

RECEIVED

07-24-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2017AP000923-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BOBBY LOPEZ,

Defendant-Respondent.

ON APPEAL FROM OZAUKEE COUNTY CASE NO.
2016CM000625 HONORABLE PAUL V. MALLOY
CIRCUIT COURT JUDGE PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Respectfully submitted,

JEFFREY A. SISLEY
Ozaukee County Assistant District Attorney
State Bar No. 1000017
1201 S. Spring Street
Port Washington, WI 53074
(262)284-8380
jeff.sisley@da.wi.gov
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE, FACTS	1
ARGUMENT	3
A. Applicable Legal Principles and Standards of Review	3
B. The Offenses Were Within Ten Years	3
CONCLUSION.....	7
CERTIFICATION	8
CERTIFICATE OF COMPLIANCE.....	8
CERTIFICATION AS TO APPENDIX.....	9
INDEX TO APPENDIX.....	100

TABLE OF AUTHORITIES

Cases

<i>State v. Alger</i> , 2013 WI App 148, ¶ 9, 352 Wis. 2d 145, 841 N.W.2d 329.....	3
---	---

Statutes

343.307(1)	4
343.65(2)(c)	4
346.63(1)	4
346.65(2)	4
346.65(2)(am)2.....	1, 2, 3, 4, 7
346.65(2)(c)	4
801.15(1)	6
809.82	6
940.09(1)	4
940.25	4
985.09	6, 7
990.001(4)	5, 6
995.20	6

ISSUE PRESENTED

What is the first day counted for the purpose of the ten (10) year period in §346.65(2)(am)2 for a charge of Operating While Intoxicated / Operating With A Prohibited Alcohol Concentration second offense? After holding a hearing, the trial court ruled that the ten (10) year period starts on the date of the previous offense.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of this case may be appropriate in the event the very narrow issue of statutory construction addressed here arises in the future.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

On August 25, 2016, the Plaintiff-Appellant (State) filed a criminal complaint charging the Defendant-Respondent (Defendant) with the offenses of Operating While

Intoxicated second offense and Operating With A Prohibited Alcohol Concentration second offense. The date of violation for these charged offenses was July 9, 2016.

The Defendant was previously convicted of Operating While Intoxicated as a first offense. The date of violation for that previous offense was July 9, 2006.

On January 20, 2017, the Defendant filed a Motion to Dismiss Complaint asserting that the date of violation of July 9, 2006 was the first day counted and that the July 9, 2016 offense was outside the ten (10) year period under §346.65(2)(am)2 of the Wisconsin Statutes.

On April 12, 2017, a hearing was held on the Motion before the Honorable Paul Malloy. Judge Malloy ruled that the new offenses were outside the ten (10) year time period and dismissed the criminal complaint.

None of these facts are in dispute. The State is appealing that ruling and the dismissal of the complaint.

ARGUMENT

A. Applicable Legal Principles and Standards of Review

This court must determine whether the ten (10) year time period in Wisconsin Statute §346.65(2)(am)2 includes or excludes the day of the previous violation in that time period.

This is a question of law that this court reviews independently by applying the statute to undisputed facts. *State v. Alger*, 2013 WI App 148, ¶ 9, 352 Wis. 2d 145, 841 N.W.2d 329.

B. The Offenses Were Within Ten Years

The Defendant asserted that the date of the previous violation is included; i.e. is day “one” for counting. In this case, that meant the ten (10) year period started to run on July 9, 2006 and ended on July 8, 2016.

The State asserts that the date of the previous violation is excluded; i.e. day “one” is the day following the previous violation date. In this case that was July 10, 2006 which

would mean that the last day within the ten (10) year period was July 9, 2016.

The language of §346.65(2) states as follows:

(am) Any person violating s. 346.63(1):

2. Except as provided in pars. (bm) and (f), shall be fined not less than \$350 nor more than \$1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1) **within a 10-year period**, equals 2, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

§343.65(2)(c) states as follows:

In sub. (2) (am) 2., 3., 4., 5., 6., and 7., **the time period shall be measured from the dates of the refusals or violations** that resulted in the revocation or convictions. If a person has a suspension, revocation, or conviction for any offense under a local ordinance or a state statute of another state that would be counted under s. 343.307(1), that suspension, revocation, or conviction shall count as a prior suspension, revocation, or conviction under sub. (2) (am) 2., 3., 4., 5., 6., and 7.

