STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING IN PART AND REVERSING IN PART A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE DONALD J. HASSIN, JR., AND MICHAEL J. APRAHAMIAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

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ARGUMENT

I. Wisconsin Stat. § 343.44(1)(b) should be construed as though the word "knowingly" did not appear there, to correct an obvious oversight by the Legislature in failing to delete this word when it revised the statute.

Lazo Villamil seems to suggest that prior to the statutory revision in 2011, the base offense of operating while suspended did not require knowledge as an element. (Lazo Villamil's Resp. Br. 2–3.) This suggestion is partially correct because before 2011 there were two base offenses of operating while suspended: one that did not require knowledge as an element, and a second that required knowledge.

Wisconsin Stat. § 343.44(1)(a) (2009–10) provided that "[n]o person whose operating privilege has been duly suspended . . . may operate a motor vehicle upon any highway in this state during the period of suspension . . . ." Wisconsin Stat. § 343.44(1)(am) provided that "[n]o person whose operating privilege has been duly suspended . . . may *knowingly* operate a motor vehicle upon any highway in this state during the period of suspension . . . ." (emphasis added). These sections were identical except that the second included the word "knowingly," while the first did not.

There was no statutory provision enhancing the penalty for the first strict liability offense. But the second scienter offense was supplemented by several penalty enhancers. The penalties for knowingly operating a vehicle while a driver's license was suspended were enhanced for causing damage to property, causing injury to another person, causing great bodily harm to another person, or

causing the death of another person. Wis. Stat. § 343.44(1)(am), (2)(e), (f), (g), (h).

These same penalty enhancers also applied to the offense of knowingly operating after revocation. Wis. Stat. § 343.44(1)(b), (2)(e), (f), (g), (h). So the base offense of knowingly operating while suspended paralleled the base offense of knowingly operating after revocation in the statutory penalty scheme. Prior to 2011, both the base offense of knowingly operating while suspended and the base offense of knowingly operating after revocation were subject to enhanced penalties for causing various kinds of harm.

As explained in the State's opening brief, the Legislature intended to revise the previous penalty scheme by shifting the element of scienter from the base offenses of OWS and OAR to the second level penalty enhancer for causing a death while committing these offenses. The Legislature intended to impose strict liability, with no requirement of knowledge, for operating a vehicle after a driver's license was suspended or revoked, but to make it a felony to cause a death while operating a vehicle knowing that a driver's license had been suspended or revoked.

The Legislature succeeded in making this shift with respect to OWS by repealing section 343.44(1)(am), which had made it an offense to knowingly operate while suspended, leaving section 343.44(1)(a), which did not require knowledge, as the only remaining base OWS offense. But the shift did not succeed with respect to OAR because there was only one base offense, section 343.44(1)(b), that required knowledge as an element, and the Legislature failed to delete the word "knowingly" from that offense.

Lazo Villamil points out that the present penalties for OWS offenses are not identical to the penalties for OAR offenses. (Lazo Villamil's Resp. Br. 3.) Generally, the penalties for the base offense of OAR and the intermediate enhancers for OAR are greater than the penalties for the base offense of OWS and the intermediate enhancers for OWS, although the penalty for the second enhancer for causing a death while knowingly operating while suspended or after revocation is the same. Wis. Stat. § 343.44(2)(ag), (ar).

The Legislature did not intend to maintain the identical penalty structure for OWS and OAR offenses that existed under the previous version of the statute. *See* Wis. Stat. § 343.44(2)(e), (f), (g), (h) (2009–10). But the Legislature intended to maintain something of the previous singular structure by creating a symmetrical penalty structure with corresponding prohibitions and penalties for both kinds of licensing violations. While the specific penalties were different, the circumstances in which the penalties went up remained essentially the same.

The Legislature intended to create a base offense that did not include an element of knowledge. It intended to create an intermediate penalty enhancer that increased the penalty for the strict liability base offense when the driver caused the death of another person. And it intended to create a second penalty enhancer that included an element of knowledge, and increased the penalty to a felony, when a driver caused the death of another person knowing that his driver's license was suspended or revoked.[1]

[1] There are also penalty enhancers for causing great bodily harm that are not involved in this case. Like the enhancers for causing death, there is an intermediate penalty enhancer for causing

Lazo Villamil reprises two arguments he made in his opening brief: (1) that this Court is prohibited from fixing legislative mistakes under the doctrine of separation of powers, and (2) that fixing the legislative mistake in this case would deprive persons of notice of the prohibited conduct. (Lazo Villamil's Resp. Br. 5–7.) These arguments were refuted in the State's response brief.

In short, the statute involved in this case is ambiguous, and fixing mistakes that muddy the real meaning of legislation is a core constitutional power of the courts.

This Court has exercised its power to fix legislative mistakes by reading into an older version of Wis. Stat. § 343.44(1), which included both revocation and suspension of driver's licenses, an element of knowledge. *State v. Collova*, 79 Wis. 2d 473, 476, 487–88, 255 N.W.2d 581 (1977). While recognizing that there were good reasons for dispensing with scienter, the Court found as a matter of statutory construction that the Legislature intended to include an element of knowledge because of the severe penalty then provided for a violation, i.e., a sentence of at least ten days and as much as one year in jail. *Collova*, 79 Wis. 2d at 484–86.

