STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP000075-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. NEILL, IV,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and from an Order Denying Postconviction Relief
Entered in the Milwaukee County Circuit Court,
the Honorable Dennis R. Cimpl Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

When Mr. Neill was convicted of third offense operating while intoxicated (OWI) and was subject to a doubling of the minimum fine under Wis. Stat. §346.65(2)(f)2 for having a child in the vehicle and a quadrupling of the minimum fine under Wis. Stat. §346.65(2)(g)3 for having a blood alcohol concentration above .25, did the statute require that the circuit court multiply Mr. Neill's minimum fine by a factor of eight?

Circuit Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted as this case involves the correct way to apply two different penalty enhancers under Wis. Stat. §346.65(2) to an OWI offense. There is no Wisconsin case addressing this issue.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF FACTS

Mr. Neill pled guilty to OWI (3^{rd}) with a penalty enhancer under Wis. Stat. §346.65(2)(f)2 for committing the offense with a child under the age of 16 in the vehicle and a penalty enhancer under §346.65(2)(g)3 for committing the offense with a blood alcohol concentration of .25 or above.

Under Wis. Stat. §346.65(2)(f)2, the applicable base fine under §346.65(2)(am)3 is doubled for committing the offense with a child under the age of 16 in the vehicle. Additionally, that provision makes a third offense a felony and increases the maximum incarceration from 12 months in jail to two years in prison. Under §346.65(2)(g)3, the applicable fine under §346.65(2)(am)3 is quadrupled for committing the offense with an alcohol concentration of .25 or above.

The circuit court imposed and stayed a prison sentence of fifteen months initial confinement and nine months extended supervision and placed Mr. Neill on probation for three years. The court imposed 6 months in jail as a condition of probation. (R. 39: 29-30). The court imposed a fine of $4,800.

Defense counsel addressed the applicable minimum fine as follows:

> [O]ur position is that the minimum fine would be four times the minimum fine of $600.
>
> I know the State is of the position it should be multiplied by eight because of the two possible enhancers. I don't see anything in the statutes or case law that direct us whether those multipliers -- the one for having the child in the car and the one for the high BAC – should be multiplied together, if the Court's following me, so because –

(R. 39: 31). The Court interjected, saying "The minimum fine is $1200. It must be multiplied by four because of his BAC." When defense counsel asked what the Court was relying on, the Court indicated that the criminal complaint was the source of this information. (R. 39: 31). Defense counsel protested that the minimum applicable fine for a third offense is $600.

The Court responded "No. This – This offense. It's not a third offense. It's this offense." The Court went on to say:

> And the minimum fine for this offense, operating while intoxicated third offense with a minor child in the fine – in the vehicle is $1,200. And by law, because it's – because of his BAC, it has to be quadrupled. I don't have any choice. I don't like it, but that's what the law says.

(R. 39: 32). The Court concluded, "So his fine is $4,800." Defense counsel continued to protest that nothing in the two penalty enhancement provisions suggested that they should be "multiplied together." Defense counsel asserted that there was an ambiguity in the statutory scheme, and that the "rule of leniency (sic) means that only one of those should apply, and it should be quadrupled." (R. 39: 33).

The Court reiterated:

> I don't see any ambiguity at all. The minimum fine is $1,200 for this crime, and by law, this crime's minimum has to be quadrupled to $4,800. I don't like it. That's what the statute says, so the fine is $4,800.

(R. 39: 33).

Mr. Neill filed a notice of intent to pursue postconviction relief, and undersigned counsel was appointed to represent him. He filed a postconviction motion seeking modification of the fine to $2,400, arguing that the plain language of Wis. Stat. §346.65(2) did not allow the two fine enhancement provisions to be multiplied by each other. The circuit court denied the motion, noting that multiple penalty enhancers can ordinarily be applied to the same crime and concluding that because the statute does not contain a limitation on the number of penalty enhancers that can be

applied, this "strongly suggests" legislative intent to allow the penalty enhancers to be applied as they were in this case. (R. 40:4; App. 104).

Mr. Neill appealed.

ARGUMENT

I. The Court Incorrectly Calculated The Minimum Fine For Mr. Neill's Offense.

This case presents a question of statutory construction that is reviewed de novo. ***State ex rel. Cramer v. Court of Appeals***, 2000 WI 86, ¶ 17, 236 Wis.2d 473, 613 N.W.2d 591. The analytical framework for Wisconsin courts when confronted with a dispute that necessarily entails resolution of a point of statutory construction is well-established. When confronted with an unresolved point of statutory construction, a reviewing court must engage in statutory interpretation to discern the legislative intent. ***State v. Sprosty***, 227 Wis.2d 316, 323–24, 595 N.W.2d 692 (1999). The court must first examine the plain language of the statute. Where the language of the statute is clear, a reviewing court does not look beyond that language to discern legislative intent. ***Id***. It is only upon a finding of ambiguity that the court turns to extrinsic materials in order to discern the legislative intent. ***Cramer***, 2000 WI 86 at ¶ 18.

