STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP1658-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA H QUISLING,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 11, THE HONORABLE ELLEN K. BERZ, PRESIDING
CIRCUIT COURT CASE 2015CT523

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STATEMENT OF THE ISSUES

1. WAS JOSHUA QUISLING SUBJECT TO AN IGNITITION INTERLOCK DEVICE ORDER UNDER WIS. STAT. § 343.301 AT THE TIME OF HIS ARREST ON MAY 22, 2015, THEREFORE MAKING HIS PROHIBITED ALCOHOL CONCENTRATION LEVEL .02 PURSUANT TO WIS. STAT. § 340.01(46M)(C)?

   Circuit court answered: Yes (R. 23:1)

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As the Plaintiff-Respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] The State will supplement the statement of the facts and case as appropriate in its argument.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

INTRODUCTION AND LEGAL FRAMEWORK

The only issue on appeal is whether the trial court properly denied Joshua Quisling's motion to dismiss the complaint and in doing so affirming that Quisling was subject to an ignition interlock device order under Wis. Stat. § 343.301 at the time of his arrest, such that his prohibited alcohol concentration (PAC) level would have been .02, as required under Wis. Stat. § 340.01(46m)(c).

The interpretation of a statute is a question of law that the Court of Appeals reviews *de novo*. *State v. Davis*, 2016 WI App 73, ¶ 14, 371 Wis. 2d 737, 747, 885 N.W.2d 807, 811.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF QUISLING'S MOTION TO DISMISS BECAUSE INTERPRETING WIS. STAT. § 343.301 TO ALLOW A PERSON CONVICTED OF AN OWI AND THEREFORE SUBJECT TO AN IID ORDER TO HAVE A PROHIBITED ALCOHOL CONCENTRATION OF .08 UNTIL THE IID IS INSTALLED AND THEN HAVE A PAC OF .02 ONCE THE IID IS INSTALLED LEADS TO AN ABSURD RESULT AND IS CONTRARY TO LEGISLATIVE INTENT OF THE STATUTE.

The State contends that under Wisconsin law, when a court orders a person's license to be restricted by requiring the person to have an IID installed for a period of time, the person becomes subject to the order when the order is pronounced, not when the IID is actually

installed. *See* Wis. Stat. § 343.301. As a result, their PAC becomes greater than .02 until the person has completed the terms of that order. There is no ability for the person to delay or manipulate at what point they become subject to the order and thus when a PAC of .02 begins. To allow a person convicted of an OWI and subject to an IID order have a PAC of .08 until the IID is installed and then have the lower PAC of .02 after the IID installed is in direct contradiction of both the plain meaning of the statute as well as the legislative intent.

A. The Plain Language Of Wis. Stats. § 340.01(46m)(c) and § 343.301(1g) Is That Quisling's PAC Is Greater Than .02 Effective Upon Court Order And Continuing Until He Has Completed The Term Required Of Him To Have An IID Installed.

It is illegal to operate a motor vehicle in Wisconsin with a prohibited alcohol concentration. Wis. Stat. § 346.63(1)(b). "Prohibited alcohol concentration" is defined 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. § 340.01(46m)(a)-(c). (emphasis added).

Therefore, the majority of people fall under the .08 definition for PAC, which is defined under the first part of that definition, Wis. Stat. § 340.01(46m)(a). However, the definition of PAC changes when an individual is subject to an order under Wis. Stat. § 343.301(1g), requiring the installation of an IID, and reads in part:

> (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.
>
> 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(1g)(a)-(b).[2]

The defendant refused to submit to a breath test in Dane County Case Number 2012TR25198, and therefore upon conviction in that case was required to have an IID under

[2] This statute went into effect in 2010 when 2009 WI Act 100 became law.

Wis. Stat. § 343.301(1g)(a). R. 17:5-6. By reading Wis. Stats. § 340.01(46m)(c) and § 343.301(1g) together, the statutes read that a person is subject to a PAC of .02 if they are *subject to an order* requiring an IID be installed.

