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STATE OF WISCONSIN

05-31-2018

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2018AP75-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. NEILL, IV,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION FOR
POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT
COURT FOR MILWAUKEE COUNTY,
THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

The crime of operating a motor vehicle while under the influence of an intoxicant (OWI), as a third offense, carries a fine of not less than \$600 nor more than \$2,000. If a driver commits this crime with a minor under the age of sixteen in the vehicle, the applicable minimum and maximum fines are doubled under Wis. Stat. § 346.65(2)(f)2. If a driver commits this crime while having an alcohol concentration of 0.25 or above, the applicable minimum and maximum fines are quadrupled under Wis. Stat. § 346.65(2)(g)3.

Was the circuit court correct in concluding that when a driver commits this crime while having an alcohol concentration of 0.25 or above and a minor passenger, the applicable minimum and maximum fines are doubled, and that the new minimum and maximum fines are then quadrupled, resulting in a minimum fine of \$ 4,800 and a maximum fine of \$16,000?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

INTRODUCTION

Neill drove a vehicle with a blood alcohol concentration above 0.25 and with a minor passenger. Because Neill had two prior offenses, this is a third offense. Because Neill had a minor passenger, this is a felony and the applicable minimum and maximum fine and time of imprisonment are doubled. Because Neill's alcohol concentration was above 0.25, the applicable minimum and maximum fine are quadrupled.

The only issue in this case is how the minimum and maximum fines are calculated when both the enhancers—for

having a minor passenger and for having an excessive alcohol concentration—apply. Whether the base minimum and maximum fines for a third offense are doubled because of the minor passenger, and the base fines are quadrupled because of the excessive alcohol, or whether the minimum and maximums are doubled, and the new minimum and maximum fines are quadrupled. Put another way, the issue is whether when a driver has both a minor passenger and an excessive alcohol concentration, both enhancers apply to increase the minimum and maximum fines.

Neill asserts that the base minimum and maximum fines are doubled for having a minor passenger, and the base minimum and maximum fines are quadrupled for having an excessive alcohol concentration, and that only one of the two new minimum and maximum fines have effect. In this case, Neill argues, the base fines of \$600 to \$2,000 are doubled to \$1,200 to \$4,000, and they are quadrupled to \$2,400 to \$8,000. He argues that the enhancer for having an excessive alcohol concentration subsumes the enhancer for having a minor passenger, so the minimum and maximum fines are quadrupled, but his having a minor passenger has no effect on the minimum and maximum fine.

The circuit court rejected Neill’s interpretation of the statutory provisions, and interpreted them to give effect to both enhancers by first doubling the base minimum and maximum fines due to the minor passenger, and then quadrupling that total due to the excessive alcohol concentration. The result is that the fines are doubled to \$1,200 to \$4,000, and the totals are then quadrupled to \$4,800 to \$16,000. Because the circuit court was correct, this Court should affirm.

STATEMENT OF THE CASE AND FACTS

Neill was arrested for driving a minivan while under the influence of an intoxicant on July 2, 2016. (R. 1.) A citizen

saw the minivan in a Subway drive-thru and observed that the driver appeared to be passed out. (R. 1:2.) The driver—later identified as Neill—woke up and drove off, and the citizen followed. (R. 1:2.) The citizen said that Neill stopped the minivan, threw a beer bottle at him, and drove away, nearly striking several cars. (R. 1:2.)

After the citizen called 911, police located the minivan. (R. 1:2.) After police activated their squad car's emergency lights and air horn, Neill pulled over. (R. 1:2.) An officer observed that Neill appeared confused, had difficulty locating his driver's license in his wallet, was unsteady on his feet, smelled of alcohol, had glassy eyes, and performed poorly on field sobriety tests. (R. 1:2.) Another officer observed that a one-year-old child was in a car seat in the minivan, with a seat belt on but with the shoulder straps unfastened. (R. 1:2.) The officer observed an open beer bottle between the child seat and the front seat, and four more beer bottles on the passenger seat. (R. 1:2.) Officers transported Neill to the hospital where his blood was drawn. (R. 1:2.) A chemical test of the blood revealed a blood alcohol concentration of 0.353. (R. 48:3–4; 49:24.)

