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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

Before the circuit court, the State expressly argued that the statute at issue here, Wis. Stat. §346.65(2), was not ambiguous. (38: 2). On appeal, the State now argues that the statute *is* ambiguous because it lacks a provision specifically stating how the enhancements under subsections (f) and (g) are to be applied when the defendant's conduct implicates both subsections. (Response Brief at 7-8).

Having now concluded that the statute is ambiguous, the State argues that its interpretation — that the enhancements under the two subsections must be multiplied by each other — is correct because it "gives effect to both provisions." (Response Brief at 10). The better part of the State's argument is devoted to this notion. The State faults Mr. Neill for arguing that once the fine is quadrupled under subsection (g), "the enhancer for having a minor passenger, section 346.65(2)(f), which doubles the minimum and maximum fine, cannot be applied." (Response Brief at 8). The principal basis for the State's argument that the enhancers must be multiplied by each other is that this is the only way both enhancers will have an effect on a defendant like Mr. Neill who violated both subsections.

The State is wrong. Mr. Neill is not arguing for an interpretation of the statute that would remove the teeth from either subsection when they both apply. Subsection (f), which enhances the penalties when a child is present, doubled Mr. Neill's prison exposure and converted his offense from a misdemeanor to a felony. Nothing about his argument renders

that subsection a nullity for defendants like him. The State is forced to acknowledge as much after devoting most of its argument to the idea that Mr. Neill's interpretation is wrong because it requires the court to "choose which enhancer it is going to apply and which it is going to disregard." (Response Brief at 9, 10). Regardless of how these two provisions are interpreted, subsection (f) will not be disregarded; it will always result in by far the greater increase in Mr. Neill's punishment. It is why he served a prison term.

Having concluded that the statute is ambiguous and requires interpretation, the State does not offer any legislative history to aid in that interpretation. The State insists that multiplying the two fine enhancements by each other just makes more sense. (Response Brief at 10). It is unclear how it makes more sense to take a doubling provision and a quadrupling provision and multiply them by each other, resulting in an eight-fold increase in the fine,[1] when there is no hint in the statute that the legislature ever contemplated such a result. The State's argument that the legislature could have written a statute that avoids such a result if that had been its intent (Response Brief at 11) is a non-starter. The legislature could just as easily have written the statute to give multiplicative effect to multiple enhancers if it had intended to do so.

Mr. Neill's reading of the statute makes more sense in light of the language of the statute and the structure of the statutory subsections. Subsection (f), which enhances the penalties when a child is present, very significantly impacts the basic seriousness of the offense, enhancing it from a misdemeanor to a felony in Mr. Neill's case. It doubles his

[1] Undersigned counsel cannot find any instance of an eight-fold penalty increase in the statutes.

maximum incarceration exposure and exposes him to prison. It also doubles the fine. Subsection (g) multiplies the fine by two, three or four for heightened alcohol concentrations, but does not change the nature of the offense or enhance the penalties in any other way.

It is plain that the legislature viewed the offense of operating with a child in the car as much more serious and deserving of enhanced punishment than operating with a higher alcohol concentration. Nonetheless, the fine is only doubled when there is a child present. One can only conclude that the fine enhancement is a very minor part of the penalty enhancement under subsection (f). Subsection (g), on the other hand concentrates only on enhancing the fine and provides for greater potential enhancement of it. For a defendant like Mr. Neill, it makes sense that subsection (g) would be applied to quadruple his fine, and that subsection (f) would make him a felon and expose him to prison. That the doubling of the base fine under subsection (f) would not have a separate effect because the fine was already quadrupled under subsection (g) is not a result that is plainly contrary to legislative intent.

The subtext in the State's argument — stated expressly in the decision of the circuit court — is that multiplying the penalty enhancers against each other *must* be what the legislature intended because it is the interpretation that is the most punitive. The circuit court declared that this interpretation was "consistent with the general trend towards harsher mandatory minimum sentences under section 346.65(2)." (40: 4). But the notion that whatever result is the most punitive must be what the legislature intended is not a rule of statutory construction. In fact, the opposite is true.

The rule of lenity "provides generally that ambiguous penal statutes should be interpreted in favor of the defendant." *State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis.2d 167, 663 N.W.2d 700. The rule applies when the penal statute is ambiguous and the Court is we are unable to clarify the intent of the legislature by resort to legislative history. *Id*. The State argues that by failing to include a provision expressly instructing how multiple penalty enhancers under §346.65(2) are to be applied, the legislature drafted an ambiguous statute. If that is so, and there is no legislative history to clarify legislative intent, then the rule of lenity should be applied, and the ambiguity should be resolved in Mr. Neill's favor.

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. The minimum fine for his offense was $2,400.

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 18th day of June, 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 1,085 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 18th day of June, 2018.

Signed:

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