1. Analyzing the statutory construction of Wis. Stat. § 343.301(1g) provides insight into the meaning of the law.

Within Wis. Stat. § 343.301(1g), there really are two portions of the order. The first is that the person's operating privilege is restricted to only operating vehicles with an IID. The second is that any vehicle the person owns be equipped with an IID. The language of Wis. Stat. § 343.301(1g) sets out that each of those is something the court must order. The two separate pieces are connected by the word "and" making both a requirement for the court to consider. *See* Wis. Stat. § 340.01(46m)(c); Wis. Stat. § 343.301(1g).

That they are separate portions of what the court must consider is amplified by Wis. Stat. § 343.301(1m):

> If equipping each motor vehicle with an ignition interlock device under sub. (1g) would cause an undue financial hardship, the court may order that one or more vehicles described in sub. (1g) not be equipped with an ignition interlock device.

Wis. Stat. § 343.301(1m).

Under this section, the court may exempt certain vehicles owned by the defendant from the requirement of being fitted with an interlock. But the restriction on the person's operation of any vehicle without such a device cannot be affected by subsection (1m).

"Subject to an order" refers to a person who has been ordered by a court to have an IID. The order has been pronounced; it has been made. It does not, as the defendant suggests, refer only to a person who has obtained a Wisconsin license and installed an IID. *See* App. Br. 8. The person to whom the order applies is clearly the defendant. That is why he is clearly the "subject of" the order, which the defendant concedes. *See* App. Br. 9. Either way, the order controls the defendant's future. His operating privileges were revoked by the OWI conviction from November 21, 2013; the defendant does not dispute this. *See* App. Br. 7. He cannot reinstate his driving privilege in Wisconsin unless and until he installs an IID. Because it has that control over his life and his ability to drive, it is clear that he is subject to the order.

The plain language of Wis. Stat. § 340.01(46m)(c) refers to an *order*. (emphasis added). In other words, when the court issues its decision and subsequently an order,

that order begins when it is issued. Whether the defendant takes a few weeks, months, or years to comply with the order, the order is in effect. The person continues to remain subject to the order during the time period the court has ordered an IID be installed. Once the person complies with the order by installing the IID for the period of time ordered by the court, there is no longer a restriction on the defendant's operating privilege. Therefore, once the IID order has ended, the defendant is no longer "subject to an order." The defendant contends that this view actually leads to an absurd result, but the State disagrees on public policy grounds as explained later in the State's brief. *See* App. Br. 10.

The defendant would prefer this Court to interpret the phrase "subject to an order" under Wis. Stat. § 346.63(1)(b) to mean that a person has a PAC of .02 only when the IID has been installed. *See* App. Br. 8. Thus, the defendant's interpretation of the statute is more akin to "a person who is subject to an order *and* has complied with that order." (emphasis added). But those are not the words in the statute and it should not be interpreted as such. If this Court were to follow the defendant's logic, a person would only become subject to a court order when they

fulfill the obligation the court ordered. This is clearly not how the statute reads nor is it how court orders function in practice.

2. When an IID is installed has no bearing on when a person is subject to the court's order.

The defendant points out that the statute allows the court to order an IID effective immediately or upon licensure. App. Br. 8. The defendant argues that the court in 12TR25198 *did not* exercise its discretionary authority to order the IID effective immediately. App. Br. 8; *see* Wis. Stat. § 343.301(2m). The statute reads:

> (2m) 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)*.

Wis. Stat. § 343.301(2m) (emphasis added).

Whether the Court in the 2012 case exercised its discretion or not, the State still contends that the defendant was subject to the IID order and therefore had a PAC of .02. Wis. Stat. § 343.301(2m) references when the person needs to install an IID – which is either when they

receive a license or immediately upon the court making such an order. When an IID is installed has no bearing on when a person is subject to the court's order. The language of the order for an IID is that it is effective upon licensure, not that the defendant is "subject to" it on licensure.

Under § 343.301(2m), the time period of the restriction on the operating privilege has to begin on the date the department issues any license. The second part of the order, the actual installation of an IID on any vehicle - an act totally separate from operating the vehicle – may, in the court's discretion, commence immediately upon conviction. The language which permits the immediate order makes no mention of the restriction on the operating privilege. *See* Wis. Stat. § 343.301(2m). If the court orders the person to have an IID immediately, the person is clearly subject to that order immediately. However, delaying the effective date of IID installation does not change whether that person is subject to the order. Plain and simple, the person is subject to the order when the order is made.