Because Neill had two prior OWI convictions, the State charged him with OWI as a third offense, with a minor in the vehicle—a felony. (R. 1:1.) The State also asserted that a penalty enhancer applied because of Neill's excessive alcohol concentration. (R. 1:1.) The State pointed out that the fine for OWI as a third offense is not more than \$600 nor less than \$2,000, and that the minimum and maximum fines are doubled under Wis. Stat. § 346.65(2)(f)2., because of the minor passenger, for a total of \$1,200 to \$4,000. The State asserted that the minimum and maximum fines are then quadrupled under Wis. Stat. § 346.65(2)(g)3., because of the excessive alcohol concentration, for a total of \$4,800 to \$16,000. (R. 1:1.)

Neill pled guilty to OWI as a third offense, with a minor in the vehicle. Neill and his counsel affirmed that the fine

would be between \$4,800 and \$16,000. (R. 48:4.) But at the sentencing hearing, defense counsel argued that the minimum fine was \$2,400 rather than \$4,800. (R. 49:32–33.) The circuit court, the Honorable Dennis R. Cimpl disagreed, concluding that the minimum fine was \$4,800. (R. 49:32–33.) The court imposed two years of imprisonment, with nine months of initial confinement and 15 months of extended supervision. (R. 18:1; 49:29–30.) The court stayed the sentence and placed Neill on probation. (R. 49:30.) The court also imposed a \$4,800 fine. (R. 18:2; 49:30–33.)

Neill moved for sentence modification, seeking reduction of his fine from \$4,800 to \$2,400. (R. 36.) He argued that the penalty enhancer for his excessive blood alcohol concentration should result in a quadrupling of the minimum and maximum fines, but that the fine is not then doubled because of his minor passenger. (R. 36:5.)

The circuit court rejected Neill’s argument, concluding that nothing in the statutes indicates a legislative intent that when a person operates a motor vehicle while under the influence and penalty enhancers for having a minor passenger and an excessive alcohol concentration both apply, only one of the enhancers has effect on the person’s fine. (R. 40:3–4.) The court concluded that the minimum fine was properly set at \$4,800, so it denied Neill’s motion. (R. 40: 4–5.) Neill now appeals.

STANDARD OF REVIEW

The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447 (citation omitted).

ARGUMENT

The circuit court properly concluded that the minimum fine for OWI as a third offense with a minor passenger and an alcohol concentration above 0.25 is \$4,800.

A. Applicable legal principles

The issue in this case requires the interpretation of Wis. Stat. § 346.65. “The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted).

When it interprets a statute, a reviewing court “begins with the plain language of the statute.” *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court “generally give[s] words and phrases their common, ordinary, and accepted meaning.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to “interpret statutory language reasonably, ‘to avoid absurd or unreasonable results.’” *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). “An interpretation that contravenes the manifest purpose of the statute is unreasonable.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49). “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46.

“[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.” *State v. Dorsey*, 2018 WI 10, ¶ 30, 379 Wis. 2d 386, 906 N.W.2d 158 (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). “If the plain language of a statute is ambiguous as to

meaning,” a reviewing court considers “the scope, context, and purpose of the statute.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶¶ 48–49).

B. While the proper application of the two penalty enhancers is clear when only one applies, the application when both apply is ambiguous.

The penalty for a third-offense OWI is set forth in Wis. Stat. § 346.65(2)(am)3., which provides that a person who violates Wis. Stat. § 346.63(1), with exceptions not relevant here, “shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not less than 45 days nor more than one year in the county jail.”

The Legislature has provided for an increased penalty for a person who violates section 346.63(1) with a minor passenger in the motor vehicle. Under section 343.65(2)(f)2., if a person with at least one prior conviction violates section 346.63(1) with a minor passenger under 16 years of age in the motor vehicle, “the applicable minimum and maximum fines and imprisonment under par. (am) 2. to 7. for the conviction are doubled.” In addition, if the person has two prior convictions and a minor passenger, the current third offense is a felony rather than a misdemeanor. Wis. Stat. § 346.65(2)(f)2.