Here, it is clear that the court intended to impose the minimum fine. The judge repeatedly stated that he was imposing the minimum he believed the law required and that he did not like it. (R. 39: 32-33). The court incorrectly believed that minimum was $4,800. The court seemed to believe that there was a discreet offense of OWI third offense with a child in the vehicle, for which the minimum fine was

$1,200, and that this minimum fine then needed to be quadrupled by operation of the penalty enhancer for a BAC of .25 or above. The court indicated that it was relying on the criminal complaint. (R. 39: 33). Looking at the complaint, it is easy to see how the court was misled. (R. 1).

The complaint set forth the offense, which it called "OPERATING A MOTOR VEHICLE WHILE INTOXICATED - THIRD OFFENSE, WITH A MINOR CHILD IN THE VEHICLE." The complaint then asserted that the minimum fine for this offense was $1,200. Separately, there was a heading that said "PENALTY ENHANCER," under which is set forth §346.65(2)(g)3, which quadrupled the fine due to the high blood alcohol concentration. (R. 1). This manner of setting forth the offense and penalties did not reflect how the statutes actually work. There is no discreet offense of "operating a motor vehicle while intoxicated – third offense with a minor child in the vehicle." Rather, there is an offense of OWI, for which the penalties are set forth in Wis. Stat. §346.65. Under §346.65(2)(am)3, the minimum fine for a third offense is $600. Mr. Neill is subject to *two penalty enhancers* – one for having a child in the vehicle, and one for having a BAC of .25 or above. Wis. Stat. §§346.65(2)(f)2, 346.65(2)(g)3

The criminal complaint upon which the court relied made no mention of the $600 fine, which is the actual starting point. The complaint made it appear that the starting point was $1,200. (R. 1). The complaint arbitrarily designated one of the penalty enhancers as part of the base offense and the other as a penalty enhancer even though there is no difference between the language of the two provisions or their placement in the statutes that would explain this.

Although the circuit court was clearly misled by the complaint when it set the fine amount at $4,800, in its decision denying Mr. Neill's postconviction motion, the court recognized that the complaint incorrectly suggested that there was a discreet offense of "operating a motor vehicle while intoxicated – third offense with a minor child in the vehicle." (R. 40; 3-3; App. 103-04). The circuit court in its decision recognized that the offense is OWI (3rd) and the statute provides a penalty enhancer for committing the offense with a minor child in the vehicle.

Nonetheless, the court concluded that the minimum fine in this case was $4,800. (R. 40: 4-5; App. 104-05). This conclusion is incorrect as a matter of law.

Wis. Stat. §346.65(2)(f)2 provides:

> 2. If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction under s. 346.63(1), the applicable minimum and maximum fines and imprisonment under par. (am)2. to 7. for the conviction are doubled. An offense under s. 346.63(1) that subjects a person to a penalty under par. (am)3., 4., 5., 6., or 7. when there is a minor passenger under 16 years of age in the motor vehicle is a felony and the place of imprisonment shall be determined under s. 973.02.

Wis. Stat. §346.65(2)(g)3 provides:

> 3. If a person convicted had an alcohol concentration of 0.25 or above, the applicable minimum and maximum fines under par. (am)3. to 5. are quadrupled.

As Mr. Neill's trial attorney correctly observed, there is nothing in the two provisions that suggests that the fine enhancements can be multiplied by each other. The penalty enhancer for the minor child in the vehicle — §346.65(2)(f)2

— says "the applicable minimum and maximum fines and imprisonment under par. (am) 2. to 7. are doubled." Similarly, the penalty enhancer for the high blood alcohol concentration — §346.65(2)(g)3 — provides "the applicable minimum and maximum fines under par. (am) 3. to 5. are quadrupled." Both penalty enhancers modify the minimum fine set forth *under §346.65(2)(am).* Again, that amount in a third offense case is $600. According to the very specific plain language of the statute, it is the $600 amount that both penalty enhancers act upon.

