, this court presumes that the legislature knows the law and the legal effect of its actions. ***Id***.

B. Impliedly repealing the element of knowledge creates constitutional violations.

To resolve the ambiguity created by legislative drafting, the state suggests that this Court find that the "knowledge element of the base offense of operating after revocation has been impliedly repealed. (State's Br. at 20-23). While the state acknowledges that implied repeal of a statute is generally not favored, it nonetheless asks this Court to do so in in this instance because the Legislature "not only intended to create, but thought that it had created, a penalty scheme in which neither the base offense . . . . nor the first penalty enhancer . . . . required knowledge of the revocation as an element of the offense." (State's Br. at 21).

Even if this Court agrees that the legislative history is clear, eliminating the element of "knowledge" through implied repeal creates significant constitutional problems. Absent from the state's opening brief is any analysis of how implied repeal of the "knowledge" element would be

constitutional. Instead, the state seems to be asking this Court to fix the legislature's drafting error. However, it is not the role of the courts to save the legislature from its drafting errors. *See e.g.*, ***State v. Reagles***, 177 Wis. 2d 168, 176, 501 N.W.2d 861 (Ct. App. 1993) (holding that the remedy for a statute's failure to cover a particular situation lies with the legislature).

Repealing the "knowledge" element from the base offense essentially rewrites the statue because it completely changes the acts required for the statute to be violated. Under the Wisconsin Constitution, Article 4, the power to enact law lies with the legislature, not the judiciary. It is not for this Court, or any court, to rewrite statutes or create laws, as doing so interferes with the essential role and power of the legislative branch. ***In Matter of Complaint Against Grady***, 118 Wis.2d 762, 775-776, 348 N.W.2d 559 (1984). (*citing* ***State v. Holme****s*, 106 Wis.2d 31, 68, 315 N.W.2d 703 (1982)).

Another constitutional problem with implied repeal of the "knowledge" element is that doing so will create a strict liability offense, thereby lowering the threshold for violating the statute without notice of such.

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." ***United States v. Batchelder***, 442 U.S. 114, 123 (1979). (***quoting Lanzetta v. New Jersey***, 306 U.S. 451, 453 (1939).). "A criminal statute violates due process if it fails to give fair notice of the proscribed conduct and the consequences of violating a given criminal statute." ***State v. Cissell***, 127 Wis. 2d 205, 216-217, 378 N.W.2d 691 (1985). (internal citation omitted). Due process requires fair notice and proper standards for

adjudication. ***State v. Lopez***, 207 Wis. 2d 412, 434-435, 559 N.W.2d 264 (Ct. App. 1996). (internal citation omitted).

A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a matter that does not encourage arbitrary and discriminatory enforcement.'" ***Cissell***, 127 Wis. 2d at 224, (quoting ***Kolender v. Lawson***, 461 U.S. 352, 357 (1983)).

Here, should this Court construe the element of "knowledge" as having been repealed through implication. The ordinary person will not understand what conduct is prohibited Wis. Stat. § 343.44(1)(b) will still contain the word "knowingly," which to the ordinary person will signal that the offense is committed only if there is knowledge that operating privileges have been revoked.

This court cannot resolve the ambiguity in the statute by impliedly repealing the element of knowledge from the base offense because doing so violates the separation of powers, and creates a new offense without notice. The error can only be remedied by the legislation. Because this court cannot remedy the ambiguity through an alternate statutory construction, the rule of lenity must apply. ***State v. Cole***, 2003 WI 112, ¶ 13, 264 Wis. 2d 520, 665 N.W.2d 328.

II. The Word "Shall" is Obligates Courts to Consider the Sentencing Factors Enumerated in Wis. Stat. § 343.44(2)(b).

A. Principles of law and standard of review.

It is well-established that the word "shall" is presumed to be mandatory. ***State ex rel. Marberry v. Macht***, 2003 WI 79 ¶15, 262 Wis. 2d 720, 665 N.W.2d 155; ***State v. Moline***,

170 Wis. 2d 531, 531-542, 489 N.W.2d 667 (Ct. App. 1992); ***State v. R.R.E.*** 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991). However, the word "shall" can be construed as directory, if "such a construction is 'necessary to carry out the intent of the legislature.'" ***Warnecke v. Estate of Warnecke***, 2006 App 62 ¶ 12, 292 Wis. 2d 438, 713 N.W.2d 109; *quoting*, ***Karow v. Milwaukee Co. Civil Serv. Comm'n***, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978).