The Legislature has also provided for an increased penalty for a person who violates section 346.63(1) while having an excessive alcohol concentration. In general, a person is prohibited from operating a motor vehicle with an alcohol concentration above 0.08. Wis. Stat. § 340.01(46m)(a). Under Wis. Stat. § 346.65(2)(g), the applicable minimum and maximum fines can be doubled, tripled, or quadrupled depending on the person’s alcohol concentration. If the person’s alcohol concentration was 0.17 to 0.199, the applicable minimum and maximum fines under Wis. Stat.

§ 346.65(2)(am)3. through 5. are doubled. If the person's alcohol concentration was 0.20 to 0.2499, the applicable minimum and maximum fines under paragraphs (am)3. through 5. are tripled. If the person's alcohol concentration was 0.25 or above, the applicable minimum and maximum fines under paragraphs (am)3. through 5. are quadrupled.

The State agrees with Neill that these two statutory provisions, when read separately, are unambiguous. But "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. When the two provisions are read in concert, because both apply in a given case, the proper joint application of the provisions is ambiguous.

There is no dispute that because Neill operated a motor vehicle while under the influence of an intoxicant or with a prohibited alcohol concentration, as a third offense, he was subject to a fine of \$600 to \$2,000.

There is no dispute that because Neill had a minor passenger, if his alcohol concentration had not been 0.17 or above, the applicable minimum and maximum fines would be doubled to \$1,200 to \$4,000.

There further is no dispute that because Neill had an alcohol concentration above 0.25, if he had not had a minor passenger, the applicable minimum and maximum fines would have been quadrupled to \$2,400 to \$8,000.

The issue is what happens to the minimum and maximum fines if a person operates a motor while under the influence or with a prohibited alcohol concentration, as a third offense, with both an excessive alcohol concentration and a minor passenger. The statutes do not clearly explain how the two enhancers are to be applied. Because the statutory provisions are ambiguous when read together, this Court

should consider “the scope, context, and purpose of the statute” in interpreting and applying them. *Dorsey*, 379 Wis. 2d 386, ¶ 30.

C. The circuit court properly interpreted Wis. Stat. §§ 346.65(2)(f)2. and 346.65(2)(g)3., to give effect to both statutes.

In the circuit court, Neill acknowledged that because he had both a minor passenger and an excessive alcohol concentration, both sections 346.65(2)(f) and (g) applied to him. (R. 36:1.) But he argued that only one of the two enhancers could have effect. He acknowledged that under section 346.65(2)(g)3., the minimum and maximum fines are quadrupled to \$2,400 to \$8,000. (R. 36:1.) But he argued that the enhancer for having a minor passenger, section 346.65(2)(f), which doubles the minimum and maximum fine, cannot be applied. (R. 36:5.)

The circuit court rejected Neill’s argument, reasoning, “When the facts support multiple penalty enhancers, multiple penalty enhancers may normally be applied to the same crime.” (R. 40:4) (citing *State v. Beasley*, 2004 WI app 42, ¶ 14, 271 Wis. 2d 469, 478, 678 N.W.2d 600.) The court recognized that the two penalty enhancers operate “based on entirely different factual circumstances – one for having a minor child in the vehicle and the other for having an excessive alcohol concentration.” (R. 40:4.) The court concluded, “It is perfectly reasonable and understandable that the legislature should want to punish a person who operates a motor vehicle while intoxicated when both of these factual circumstances are present.” (R. 40:4.)

The circuit court was correct. The purposes of the statutory provision requiring that the minimum and maximum fines for an OWI are increased when there is a minor passenger is to protect children and to punish a person who jeopardizes the welfare of a child by operating a motor

vehicle while under the influence with a child in the vehicle. But under Neill’s interpretation of the two provisions at issue, if the person further jeopardizes a child by having an excessive alcohol concentration, the required increase in the minimum and maximum fines due to the minor passenger are disregarded. An interpretation of a statute “that contravenes a purpose of the statute is not favored.” *State v. Baker*, 2005 WI App 45, ¶ 8, 280 Wis. 2d 181, 694 N.W.2d 415 (citation omitted).