Turnabout is fair play. This Court has construed section 343.44 to include an element of knowledge that the Legislature intended, but failed, to write into in the statute.

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great bodily harm while operating a vehicle when a driver's license was suspended or revoked, and a felony penalty enhancer for causing great bodily harm while operating a vehicle knowing that a driver's license was suspended or revoked. Wis. Stat. § 343.44(2)(ag)2., (2)(ar)3.

Now it should construe section 343.44 to exclude an element of knowledge that the Legislature intended, but failed, to write out of the statute.

The Legislature has reduced the sanction for the base offense of operating after revocation to a forfeiture–no criminal penalties, no fine, no jail time. Wis. Stat. § 343.44(2)(ar)1. And it has clearly expressed an intent to repeal the element of knowledge in the base offense of OAR. Even if the penalty had not been reduced, the clear intent of the Legislature would be controlling. *State v. Cissell*, 127 Wis. 2d 205, 226–27, 378 N.W.2d 691 (1985) (citing *State v. Stanfield*, 105 Wis. 2d 553, 561 n.10, 314 N.W.2d 339 (1982)). This Court should exercise its power to give effect to that clear intent.

As for notice, an ambiguous statute gives adequate notice that conduct comes close to the prohibited zone when under one reasonable reading of the provision that conduct is prohibited. Potential offenders are put on notice that a court could very well construe the statute, in accord with the intent of the Legislature, to include their conduct.

II. Wisconsin Stat. § 343.44(2)(b) should be construed to be directory rather than mandatory, to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors.

Lazo Villamil argues that the Legislature intended to require sentencing courts to consider the factors enumerated in Wis. Stat. § 343.44(2)(b) because it used the word "shall" in that section, although he concedes that the word "shall" is not always mandatory and can be directory if that is what

the Legislature intended. (Lazo Villamil's Resp. Br. 7–8.) This Court must determine which way the Legislature intended to use that word in that provision.

Generally, courts have discretion to decide which factors to consider in imposing a sentence. *State v. Grady*, 2007 WI 81, ¶ 31, 302 Wis. 2d 80, 734 N.W.2d 364. Although the Legislature may put some limits on the exercise of this discretion, its intention to do so in one situation, when it has not done so in other situations, should be clear. The Legislature should express its intent to limit the powers of another branch of the government more clearly than by using a word that can have either of two different meanings, one mandating, the other simply suggesting, what factors a court should consider in exercising its sentencing discretion.

This Court has recently made clear that in interpreting statutes, its members "are not merely arbiters of word choice." *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 19, _ Wis. 2d _, _ N.W.2d _, 2017 WL 914805. In determining the meaning of a statute, the Court must "examine the statute's contextualized words, put them into operation, and observe the results to ensure we do not arrive at an unreasonable or absurd conclusion." *Wisconsin Carry,* 2017 WL 914805, ¶ 20.

Indeed, even an otherwise clear and unambiguous statute should be interpreted to avoid absurd or unreasonable results. *State v. Delaney*, 2003 WI 9, ¶ 15, 259 Wis. 2d 77, 658 N.W.2d 416. Where a literal interpretation of a statute would lead to an unreasonable result, the spirit of the statute prevails over the literal meaning of the language used. *State v. Neumann*, 179 Wis. 2d 687, 712 n.14, 508 N.W.2d 54 (Ct. App. 1993).

In its opening brief, the State explained that interpreting section 343.44(2)(b) to require courts to consider the enumerated sentencing factors would lead to unreasonable results. There is no apparent reason to require a court to consider certain factors in imposing a disposition for the base forfeiture offense of operating after revocation when a court does not have to consider any particular factors in imposing a disposition for any analogous offense involving operating without a license or operating after suspension of a license, even those enhanced offenses that involve knowing operation causing death. There is no apparent reason to require a court to consider certain factors in imposing a disposition for the offense of causing a death while operating after revocation of a driver's license when a court does not have to consider any particular factors in any other homicide case, even those that involve deaths caused negligently, recklessly or intentionally.

Wisconsin Stat. § 973.017(2) similarly states that a circuit court "shall" consider a host of enumerated factors in imposing a sentence. But this Court has stated that a circuit court has discretion to decide which factors to consider in imposing a sentence. *State v. Gallion*, 2004 WI 42, ¶¶ 40–43, 270 Wis. 2d 535, 678 N.W.2d 197. The court may choose to base the sentence on any one or number of these factors. *Grady*, 302 Wis. 2d 80, ¶ 31. 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, ¶¶ 41, 42.

Lazo Villamil has not responded to the State's argument. He has not attempted to show why requiring a court to consider enumerated sentencing factors in an OAR case but not in any other case would have any rational basis. This is essentially a concession that there is no reason for

any disparate treatment. *State v. Kramer*, 2006 WI App 133, ¶ 14, 294 Wis. 2d 780, 720 N.W.2d 459.

To avoid unreasonable results, section 343.44(2)(b) should be interpreted to permit, but not require, a court to consider the enumerated factors in imposing sentence for an offense involving operating after revocation.

CONCLUSION

This Court should construe the provisions of Wis. Stat. § 343.44 at issue in this case in a way that gives effect to the intent of the Legislature and comports with common sense. The judgment and order of the circuit court should be affirmed.

Dated this 24th day of March, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,051 words.

Dated this 24th day of March, 2017.

_____
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 24th day of March, 2017.

_____
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