STATE OF WISCONSIN

IN SUPREME COURT

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 a Judgment of Conviction and Order Denying
Postconviction Relief Entered
in the Circuit Court for Waukesha County,
the Honorable Michael J. Aprahamian, Presiding.

REPLY BRIEF OF THE DEFENDANT-APPELLANT-PETITIONER

MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-5266
E-mail: michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. The Ambiguity Created by Legislative Error Cannot be Resolved Constitutionally.

The parties agree on the following:

1.) As written, Wis. Stat. § 343.44(2)(ar)4 is ambiguous because . (State's Response at 3).

2.) The ambiguity should not be resolved by construing the statute to provide different penalties for the same conduct. (State's Response at 3).

3.) Finding that the statute provides different penalties for the exact same conduct is contrary to the legislative intent. (State's Response at 3).

Additionally, Mr. Lazo Villamil agrees that courts are permitted to interpret statutes, and does not argue, as the state complains, that separation of powers doctrine prevents this Court from interpreting an ambiguous statute. (State's Response at 2, 3). What Mr. Lazo Villamil does argue, however, is that there are constitutional limitations to statutory construction, and that in this instance, those limitations prevent this Court from resolving the ambiguity that the parties agree exists in Wis. Stat. 343.44(2)(ar)4.

A. Construing the statute to provide for prosecution as either a misdemeanor or felony contravenes legislative intent.

The goal of statutory interpretation is to "determine what a 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. And while this Court "will strive to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." ***State v. Hall***, 207 Wis.2d 54, 82, 557 N.W.2d 778 (1997).

"A cardinal rule of statutory interpretation is that the legislature intended to adopt a constitutional statute and that a court should preserve a law and hold it constitutional *when possible*." ***American Family Mut. Ins. Co. v. Wisconsin Department of Revenue***, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (emphasis added); *citing* 2A Sutherland Stat. Const. § 45.11 at 48–49 (5th ed.1992); ***State ex rel. Hammermill Paper Co. v. La Plante***, 58 Wis.2d 32, 46–47, 205 N.W.2d 784 (1973). Moreover, courts should select a construction that results in constitutionality. ***State ex rel. Strykowski v. Wilkie***, 81 Wis.2d 491, 526, 261 N.W.2d 434 (1978).

Here, the Court of Appeals construed Wis. Stat. § 343.44(2)(ar)4 to allow for prosecution of operating a vehicle after revocation-causing death as either a misdemeanor or felony. ***State v. Lazo Villamil***, 2016 App 61 ¶ 13, 371 Wis. 2d 519, 885 N.W.2d 381. This interpretation, as the state concedes, in contrary to the legislative intent. (State's Brief at 2, 3, 13). Likewise, the state agrees that this Court should not interpret Wis. Stat. § 343.44(2)(ar)4 as providing either a misdemeanor or felony punishment for the conduct. (State's Response at 3).

B. Implied repeal of the scienter in Wis. Stat. § 343.44(1)(b) raises serious constitutional problems.

The state urges this court to adopt a construction of the statute that "clarifies" that the knowledge of revocation is not a requirment of the base offense "so as to avoid any questions

about the constitutionality . . . ." (State's Response at 5, 8). The state contends that there is "no question" that pursuant to Wis. Stat. § 343.44(2)(ar)4 a felony is committed when a driver operates after revocation of his driver's license and causes the death of another, knowing that his license was revoked. (State's Response at 7). Similarly, there is no question that

> Because the word 'knowing' appears in the section of the statute creating the base offense of operating after revocation, knowledge is made an element, not only of the base offense, but also of the first enhanced misdemeanor offense of causing a death while operating after revocation. The enhanced misdemeanor is committed when a driver causes the death of another person while committing the base offense by operating a vehicle knowing that their license has been revoked

(State's Opening Brief at 9).

However, the state now contends that it is not clear whether "knowledge" is an element of the base offense pursuant to Wis. Stat. § 343.44(1)(b) or the enhanced misdemeanor penalty. (State's Response at 7). This is the first time the state has questioned the clarity of "knowledge" being a requirement of the base offense or the first enhanced penalty. To the contrary, in its opening brief, the state agreed that Wis. Stat. § 343.44(1)(b) requires knowledge that the license has been revoked. (State's Opening Brief at 7, 8, 20). Therefore, by incorporation, the first enhanced misdemeanor requires knowledge because to be guilty of that offense, one must cause the death of another while violating Wis. Stat. § 343.44(1)(b). *See* Wis. Stat. § 343.44(2)(ar)4; (State's Opening Brief at 8).

The ambiguity arises where a second penalty enhancer purports to punish the offense as a felony when causing the

death of another knowing that one's operating privileges have been revoked. Wis. Stat. § 343.44(2)(ar)4. This enhanced penalty is illusory as the element that triggers the application of the enhanced penalty is an element of the base offense, which must be violated before any enhanced penalties can exist.