As the circuit court noted, nothing in the statutes or in any case cited by Neill or of which the State is aware requires a circuit court to choose which enhancer it is going to apply, and which it is going to disregard, when both apply to the facts of the case and the conviction.

Neill points out that section 346.65(2)(f) refers to doubling, the minimum and maximum fine “under par. (am) 2. to 7.” (Neill’s Br. 7.) And section 346.65(2)(g) refers to doubling, tripling, or quadrupling the minimum and maximum fine “under par. (am) 3. to 5.” (Neill’s Br. 7.)

But the provisions refer to the base fines under section 346.65(2)(am) because that is the starting point for determining the fines, based on the number of prior convictions. Paragraph (f) does not refer to the fine under paragraph (g) because a person who commits an OWI with a minor passenger may not have an alcohol concentration above 0.17. And paragraph (g) does not refer to a fine under paragraph (f) because a person who commits an OWI with an alcohol concentration above 0.17 may not have a minor passenger. Neither paragraph (f) nor paragraph (g) sets the base fine. They both only increase the base fine that is set under paragraph (am).

Moreover, it would make little sense to double the applicable minimum and maximum fines, disregard that calculation, and then double, triple, or quadruple the base

fine. It makes more sense that the Legislature intended that once the base fine is doubled under section 346.65(2)(f), the new totals become the applicable minimum and maximum fine under Wis. Stat. § 346.65(2)(am)3. through 5. Then, the new total is doubled, tripled, or quadrupled, depending on the alcohol concentration. This interpretation—which the circuit court adopted—gives effect to both provisions.

Neill points out, correctly, that under any interpretation of the statutes, he would be penalized for having a minor passenger, even if the minimum and maximum fines are not doubled, because his crime is now a felony rather than a misdemeanor, and the maximum prison sentence is increased from one year to two years. (Neill’s Br. 8–9.)

While that is true, the provision at issue requires that the minimum and maximum fines are doubled for having a minor passenger. And under Neill’s interpretation, that provision never has effect when the driver also has an excessive alcohol concentration.

Neill offers an alternative argument that would give effect to both the provision doubling the minimum and maximum fine for having a minor passenger, and doubling, tripling, or quadrupling the fine for having an excessive alcohol concentration, when both are present in a case. (Neill’s Br. 9–10.) He asserts that a court could calculate the minimum and maximum fine for having a minor passenger, and the fine for having an excessive alcohol concentration, and add the two. In this case, the fine for OWI as a third offense, with a minor passenger, would be \$1,200. And the fine for OWI as a third offense, with an alcohol concentration of 0.25 or above, would be \$2,400. The total fine would therefore be \$3,600. (Neill’s Br. 9–10.)

While Neill’s alternative argument would give effect to both provisions, nothing in the statutes says that that the

minimum and maximum fines are added. Instead, both provisions call for multiplying the minimum and maximum fine, doubling it under section 346.65(2)(f), and doubling, tripling, or quadrupling it under section 346.65(2)(g). This requires multiplying, not adding.

Finally, as the circuit court recognized, nothing in the statutes indicates that when both enhancers apply, the Legislature intended that the base minimum and maximum fines be multiplied for each provision, and then only one or the other be given effect. If that were the case, the Legislature could easily have written a statute that provides that the applicable minimum and maximum fine be doubled under section 346.65(2)(f), or doubled, tripled, or quadrupled under section 346.65(2)(g), but not both. When the Legislature enacted section 346.65(2)(g) in 1999, section 346.65(2)(f), which was enacted in 1995, was already in place. Presumably, the Legislature knew that a person could be subject to both enhancers. If the Legislature had intended that only one apply in regard to the minimum and maximum fines, it could have said so. It did not. As the circuit court recognized, absent any indication that only one of the two enhancers can apply to the minimum and maximum fines, and that the enhancer for having a minor passenger can never apply if the person also has an alcohol concentration above 0.17, both enhancers should apply.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the judgment of conviction and the circuit court's order denying Neill's motion for postconviction relief.

Dated this 31st day of May, 2018.

Respectfully submitted,

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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 proportional serif font. The length of this brief is 3,089 words.

Dated this 31st day of May, 2018.

MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 31st day of May, 2018.

MICHAEL C. SANDERS
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