(Emphasis added)

§346.65(2)(am)2 uses the language “within a 10-year period” and §346.65(2)(c) uses the language “from the dates of the refusals or violations.” Neither specifically states

whether the day of violation for the first offense is included or excluded.

The State asserts that §990.001(4) of the Wisconsin Statutes supplies the answer.

990.001(4) Time, how computed.

(a) The time within which an act is to be done or proceeding had or taken shall be computed **by excluding the first day and including the last**; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

(b) If the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday the act may be done or the proceeding had or taken on the next secular day.

(c) When the last day within which a proceeding is to be had or taken or an act done, which consists of any payment to or the service upon or the filing with any officer, agent, agency, department or division of the state or of any county, city, village, town, school district or other subdivision of the state, of any money, return, statement, report, notice or other document, falls on a Saturday and the duly established official office hours of such officer, agent, agency, department or division to which such payment is to be made or upon which such service is to be made or with which such return, statement, report, notice or other document is required to be filed, do not include any office hours thereof on such Saturday, said proceeding may be had or taken or such act may be done on the next succeeding day that is not a Sunday or a legal holiday.

(d) Regardless of whether the time limited in any statute for the taking of any proceeding or the doing of an act is measured from an event or from the date or day on which such event occurs, the day on which

such event took place shall be excluded in the computation of such time.

(e) "Legal holiday" as used in this section means any statewide legal holiday provided in s. 995.20. When an act is permitted to be done by the use of the postal service, and the last day within the time prescribed by law for performing such act falls on a legal public holiday under federal law, or other holiday designated by the president such that the postal service does not receive registered mail or make regular deliveries on that day, the day shall be considered a legal holiday for purposes of this section.

(Emphasis added)

Other sections of the Wisconsin Statutes use the same method of computation.

§801.15(1) states:

(b) Notwithstanding ss. **985.09 and 990.001 (4)**, in computing any period of time prescribed or allowed by chs. 801 to 847, by any other statute governing actions and special proceedings, or by order of court, **the day of the act, event or default from which the designated period of time begins to run shall not be included.** The last day of the period so computed shall be included, unless it is a day the clerk of courts office is closed. When the period of time prescribed or allowed is less than 11 days, Saturdays, Sundays and holidays shall be excluded in the computation.

(Emphasis added)

§809.82 Rule (Computation and enlargement of time).

(1) Computation. In computing any period of time prescribed by these rules, the provisions of s. 801.15 (1) and (5) apply.

§985.09 Computation of time, Sundays, legal holidays.

(2) The time within which an act is to be done or proceeding had or taken, as prescribed by the rules of procedure, **shall be computed by excluding the first day and including the last**; if the last day be Sunday or a legal holiday the party shall have the next secular day in which to do the act or take such proceeding.

(Emphasis added)

CONCLUSION

The day of violation for the previous offense should be excluded when determining the ten (10) year period in §346.65(2)(am)2. In this case, the date of July 9, 2016 was the last day within the ten (10) year period.

The State requests that this Court reverse the trial court's decision and remand with instructions to reinstate the criminal complaint.

Dated this ____ day of July, 2017.

Jeffrey A. Sisley
Assistant District Attorney
State Bar No. 1000017
1201 South Spring Street
Port Washington, Wisconsin 53074
(262) 284-8380 Fax (262) 284-8365

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. State § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,396 words. An appendix is attached and is not included in either the word or page count.

Dated this ____ day of July, 2017.

Jeffrey A. Sisley
Assistant District Attorney

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 ____ day of July, 2017.

Jeffrey A. Sisley
Assistant District Attorney

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions law, if any, and final decision of the administrative agency.

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 notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of July, 2017.

Jeffrey A. Sisley
Assistant District Attorney

APPENDIX

INDEX TO APPENDIX

	Page
Criminal Complaint	101
Defendant's Motion To Dismiss Complaint	104
Hearing Transcript	105
Order	113