The state insists that no issues of notice arise from construing the law to "clarify" that the base offense of operating after revocation, contrary to Wis. Stat. § 343.44(1)(b), which states in relevant part that **"**[n]o person whose operating privilege has been duly revoked under the laws of this state may knowingly operate a motor vehicle upon any highway in this state during the period of revocation . . . ." does not require knowledge of revocation does not change the law, but that it actually "provides better notice of precisely what has been prohibited all along." (State's Response at 8).

The state argues that Mr. Lazo Villamil's argument that an ordinary person would not understand the statute to mean anything other than requiring knowledge of revocation is inconsistent with his position that the statute is ambiguous. (State's Response at 7). However, the it is the penalty enhancer statute, pursuant to Wis. Stat. § 343.44(2)(ar)4, that is ambiguous, as it provides two distinct penalties for the exact same conduct. (State's Opening Brief at 9). The base offense makes it clear that knowledge is an element of the offense.

Nonetheless, the state asserts that because it is reasonable to view the element of knowledge in Wis. Stat. § 343.44(1)(b) as a mistake, "drivers have always had notice that knowledge of a revocation might not be a requirement of the base offense . . . . or the misdemeanor penalty enhancer

for this offense." (State's Response at 8). To support this contention that drivers have "always" had notice that driving after being revoked without knowledge of revocation could be an offense, the state presumes that a "reasonably well-informed person" like the courts, must look beyond the words of the statute to the entire structure. (State's Response at 7).

Due process requires that "[a] criminal statute [] be sufficiently definite to give a person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited." ***State v. Cissell***, 127 Wis. 2d 205, 224-225, 378 N.W.2d 691 (1985). (citation omitted). Second, the "statute must also provide standards for those who enforce the laws and those who adjudicate guilt." ***Id.*** at 225. Here, the ambiguity arises in the penalty portion of the statute described in Wis. Stat. § 343.44(2)(ar)4.

A person of "ordinary intelligence" would not read the base offense as being a strict liability offense, or that it is possible that one would be guilty of the offense even if he did not have knowledge of revocation. Rather, the confusion would result from determining which penalty applied. Moreover, the surrounding language confirms that knowledge is an element of operating after revocation. For example, operating while suspended, contrary to Wis. Stat. § 343.44(1)(a) specifically explains that "[a] person's knowledge that his or her operating privilege is suspended is not an element of the offense under this paragraph."

In contrast, Wis. Stat. § 343.44(1)(a) does not contain this language, and instead explicitly prohibits a person from "knowingly" operating after revocation. It is unreasonable to claim that an ordinary person is put on notice that the base offense may or may not require knowledge because of the ambiguity in the penalty enhancer.

Finally, the state, in an undeveloped argument[1], contends that Mr. Lazo Villmil does not have standing to "complain" about notice because he is not convicted of either the base offense or the enhanced misdemeanor. (State's Response at 8). At no point in the circuit court, the court of appeal, or in its petition for review in this Court, di the state argue that Mr. Lazo Villamil has no standing to argue that the state's preferred construction is constitutionally deficient for lack of notice. As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal. ***State v. Dowdy***, 2012 WI 12, 338 Wis.2d 565, 808 N.W.2d 691. (*citing* ***Wirth v***. ***Ehly***, 93 Wis.2d 433,443, 287 N.W.2d 140 (1980)).

In ***Dowdy***, the petitioner successfully petitioned the circuit court for a reduction in his length of probation. 338 Wis. 2d 56, ¶1. The state appealed and the court of appeals reversed, concluding that the circuit court lacked both the statutory and inherent authority to modify the length of probation. ***Id***. ¶ 2. This Court granted Dowdy's petition for review, which raised the issue as to whether the circuit court had the inherent authority to reduce his period of probation. ***Id***. Ultimately, this Court declined to decide that issue, because "[n]either Dowdy's petition to the circuit court nor the circuit court's order was grounded in the court's alleged inherent authority." ***Id***. ¶ 43.

Here, Mr. Lazo Villamil has raised the same issues throughout the various stages of this appeal. The state, like the defendant in Dowdy, won at the circuit court. Neither its brief to the circuit court, nor the circuit court's decision was

[1] This Court may ignore undeveloped arguments. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

"grounded" in Mr. Lazo Villamil's lack of standing. Moreover, the state did not raise the issue of standing in its cross-petition for review. Therefore, the state's argument should be deemed waived. ***Dowdy***, 338 Wis.2d 565, ¶ 43. [2]

Nonetheless, Mr. Lazo Villamil indeed has standing. Contrary to the state's contention, he is convicted of violating Wis. Stat. § 343.44(1)(b) because violation of that offense is required before any enhanced penalties can be applied. Likewise, he is also convicted of the enhanced misdemeanor because that offense requires the identical conduct that the felony requires. That is the precise problem this case presents – Mr. Lazo Villamil's conduct falls within the proscription of the base offense and both enhanced penalties.

