STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001658 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOSHUA H. QUILSING,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,

JOSHUA H. QUISLING,
Defendant-Appellant

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

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.

For the reasons previously argued my Mr. Quisling, and those detailed below, Mr. Quisling maintains that his prohibited alcohol concentration was .02, and not .08.

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

The state contends that because the Court issued an ignition interlock device (IID) order pursuant to Wis. Stat. § 343.301(1g) in Dane County Case Number 2012TR25198, and Mr. Quisling was the subject of that order, that he was "subject to" that order at the time of his arrest. Therefore, under Wis. Stat § 340.01(46m)(c), his prohibited alcohol concentration was .02 rather than .08. As previously argued, given that the Court did not exercise its discretion under Wis. Stat. § 343.301(2m) to make the IID order effective immediately, but rather left the order effective only upon licensure, any reasonable interpretation of the words "subject to" lead to the conclusion that Mr. Quisling was not "subject to" the order. This is because he had not obtained any form of Wisconsin driver license and therefore the order had not yet taken effect.

The State's contention that the fact that an IID order consists

of two mandatory components (a driving restriction and a requirement to equip vehicles with IID), "amplified" by the language of § 343.301(1m), regarding IID exemption orders, supports its interpretation of the words "subject to" is without merit. *Neither* component of the IID order takes effect until licensure, *unless* the court exercises its discretion to make the IID order effective immediately. The Court did not do so in this case. Consequently, Mr. Quisling, the "subject of" that order, was not "subject to" the order until relicense.

The State contends that "when the court issues its decision and subsequently an order, that order begins when it is issued." This is a direct contradiction of the explicit language of Wis. Stat. § 343.301(2m), which 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). By operation of law, an IID order does *not* begin when issued *unless* the Court orders that it be effective immediately.

Mr. Quisling's interpretation of a person "subject to" for purposes of Wis. Stat § 340.01(46m)(c) is not "more akin to 'a person who is subject to an order *and* has complied with that order.'" Resp. Br. 6. The State is suggesting that Mr. Quisling is reading into the statute a compliance component that is not present in the text. He is not. Rather, he is pointing out that compliance or non-compliance with the order was not possible under the facts of this case because he could not be subject to an order that had not yet taken effect.

The State further argues that under Mr. Quisling's logic "a person would only become subject to a court order when they fulfill the obligation that the court ordered." Resp. Br. 6-7. Relicensure was not an "obligation that the court ordered." It was a condition precedent to the IID order taking effect. The State then concludes that "this is clearly not how the statute reads nor is it how court orders function in practice." Resp. Br. 7. This is precisely how Wis. Stat. § 343.301(2m) reads, and in many cases (such as this one) it *is* how court orders function in practice. E.g., a court may grant a defendant a signature bond and order certain conditions, but that defendant is not subject to those conditions until he or she signs the bond.

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

On this point, the parties are in agreement. Installation of the IID is not what triggers the order taking effect. Licensure is what causes the order to take effect, unless the court elects to make the order effective immediately. Thus, the subject of the order is not subject to that order until it takes effect, which in the present case was upon licensure, and Mr. Quisling had not obtained a Wisconsin license.

c. The plain language of Wis. Stat. § 343.301(2m) and relevant statutes supports Mr. Quisling's position.

With regards to the Court's ability to make a finding that a defendant's low income qualifies him or her for reduced cost of IID installation, Mr. Quisling takes no position on whether that should occur at the time of sentencing or whether a defendant should apply for this at the time the IID order takes effect. It is not germane to the issues in this appeal. But it is worth noting that even if a Court makes that finding at the time of the sentencing but leaves the IID order effective upon licensure, the finding itself has no practical effect until the order takes effect and the defendant is subject to its conditions upon licensure. Moreover, it is hardly unusual for a court to make a finding in advance relating to a future event, even one that

may or may not come to pass. For example, courts routinely find expungement is not against the public interest and that the defendant's conviction may be expunged upon successful completion of a sentence or probation even though that has not yet happened and may never happen.

With regards to Wis. Stat. §§ 343.301(4) and 343.301(5), the fact that those sections do not use the term "subject to" very much supports Mr. Quisling's interpretation of § 340.01(46m)(c). In § 343.301(4), the use of "applies" suggest that that provision is applicable to any individual who is the subject of an IID order, rather than being limited to those cases where the order has actually taken effect and rendered the defedant "subject to" the order and its conditions. Similarly, that the surcharge imposed under § 343.301(5) is not limited to those "subject to" an IID order, but rather is imposed upon entry of the order suggests that a defendant is *not* subject to the order upon its entry.

d. Mr. Quisling's interpretation of "subject to" for purposes of § 340.01(46m)(c) would not lead to absurd results and is not contrary to legislative intent or the public interest.

Mr. Quisling reiterates his argument that the State's interpretation is actually the one that would lead to the absurd result in this case – an IID order perpetually in effect that could never be

satisfied.

The State's absurd result argument is essentially that under Mr. Quisling's interpretation, a defendant could skirt the IID order indefinitely by simply never applying for a Wisconsin driver license. This argument overlooks two critical facts. First, if a defendant were to do so, that defendant would be prohibited from legally driving in the State of Wisconsin *at all.* Hardly an absurd result. And indeed, Mr. Quisling was charged with operating while revoked, contrary to Wis. Stat. § 343.44(1)(b), in Dane County Case No. 2015CT522, though that charge was ultimately dismissed due to suppression of an unlawful stop. And second, even if the above result was somehow deemed absurd, then it is not an inevitable result. The statute permits the issuing court to make the IID order effective immediately, thereby avoiding the result of which the State complains.

And Mr. Quisling does not disagree that the legislative intent of 2009 WI Act 100 was to enact tougher laws relating to drunk driving. And Mr. Quisling's interpretation in no way undermines that legislative intent.

Wis. Stat. §§ 343.301(1g) and 343.301(2m) provide sentencing judges with two distinct options for deterring drunk driving, each with its pros and cons. If the court does not opt to

make the IID order effective immediately, but rather upon the statutory default of licensure, a defendant may delay the inevitable by not immediately obtaining a Wisconsin license, but the court ensures that the defendant is either unable to drive legally in Wisconsin *at all* or will have no choice but to actually install the IID when a license is obtained and the defendant is subject to the order. On the other hand, if the court does opt to make the IID order effective immediately, it has ensured that the defendant will be subject to the order without delay, but leaves the defendant with the option to simply elect not to drive for the duration of the IID order, and never have the experience of mandatorily imposed sober driving (presumably one of the results that 2009 WI Act 100 was intended to discourage by creating § 343.301(2m) making the IID order effective upon licensure unless otherwise ordered by the court). Given Mr. Quisling's status as a driver licensed in another state (a fact of which the Court may not have even been aware), in retrospect, this second option may have been the better choice in Mr. Quisling's 2012 case. Nevertheless, the Court did not exercise its discretion to make the IID order effective immediately in that case, and consequently, Mr. Quisling was not subject to that order at the time of his arrest in the present case.

II. 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, and vacate the conviction in this matter.

Dated at Middleton, Wisconsin, March 23, 2018.

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 1702 words.

_____

JOHN C. ORTH