STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV



Appeal No. 2017AP001658 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA H. QUILSING,

Defendant-Appellant.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT FOR
DANE COUNTY, BRANCH XI, THE HONORABLE
ELLEN K BERZ, PRESIDING

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Respectfully submitted,

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Defendant-Appellant

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## ISSUE PRESENTED

A. Was the defendant-appellant subject to an ignition interlock order under Wis. Stat. §343.301 at the time of his arrest, such that his prohibited alcohol concentration level would have been .02 pursuant to Wis. Stat. § 340.01(46m)(c)?

***Trial court.*** Yes. The trial court concluded that the Defendant-

Appellant was subject to an order under Wis. Stat. §343.301 at the time of his arrest, therefore his prohibited alcohol concentration level would have been .02. The court consequently denied the defendant's motion to dismiss the criminal complaint.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

## STATEMENT OF THE CASE

By a criminal complaint filed in the Dane County Circuit Court on June 17, 2015, the defendant-appellant, Joshua H. Quisling (hereinafter Mr. Quisling), was charged in case number 15CT523 with operating a motor vehicle while having a prohibited alcohol concentration (PAC) as a third offense, contrary to Wis. Stat. § 346.63(1)(b).

On November 16, 2015, Mr. Quisling filed a Motion to Dismiss – Criminal Complaint. Following briefing by the parties, the Honorable Ellen K Berz denied the defendant's motion on March 1, 2017.

A bench trial by written stipulation was submitted to the Court on

June 6, 2017. On that date, the Court found the defendant guilty of the sole count of operating with a prohibited alcohol concentration.

By Notice of Appeal filed on August 21, 2017, Mr. Quisling appeals the trial court's denial of his motion to dismiss and the judgment in this matter in its entirety.

## FACTS

At a November 21, 2013, bench trial in the Dane County Circuit Court, Branch XVI, the Honorable Rhonda L. Lanford presiding, Mr. Quisling was found guilty of operating while intoxicated as a first offense within 10 years, contrary to Wis. Stat. § 346.63(1)(a) (see: Dane County Case No. 2012TR025198 and record 17: 5-6). Among other penalties, the Court ordered a 12 month ignition interlock device (IID) restriction. Mr. Quisling appealed this conviction, with the Court having stayed all penalties pending appeal. However, the judgment was ultimately affirmed in an October 16, 2014, decision by the Court of Appeals. Having received the remittitur, the trial court lifted the stay of penalties on February 16, 2015.

By a criminal complaint filed in the Dane County Circuit Court, Mr. Quisling was charged with a single count of operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat. § 346.63(1)(b), as a third offense. The complaint, listing an offense date

of May 22, 2015, alleges that Mr. Quisling "did have a breath alcohol reading in grams of alcohol in 210 liters of breath of .07" (2: 1). The Complaint further incorporated Mr. Quisling's Wisconsin driving record which contained a notation indicating "03/05/2015 11/03/2015 Ignition Interlock Device Restr Required."

Following briefing by the parties, the Court issued a brief written decision adopting the State's position, and ruling that accepting Mr. Quisling's position "would lead to an absurd result" (23: 1).

## ARGUMENT

### I. BURDEN OF PROOF AND STANDARD OF REVIEW

This appeal requires the Court to interpret Wis. Stat. § 340.01(46m), which establishes the prohibited alcohol concentration level for motorists under varying circumstances. Statutory interpretation presents a question of law, which is subject to *de novo* review. State v. Cole, 2000 WI App 52, ¶3, 233 Wis.2d 577, 608 N.W.2d 432. The goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. State v. Kirch, 222 Wis.2d 598, 602, 587 N.W.2d 919 (Ct. App. 1998). When interpreting a statute, the Court begins with the statute's text, giving it its common, ordinary, and accepted meaning, except that technical or specially

defined words are given their technical or special definitions. State v. Warbelton, 2008 WI App 42, ¶13, 308 Wis.2d 459, 747 N.W.2d 717. If the language of the statute is plain and unambiguous, the inquiry ends and the plain meaning is applied. Id.

In ascertaining the plain meaning of a statute, more than a single sentence or a portion thereof must be considered. State v. Ziegler, 2012 WI 73, ¶43, 342 Wis.2d 256, 816 N.W.2d 238. The Court will "therefore interpret statutory language in the context in which it is used, 'not in isolation but as part of the whole.' In addition, we must construe statutory language reasonably. An unreasonable interpretation is one that yields absurd results or contravenes the statute's manifest purpose." Id.

**II. THE DEFENDANT'S PROHIBITED ALCOHOL CONCENTRATION LEVEL AT THE TIME OF THE ALLEGED OFFENSE WAS .08, NOT .02.**

Mr. Quisling contends that on May 22, 2015, he was not "subject to" the ignition interlock device (IID) order which was issued on November 21, 2013, and reinstated on February 16, 2015, following an unsuccessful appeal. As such, the reduced .02 prohibited alcohol concentration specified in § 340.01(46m)(c) would not apply to him, but rather the .08 or above limit in §

340.01(46m)(b) would. Consequently, the criminal complaint in this matter, alleging a breath alcohol concentration of .07, failed to state probable cause and should have been dismissed by the trial court.

### a. Applicable Statutes

Wis. Stat § 340.01(46m) defines a prohibited alcohol concentration as:

> **(a)** If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307 (1), an alcohol concentration of 0.08 or more.
> **(c)** If the person is subject to an order under s. 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), an alcohol concentration of more than 0.02.