This Court may not rewrite statutes, for that power lies solely with the legislature. ***Accord State ex re. Broughton v. Zimmerman***, 261 Wis. 398, 405, 52 N.W.2d 903 (1952), *overruled in part by* ***Reynolds v. Zimmerman***, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). The role of the judiciary is to determine the meaning of a statute and to give it its proper effect. ***Kalal***, 271 Wis. 2d 633, ¶44. It must however, do so constitutionally. ***Strykowski*** 81 Wis.2d at 526. Construing the base offense as a strict liability offense re-writes the plain language of the base offense codified in Wis. Stat. 343.44(1)(b), and violates due process. Accordingly, this Court should not favor the state's proposed construction.

[2] Should this Court determined that standing is an issue, this court should remand the matter for briefing on the issue to allow Mr. Lazo Villamil the opportunity to meet the burden.

II. Statutes that Prescribe Significantly Different Penalties for the Exact Same Conduct Cannot Be Applied Constitutionally.

Both parties agree that Wis. Stat. § 343.44(2)(ar)4 should not be interpreted as providing two penalties for the identical offense. (State's Response at 14).

The state argues that there is no rational basis to distinguish identical statutes from overlapping ones when considering whether there are constitutional problems that arise from identical statutes. (State's Response Br. at 11). However, as Mr. Lazo Villamil indicated in his opening brief, a distinction can be drawn by looking at the legislative intent in creating the overlapping statute.

Overlapping statutes

> . . . . clearly present[] a harder case. Here as well, the dilemma is likely to have been created by legislative carelessness ... overlapping statutes are very common at both the federal and state level, and it can hardly be said that in every instance they are a consequence of poor research or inept drafting. Drafting a clear criminal statute and still ensuring that in no instance could it cover conduct embraced within any existing criminal statute in that jurisdiction can be a formidable task. (This fact alone may make courts somewhat reluctant to find overlap per se unconstitutional, although the consequence of such a finding, limiting punishment to that under the lesser of the two statutes until such time as the legislature decides what to do about the now-identified overlap, is hardly a cause for alarm.) Moreover, in the overlap scheme the two statutes will at least sometimes assist the prosecutor in deciding how to exercise his charging discretion.

Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 13.7(a) (2d ed.2007).

As Mr. Lazo Villamil previously argued, this Court can look to legislative intent to determine whether identical statutes offend due process. "When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, the fundamental determination to be made . . . is whether there is an arbitrary discrimination in the statute . . . and thus whether there is a rational basis which justifies a difference in rights afforded." ***Joseph E.G.***, 2001 WI App 29 ¶ 8, 240 Wis. 2d 481, 623 N.W.2d 137 (internal citations omitted).

Like the Utah Supreme Court, this court should hold that "unfettered" prosecutorial discretion to charge either of *two identical statutes* with different penalties offends equal protection. ***State v. Williams***, 2007 UT 98 ¶ 15, 593 Utah Adv. Rep. 39, 175 P.3d 1029. While the situation presented in this case does not concern overlapping statutes, the reasoning of the Utah Supreme Court is persuasive. There, the court looked to the legislative intent and determined there was no violation of equal protection where the legislature had an intent to create two separate criminal statutes that overlapped. ***Williams***, Utah Adv. Rep. 39, ¶ 22.

As noted by La Fave, there will be times when the overlap is intended to provide guidance to the prosecutor. Such an approach is a logical way to deal with the more difficult matter of overlapping statutes. Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 13.7(a) (2d ed.2007). Here, the state speculates as to the various rationale that could be possible for creating two identical statutory schemes. That speculation in this case, however, is irrelevant, because, as the parties agree, the

creation of the identical statute was a result of legislative error rather than legislative intent.

CONCLUSION

Mr. Lazo Villamil respectfully requests that for the reasons stated above, as well as in his opening brief, and response brief, that this Court reverse the decision of the court of appeals and vacate the judgment of conviction and apply the rule of lenity, thereby commuting the conviction to a misdemeanor; alternatively he asks that this court find the statue under which he was convicted unconstitutional.

Respectfully submitted,

MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-6266 ext. 2
E-mail: michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant-Petitioner

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 2,579 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 6th day of April, 2017.

Signed:

MICHELLE L. VELASQUEZ
State Bar No. 1079355

Civitas Law Group, Inc.
2224 W. Kilbourn Ave.
Milwaukee, WI 53233
(414) 949-6266 ext. 2
E-mail: michelle.velasquez@clgmke.org

Attorney for Defendant-Appellant-Petitioner