3. The financial hardship language in Wis. Stat. § 343.301(3)(b) supports the State's interpretation of what "subject to the order" means.

Looking to the financial hardship language for IID installation in Wis. Stat. § 343.301(3)(b) also provides context for the plain meaning of the statutes at issue in this case:

> (3)(b) If the court finds that the person who is subject to an order under sub. (1g) has a household income that is at or below 150 percent of the nonfarm federal poverty line for the continental United States, as defined by the federal department of labor under 42 USC 9902 (2), the court shall limit the person's liability under par. (a) to one-half of the cost of equipping each motor vehicle with an ignition interlock device and one-half of the cost per day per vehicle of maintaining the ignition interlock device.

Wis. Stat. § 343.301(3)(b).

As noted above, the statute states in relevant part, "If the court finds that the person who is *subject to an order under sub. (1g)*" is below a certain financial threshold, the person can qualify for a reduced installation cost for the IID. Wis. Stat. § 343.301(3)(b) (emphasis added). The argument put forth by the defendant must, if followed logically, mean that the court could not make such an order until the actual commencement of the running time of the IID order. That would require defendants to file a separate motion to the court and the court to hold a hearing separate from the sentencing under that interpretation of the law. Nothing in subsection

(3)(b) seems to imply that they are not "subject to an order" the moment it is pronounced.

4. Language choices matter when analyzing statutes and determining the meaning of the law and the intent behind it.

Section 343.301(4) uses a totally and significantly different operative word than in § 340.01(46m)(c). It reads that the order must actually *apply* as ordered. That is exactly the kind of language that the legislature would have used instead of "subject to" had it intended what the defendant contends it does. The statute reads:

> (4) A person to whom an order under sub. (1g) *applies* violates that order if he or she fails to have an ignition interlock device installed as ordered, removes or disconnects an ignition interlock device, requests or permits another to blow into an ignition interlock device or to start a motor vehicle equipped with an ignition interlock device for the purpose of providing the person an operable motor vehicle without the necessity of first submitting a sample of his or her breath to analysis by the ignition interlock device, or otherwise tampers with or circumvents the operation of the ignition interlock device.

Wis. Stat. § 343.301(4) (emphasis added).

It is the clear difference of that operative word "applies" that sets forth the legislature's intent that "subject to" means something else. Under this statutory scheme, "subject to" is not used as a synonym for "applies," otherwise the word "applies" would have appeared throughout the statutes.

Under Wis. Stat. § 343.301(5) there is another way that the defendant is subject to the order immediately upon it being pronounced, "[i]f the court enters an order under sub. (1g), the court shall impose and the person shall pay to the clerk of court an ignition interlock surcharge of $50." The order for the $50 surcharge is made at the time of the court's order. The defendant is subject to at least that portion of the order at its pronouncement. It would be silly to insist that the defendant was not subject to that portion of the order until the defendant took the steps necessary to get his license back.

If the person was not subject to the order at the time the order is issued, then how could any person be required under a court order to complete some action at a later date? That interpretation flies in the face of logic. Therefore, the plain language of Wis. Stats. §§ 340.01(46m)(c) and 343.301(1g) is that a person is subject to an order regardless of when the person actually installs an IID.

B. If The Court Does Not Find That The Plain Language Of Wis. Stats. § 340.01(46m) And § 343.301(1g) Requires A PAC Of .02, Then The Court Should Look To The Legislative Intent Of The Statute And Find That The Legislature Intended For A Person Ordered To Have An IID To Have A Lower Pac (.02) Upon Conviction Of An OWI Regardless Of When The IID Is Actually Installed.