Determining how a court satisfies a requirement that it consider any applicable sentencing guideline is a matter of statutory interpretation that this Court reviews de novo. ***State v. Grady***, 2007 WI 81, ¶14, 302 Wis. 2d 80, 734 N.W.2d 364.

B. The legislature intended to require courts to consider the enumerated factors at sentencing.

Wis. Stat. §343.44(2)(b) provides that:

> In imposing a sentence under par. (ar) or (br), the court ***shall*** review the record and consider the following:
>
> 1. The aggravating and mitigating circumstances in the matter, using the guidelines described in par. (d).
>
> 2. The class of vehicle operated by the person.
>
> 3. The number of convictions of the person for violations of this section within the five years preceding the person's arrest.
>
> 4. The reason that the person's operating privilege was revoked, or the person was disqualified or ordered out of service, including whether the person's operating privilege was revoked for an offense that may be counted under s. 343.307(2).

> 5. Any convictions for moving violations arising out of the incident or occurrence giving rise to sentencing under this section.

(Emphasis added). Paragraph (d) states that "[t]he chief judge of each judicial administrative district shall adopt guidelines . . . for the consideration of aggravating and mitigating factors." Wis. Stat. § 343. 44(2)(d).

The word "shall" will be presumed as mandatory unless doing so will be contrary to the legislative intent. ***Warnecke***, 292 Wis. 2d 438 at ¶ 12, *quoting*, ***Karow*** 82 Wis. 2d at 571. The state argues that interpreting the word "shall" as mandatory yields unreasonable results because similar offenses, such as OWL or OWS, do not require consideration of the factors. (State's Br. at 25). It argues further that it "makes little sense" that a court would be required to consider particular sentencing factors here, when it would not be required to consider such factors in homicide offenses. (State's Br. at 25).

The court of appeals rejected these arguments. ***State v. Lazo Villamil***, 2016 App 61 ¶26, 371 Wis. 2d 519, 885 N.W.2d 12. Rather, it viewed the state's above-stated points as "highlighting the intentionality with which the legislature has treated the OAR offenses covered by this provision." ***Id***. It concluded that the legislature meant what it wrote, and that the legislature was "not secretly hoping courts would interpret this word as 'should.'" ***Id***. It is presumed that the Legislature knew that the word shall is presumed mandatory and that using that word would result in creating a requirement courts consider the enumerated factors. ***In re Commitment of West***, 336 Wis. 2d 578, ¶ 61, (*citing* ***Shill***, 327 Wis. 2d 572 ¶103).

This Court has previously held that a statute requiring a circuit court to "consider" factors and guidelines at sentencing is satisfied "when the record of the sentencing hearing demonstrates that the court actually considered the guidelines and so stated on the record." ***Grady***, 302 Wis. 2d, ¶ ¶ 33,44. That case asked this Court to consider how a sentencing court fulfills its obligation to consider an applicable sentencing guideline. ***Id***. ¶ 2. While this case does not ask that exact question, the holding is nonetheless instructive because it shows that this Court interpreted the statute to create an obligation to be satisfied when the court stated its consideration of the factors on the record. ***Id***. ¶ 44.

Likewise, the word "shall" in this case creates an obligation that sentencing courts consider the factors in Wis. Stat. § 343.44(2)(b). The state has failed to demonstrate that the clear intent of the legislature will not be carried out if the word "shall" is interpreted presumptively mandatory. ***Lazo Villamil***, 371 Wis. 2d ¶ 27 fn8. Accordingly, the circuit court's failure to consider the factors entitles Mr. Lazo Villamil to resentencing.

CONCLUSION

Mr. Lazo Villamil respectfully requests that this Court reject the State's proposed solution of implied repeal to resolve the ambiguity in Wis. Stat. § 343.44(2)(ar)4, and hold that the rule of lenity applies. Further, he respectfully requests that this court affirm the court of appeals in relation to sentencing, and hold that the word "shall" in Wis. Stat. § 343.44(2)(b) is mandatory; therefore Mr. Lazo Villamil is entitled to resentencing.

Dated this 8th day of March, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,608 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 8th day of March, 2017.

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