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STATE OF WISCONSIN

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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Appeal No. 2017AP000923 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BOBBY LOPEZ,

Defendant-Respondent.

APPEAL FROM AN ORDER FROM THE OZAUKEE COUNTY CIRCUIT COURT,
CASE NO. 2016CM000625, HONORABLE PAUL V. MALLOY CIRCUIT
COURT JUDGE PRESIDING

DEFENDANT-RESPONDENT'S REPLY BRIEF AND SUPPLEMENTAL
APPENDIX TO PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

Whether the day of violation is the first day counted for the purpose of the ten (10) year period in Wis. Stat. § 346.65(2)(am)2 for a charge of Operating While Intoxicated / Operating with a Prohibited Alcohol Concentration second offense. The trial court ruled that the ten (10) year period starts on the date of arrest of the previous offense.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is not believed to be necessary in this case. The publication of this case may be appropriate in the event the issue of statutory construction addressed here arises in the future.

STATEMENT OF THE CASE

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 and

the time of the arrest was 10:49 p.m. (R.14, App. A). 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 and the time of the arrest was 2:39 a.m. (R.14, App. A).

On January 20, 2017, the Defendant filed a Motion to Dismiss Complaint asserting that the violation occurring on July 9, 2016 was not within the ten year period under § 346.65(2)(am)(2) of the Wisconsin Statutes. (R.11, App. B).

On April 12, 2017, a hearing was held on the Defendant's Motion before the Honorable Paul V. Malloy. Judge Malloy ruled that the new offenses were not within the ten years of the violation date of the Defendant's first offense. On May 12, 2017, Judge Malloy issued an Order dismissing the criminal complaint finding that the date of violation for the charged second offense was not within the ten years of the violation date of the Defendant's first offense. (R.15, App. C).

ARGUMENT

A. The Offenses Were Not Within Ten Years

The Defendant asserts that the date of the previous violation, July 9, 2006, is to be included in determining whether or not the current violation is within the ten (10) year period per the language of § 346.65(2).

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.

§ 346.65(2c) 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)

The State asserts that the Statutes do not

specifically state whether the day of violation for the first offense is included or excluded. The Defendant asserts that the language in § 346.65(2c) is clear that the time period shall be measured from the date of the refusal or violations. "From the date," in the Circuit Court's reasoning, as well as the Defendant's, means from the time of the violation. That would put the start of the time measured for the ten year period beginning on July 9, 2006 at 2:39 a.m.

The Circuit Court stated as follows in regard to it's reasoning to determine that the date of violation should be counted as the first day to determine if the second violation was within ten years:

"But when they use "within," I think it's more specific language than the general counting statute, and I think that - I agree with what the State is saying, 990 gives you the counting statute; but I think that Mr. Lieuallen's point is well taken." (Hearing Transcript, App. D, Pg. 5).

The Circuit Court further stated when making it's final order at the hearing:

"And so I'm going to find this is outside the ten-year period because the operative word "within" in that statute indicates to me that a conclusive starting from the date of the arrest, not the day after the arrest, because that would be ten years and one day." (Hearing Transcript, App. D, Pg. 5).

When thinking of the word "within" which is the term used specifically for this Statute, we look to the Merriam-Webster dictionary which defines the word "within" as "in or into the interior : inside." (Retrieved August 21, 2017 from <https://www.merriam-webster.com/dictionary/within>.)

Taking that definition into account, "within" in the statute would be interpreted as the Circuit Court did, as meaning beginning July 9, 2006 at 2:39 a.m. and ending on July 8, 2016 at 2:39 a.m. Therefore, the offense of the Defendant, which occurred on July 9, 2016 at 10:49 p.m. would not fall "within" the above time period, but rather falls ten years and one day later.

The State then asks the Court of Appeals to apply definitions of how to calculate time from other Wisconsin Statutes, and apply it to Wis. Stats. § 346. Chapter 346 specifically relates to Rules of the Road, and does not

direct that time calculated regarding offenses in the Chapter should be calculated per any other Chapter, but rather, sets its own standard for calculating time.

CONCLUSION

The day of violation for the previous offense should be included in the calculation to determine the ten (10) year period in § 346.65(2c). In this case, the date of July 8, 2016 should be the last day within the ten (10) year period.

The Defendant requests that this Court affirm the trial court's decision as the trial court did not err in its order to dismiss the State's Complaint.

Dated at Saukville, Wisconsin this 23rd day of August, 2017.

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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 monospaced Courier New font. The length of the brief is 11 pages. An appendix is attached and is not included in either the word or page count.

Dated this 23rd day of August, 2017.

Attorney Perry P. Lieuallen, SB#1015094
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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 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 23rd day of August, 2017.

Attorney Perry P. Lieuallen, SB#1015094
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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 with s. 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 s. 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 of 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of August, 2017.

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