Wis. Stat. § 343.301(1g), dealing with ignition interlock device (IID) orders, states, in pertinent part, that:

> **(1g)** A court shall order a person's operating privilege for the operation of "Class D" vehicles be restricted to operating vehicles that are equipped with an ignition interlock device and, except as provided in sub. (1m), shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device if either of the following applies:
> **(a)** The person improperly refused to take a test under s. 343.305.
> **(b)** The person violated s. 346.63 (1) or (2), 940.09 (1), or 940.25 and either of the following applies:
> **1.** The person had an alcohol concentration of 0.15 or more at the time of the offense.
> 343.301(1g)(b)2. **2.** The person has a total of one or more prior convictions, suspensions, or revocations, counting convictions under ss. 940.09 (1) and 940.25 in the person's lifetime and other

> convictions, suspensions, and revocations counted under s. 343.307 (1).

Wis. Stat. § 343.301(2m) addresses when orders under § 343.301(1g) become effective, and states:

> The court shall restrict the operating privilege under sub. (1g) for a period of not less than one year nor more than the maximum operating privilege revocation period permitted for the refusal or violation, *beginning on the date the department issues any license granted under this chapter*, except that if the maximum operating privilege revocation period is less than one year, the court shall restrict the operating privilege under sub. (1g) for one year. The court *may* order the installation of an ignition interlock device under sub. (1g) immediately upon issuing an order under sub. (1g).

(Emphasis added).

**b. Mr. Quisling Was Not Subject to an Ignition Interlock Order Under Wis. Stat. § 343.301 at the Time of the Alleged Offense.**

The parties are in agreement that on November 21, 2013, in Dane County Circuit Court, Branch 16, Case No. 12TR25198, he was found guilty of first offense operating while intoxicated and that the Court issued an IID order. And that conviction was appealled and all penalties stayed pending appeal. And that judgment was affirmed and penalties were reimposed on February 16, 2015. And that Mr. Quisling did not possess a valid Wisconsin driver license at the time of the alleged offense. Rather, on May 22, 2015, the defendant was operating with a valid license issued by the state of

his primary residence, Nevada.

By the plain language of § 343.301(1g), IID orders are effective upon the defendant obtaining a license under Chapter 343 unless the issuing court exercises its *discretionary* authority to make the order effective immediately. As demonstrated by certified copy of the Court's November 21, 2013 order in 12TR25198 attached to the Defendant's Motion to Dismiss – Criminal Complaint, the Court in Mr. Quisling's 2012 case did not exercise its authority to make its order effective immediately. Rather, the Court's order simply stated that Mr. Quisling "Install an ignition interlock device on any vehicle owned or operated by the defendant [Appellant] for a period of 12 months." Because the Court did not specify that the order was effective immediately, it was effective upon licensure by operation of law. Wis. Stat. § 343.301(2m).

The State argued that the mere existence of this order means that Mr. Quisling was "subject to" it. How can one be "subject to" an order that has yet to take effect? It is akin to arguing that a probationer with an imposed and stayed prison sentence should be bound by the prison's rules during the pendency of his probation because he is somehow "subject to" the imposed and stayed prison sentence even though the event that would trigger imposition of that

sentence, revocation of probation, has not occurred. Or, as Mr. Quisling argued to the trial court, arguing that a person is subject to the conditions of a signature bond upon the court ordering the conditions, but before the bond is signed.

In this case, the IID order existed. Mr. Quisling was the "subject of" that order. But by any reasonable view of the plain, ordinary meaning of the words "subject to," he was not "subject *to*" the order until it took effect.

The state further argued that Mr. Quisling's interpretation of the words "subject to" in § 340.01(46m) would lead to absurd results, which the trial court also specified in its order denying Mr. Quisling's motion to dismiss. That State suggested, among other things that:

> The defendant's argument hinges on the premise that his PAC will be .02 when or if he reinstates his Wisconsin driving privilege and installs an IID, but until he does so the defendant's PAC remains at .08. Under the defendant's line of reasoning, the defendant may visit Wisconsin as often as he chooses and drive within the Wisconsin borders with his Nevada license, never to reinstate his Wisconsin driving privileges, and thus never facing the additional court-ordered restrictions on his driving privileges such as the .02 PAC and installing an IID. This argument fails as it contradicts the plain language of the Wisconsin statutes and is contrary to the legislative intent of the law which was to increase the penalties for and restrictions on repeat drunk drivers.

(State's brief to the trial court, p. 2).

If Wis. Stat. § 343.301(1g) made *all* IID orders effective *only*

upon licensure, then perhaps this argument would have merit. However, since the legislature *did* provide the alternative of forthwith commencement of IID orders, the scenario sketched out by the State is *not* the inevitable result of Mr. Quisling's interpretation of § 340.01(46m). The Court always has the discretionary option of ordering the IID period to commence immediately, in which case both the IID requirement and the reduced .02 PAC level would be in effect for the court-ordered period of time, and a person in Mr. Quisling's position would be prohibited from operating on the roadways of Wisconsin without an IID or with an alcohol level above .02 during that time.

Moreover, the State's interpretation would itself lead to the absurd result that any person in Mr. Quisling's position, who resides primarily outside of Wisconsin, following a first offense OWI conviction including an IID order, would be perpetually subject to an IID order and .02 PAC level because that person could never obtain a Wisconsin license in order to commence the 12-month time frame.

## III. CONCLUSION

For the above-stated reasons, Mr. Quisling respectfully asks this Court to reverse the trial court's denial of his Motion to Dismiss – Criminal Complaint.

Dated at Middleton, Wisconsin, November 10, 2017.

Respectfully submitted,

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## CERTIFICATION

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 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 2048 words.

_____

JOHN C. ORTH