Trial counsel was mistaken in suggesting that there was an ambiguity in the statutes. (R. 39: 33). There is none. The statutory language is clear. The penalty enhancer for the child in the vehicle doubles the $600 minimum fine amount. The penalty enhancer for the high blood alcohol concentration quadruples the $600 amount. Nothing in the statutes suggests that it is permissible to do what the court did here — multiply the $600 base minimum fine by two and then multiply the resulting $1,200 by four, thereby multiplying the two penalty enhancers by each other. There is nothing in the language of the statute to suggest that the legislature ever contemplated a scenario in which the mandatory minimum and maximum fines would be multiplied by a factor of eight.

Properly applied, the greater enhancement of the fine (quadruple) subsumes the lesser enhancement (double) in this case. The minimum fine is $600 times four, or $2,400. It is worth noting that both penalty enhancers, nonetheless, did have a substantial effect on Mr. Neill's penalty. Wis. Stat. §346.65(2)(g)3 quadrupled his fine for his high blood alcohol concentration, and §346.65(2)(f)2, although not separately affecting the fine, converted his offense from a misdemeanor to a felony and doubled his maximum prison time.

The circuit court in its decision faulted Mr. Neill for offering "no authority or legislative history" to support his interpretation of the statute. (R. 40: 4; App. 104). But there is no authority to the contrary either. There is simply no authority supporting *either* Mr. Neill's interpretation *or* the circuit court's conclusion because there is no authority addressing the way multiple penalty enhancers under §346.65(2) are to be applied. And Mr. Neill does not offer legislative history because he relies upon the plain language of the statute, which very specifically states that the numbers that both penalty enhancers multiply are the minimum and maximum fine amounts under §346.65(2)(am). In this case, that minimum fine amount is $600. Where the language of the statute is clear, a reviewing court does not look beyond that language to discern legislative intent. ***Sprosty,*** 227 Wis.2d at 323–24.

At bottom, the circuit court's position is that there is a "general trend toward harsher mandatory minimum sentences" for OWI offenses, and that it is "perfectly reasonable and understandable" that the legislature would want to give separate effect to the two fine enhancers. (R. 40: 4-5; App. 104-05). But whether such a result would be reasonable or desirable as a matter of policy is beside the point. The circuit court could only speculate regarding legislative intent, and such speculation was not called for in the absence of a statutory ambiguity. ***Id***. The circuit court did not find the statute to be ambiguous, and the State's position in its response to Mr. Neill's postconviction motion was that there was no ambiguity. (R. 38: 2).

Mr. Neill, whose offense would otherwise have been a misdemeanor, was subject to a felony conviction and a two-year maximum prison sentence by operation of §346.65(2)(f)2 because he had a child in his vehicle.

Additionally, he was subject to a quadrupling of the minimum maximum fines by operation of §346.65(2)(g)3 because of his high blood alcohol concentration. Under this reading of the statute, both penalty enhancers are given effect. That result is consistent with the plain language of the statute, and nothing about the statute's language or the reasonableness of this result suggests that some other result *must* have been intended by the legislature. *See*, ***State v. Jennings***, 2003 WI 10, ¶ 11, 259 Wis. 2d 523, 529, 657 N.W.2d 393, 396 ("When a literal interpretation produces absurd or unreasonable results, or results that are clearly at odds with the legislature's intent, [the court's] task is to give some alternative meaning to the words.")

Furthermore, even if the plain language of the statute did not resolve the question, and even assuming that the legislature must have intended some cumulative effect on the *fine* when multiple penalty enhancers apply, that still does not lead to the conclusion that two penalty enhancers should be multiplied by each other. Separate effect could just as easily be given to the two enhancers by applying each multiplier to the base minimum fine and adding the resulting amounts. In this case the $600 minimum fine would be doubled for the presence of the child in the car, and the $600 minimum fine would be quadrupled for the high blood alcohol concentration, and the two amounts would be added for a total of $3,600.

The circuit court does not explain why, given its assumptions about legislative intent, multiplying the two enhancers is the necessary result. Multiplying the enhancers does not make any more sense than adding them. Mr. Neill does not believe that the plain language of the statute allows either operation, but if one is required, adding the two enhancers is more consistent with the statute's language,

since it would allow each enhancer to modify the base fine amount, which the statute plainly requires.

CONCLUSION

Mr. Neill requests that the Court modify his sentence to reduce the fine from $4,800 to $2,400. If the court declines that request, then he requests that the court modify the fine amount to $3,600.

Dated this 14th day of March, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,403 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 14th day of March, 2018.

Signed:

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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 § 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 of law, if any, and final decision of the administrative agency.

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Dated this 14th day of March, 2018.

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