The current language in Wis. Stat. § 343.301 allowing courts a choice between ordering an IID to be effective immediately or upon licensure was created by 2009 WI Act 100. This act, relating to impaired driving, took effect July 1, 2010. *See* 2009 WI Act 100. The act created several significant changes, including new criminal classifications for previously non-criminal offenses, established probation eligibility for all criminal OWI offenders, and expanded orders and penalties regarding ignition interlock devices. 2009 WI Act 100; Wis. Legis. Council Act Memo. This act was widely perceived as the legislature getting tough on drunk drivers.[3]

Many of the changes included in 2009 WI Act 100 were related to IIDs. Prior to the passage of that legislation, an IID was allowed for a second and subsequent OWI but only required when there was a prior offense within five years. 2009 WI Act 100. The act made an IID mandatory for all repeat OWI offenses, and also required it for a first offense when the breath alcohol concentration (BAC) is .15 and above. *Id*. The act also created an IID surcharge that previously did not exist, and a criminal penalty was also added for failure to install an IID. *Id*. Additionally, the

[3] Patrick Marley and Lee Bergquist, *Legislature Passes Tougher DUI Laws*; *Doyle to Sign Measure*, Milw. J. Sentinel, Dec. 16, 2009.

legislation included a provision that a person *subject to an IID order* have a PAC of .02. *Id*. Given the numerous changes to the previous OWI law, it is clear that 2009 WI Act 100 was designed to create harsher penalties for repeat OWI offenders. *Id*.

The new OWI laws under 2009 WI Act 100 also included a change to the way a court could order an IID. Previously, when a court ordered an IID, the time period ordered began when ordered by the court. Which means, a person could have waited out the IID period by not applying for a license until that IID period expired. Under the 2009 Act, the legislature granted courts the discretion they now have to either order the IID immediately or upon licensure. 2009 WI Act 100. This means that the clock does not start until the person obtains a product – be that an occupational license or a regular license.

The State contends that 2009 WI Act 100 certainly illustrates that the legislature did not intend for people convicted of OWIs to be able to circumvent the restrictions and penalties that are ordered upon conviction. It would follow that the legislature intended for someone who is subject to an order to have not only the requirement of an IID upon licensure, but also the lower PAC, just as the

statute is written. The purpose of the law changes included in 2009 WI Act 100 was to crack down on repeat and serious OWI offenders. The defendant's interpretation of Wis. Stat. § 340.01(46m) is clearly contrary to that intent. *See* App. Br. 10.

Based on the action of the Wisconsin Legislature to create tougher OWI laws through its passage of 2009 WI Act 100, it follows that the legislature intended for serious OWI offenders – those with more than one conviction or those with a high BAC at the time of the offense – would be immediately subjected to a lower PAC for a period of time. The defense argues that the court should interpret the statute to read that when a person is ordered to have an IID, that person has a grace period of having their PAC remain at .08 upon conviction of an OWI until the IID is installed. *See* App. Br. 9-10. The defense further argues that it is not until a later date - upon licensure - that the lower PAC of .02 should apply. By this logic, a person who is convicted of an OWI, but fails to reinstate his Wisconsin driving privilege and fails to install an IID is in a better position than a person who follows the law, gets their Wisconsin license reinstated, and installs the IID. This argument fails on its face. Based on the multiple

provisions enacted by 2009 WI Act 100 to increase the penalties and restrictions on impaired drivers, it is implausible that the legislature would have intended such an effect because the defendant's interpretation of the statutes goes against everything 2009 WI Act 100 was designed to do.

CONCLUSION

When a court orders a person's license to be restricted by requiring the person to have an IID installed for a period of time, the person becomes subject to the court's order when the order is pronounced, not when the IID is actually installed. As a result, the person's PAC becomes greater than .02 until the person has completed the terms of that order. There is no ability for the person to delay or manipulate at what point they become subject to the order and thus when a PAC of .02 begins. To allow a person convicted of an OWI and subject to an IID order have a PAC of .08 until the IID is installed and then have the lower PAC of .02 once they have an IID is in direct contradiction of both the plain meaning of the statute as well as the legislative intent.

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Joshua Quisling's motion to dismiss and affirm the conviction.

Dated this 28th day of February, 2018.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 16 pages.

Dated: _____.

Signed,

_____
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 28th day of February, 2018.

_____

Stephanie R. Hilton
Assistant District Attorney
Dane County, Wisconsin

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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

Dated this 28th day of February, 2018.

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