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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP000075-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. NEILL, IV,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
Affirming an Order Denying Postconviction Relief
Entered in the Milwaukee County Circuit Court,
the Honorable Dennis R. Cimpl Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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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.

Court of Appeals Answer: A majority of the court answered in the affirmative. One dissenting judge would have ruled that the statute required that the minimum fine be multiplied two and by four, with the resulting numbers added to arrive at the total fine.

STATEMENT OF THE CASE AND FACTS

Mr. Neill pled guilty to OWI (3rd) 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. (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 –

(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. (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.

(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." (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.

(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) allowed both fine enhancement provisions to be applied, but did not allow the court to multiply them by each other. He argued that the greater enhancement of the fine (quadruple) subsumed the lesser (double). Thus, the $600 minimum fine was quadrupled under §346.65(2)(am)(3). for a total of $2,400 (36:5).

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. (40:4; App. 114).

Mr. Neill appealed. He again argued that the plain language of the statute did not allow the two fine enhancement provisions to be multiplied by each other. He alternatively argued that even if the plain language of the statute did not resolve the question as he asserted it did, and even assuming that the legislature must have intended some cumulative effect on the *fine* when multiple penalty enhancers apply, that still did not lead to the conclusion that two penalty enhancers should be multiplied by each other. He argued that separate effect could just as

easily be given to the two fine 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.

Although the State argued in the circuit court that the statute was not ambiguous, on appeal it changed course and argued that it was (38; State's Response Brief: 6). The State argued on appeal that multiplying the two enhancers by each other was necessary to give effect to both provisions and to honor legislative intent. (State's Response Brief: 6-11).

A majority of the court of appeals affirmed the decision of the circuit court. The court rejected the State's argument that the statute was ambiguous. (Slip op., ¶24; App. 108). The majority concluded that according to the plain language of the statute, "after one enhancer is applied, that increased minimum fine is used as the base for purposes of calculating the other enhancer." (Slip op., ¶23; App. 108). Thus, the court concluded that the circuit court correctly calculated the minimum fine to be $4,800.

In a dissenting opinion, Judge Kessler agreed that the statute was not ambiguous, but rejected the majority's interpretation of the statute's plain language. Judge Kessler noted that "[n]othing in the

statute instructs us to apply sequential enhancers to any figure other than the base fine set out in the statute." (Slip op., dissent, ¶28; App. 110). She concluded that each penalty enhancer must be separately applied to the base fine. Thus, "[a]pplying the enhancer for having a minor in the car ($1,200) and the enhancer for a prohibited BAC ($2,400) results in a total fine of $3,600 when the plain language the legislature chose is applied." (Slip op., dissent, ¶29; App. 110).

ARGUMENT

I. The plain language of Wis. Stat. § 346.65(2) did not permit the sentencing court to multiply Mr. Neill's fine by a factor of eight.

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. 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 sentencing judge 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. (39: 32-33). The court believed that minimum was $4,800.[1] The circuit court concluded that Mr. Neill's minimum fine must be calculated by doubling the minimum base fine of $600 dollars to $1,200 and then quadrupling *that amount* for a total minimum fine of $4,800. That conclusion was incorrect as a matter of law.

Wis. Stat. §346.65(2)(g)3—the alcohol concentration enhancer—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.

Wis. Stat. §346.65(2)(f)2—the child passenger enhancer—provides:

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[1] The judge originally arrived at this conclusion because, relying on a poorly drafted criminal complaint, he believed 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. (39: 33; 1). In its decision denying Mr. Neill's postconviction motion, the court recognized that was incorrect. Nonetheless, the judge concluded that the statute required that the two fine enhancements be multiplied by each other.

> 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.

The alcohol concentration enhancer quadruples the fine. The child passenger enhancer has far greater effects on the penalties than just an increase in the fine. When applied to a third offense, as here, the child passenger enhancer makes the offense a felony punishable by a maximum of two years in prison where it would otherwise be a misdemeanor with a 12-month maximum jail term. When applied to a fourth or subsequent offense, this provision doubles the minimum and maximum prison sentence. Less significantly, this enhancer also doubles the fine.

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 child passenger enhancer— §346.65(2)(f)2 —says "the applicable minimum and maximum fines and imprisonment under par. (am) 2. to 7. are doubled." Similarly, the alcohol concentration enhancer— §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.[2] According to the very specific plain language of the statute, it is the $600 amount that both penalty enhancers act upon.

The statutory language is clear. The child passenger enhancer doubles the $600 minimum fine amount. The alcohol concentration enhancer 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 or intended a scenario in which the

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[2] Wis. Stat. § 346.65(2)(am)3 provides: "Except as provided in pars. (cm), (f), and (g), 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 if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1), equals 3 . . .

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.

Both penalty enhancers, nonetheless, did apply and did have a substantial effect on Mr. Neill's penalty. 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 and 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 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.")

A majority of the court of appeals concluded that the circuit court correctly calculated the minimum fine when it multiplied the base minimum

fine by two and the result by four for a total minimum fine of $4,800. The court stated the basis for this conclusion:

> A plain reading of the statute reveals that there is no language precluding the application of both enhancers to the same offense. Furthermore, "multiple enhancers may normally be applied to the same underlying crime." *State v. Beasley*, 2004 WI App 42, ¶14, 271 Wis. 2d 469, 678 N.W.2d 600. Thus, we reject Neill's argument that only the excessive blood alcohol content enhancer should be applied to reduce his fine to $2400.

(Slip op., ¶22; App. 107).

In that passage and at other points in its majority opinion, the court of appeals mischaracterized Mr. Neill's argument as an argument that only one of the two penalty enhancers should have been applied. (Slip op. ¶¶11, 17, 22; App. 104, 106, 107). The question has never been whether both penalty enhancers apply. Mr. Neill readily concedes that they do. By operation of the child passenger enhancer, Mr. Neill's offense was a felony, and he was subject to a prison sentence, which the sentencing court imposed and stayed and which he ultimately served. (18; 34). The question is what *effect* the two enhancers have on the fine when they are *both* applied. Put another way, the question is *how* the two enhancers are applied to the fine.

The absence of language specifically *precluding* the double multiplication does not mean that it is

what the statute *requires* or even *permits*. Judge Kessler in dissent explained the flaw in the majority's reasoning:

> The statute does not state that penalty enhancers are to be multiplied by each other, which is what the trial court did here. *See* Majority, ¶10. The Majority states that the statute does not preclude a trial court from changing a base fine by multiplying penalty enhancers together, *see* Majority, ¶¶22-23, but the statute does not specifically instruct a court to apply the *second or subsequent* multiplier to an *already multiplied* fine. We may not add words to the statute's text. Words excluded from a statutory text must be presumed to have been excluded for a purpose. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶14 & n.9, 316 Wis. 2d 47, 762 N.W.2d 652.

(App. 110, ¶27).

Besides, there *is* language in the statute that precludes the majority's interpretation. The plain language of the statute specifically states that the figure that both penalty enhancers multiply is the minimum and maximum fine amount under §346.65(2)(am). In this case, that minimum fine amount is $600.

Finally, even if the plain language of the statute did not resolve the question as Mr. Neill asserts it does, 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 the 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 then 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. Judge Kessler concluded that this was the correct interpretation of the statute's plain language. (Slip op., ¶27; App. 110).

The majority opinion of the court of appeals does not explain how multiplying the enhancers by each other makes 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.

II. If the statute is ambiguous, then the rule of lenity governs its interpretation.

The circuit court justified its interpretation of the statute as being more "consistent with the general trend towards harsher mandatory minimum sentences" for OWI offenses. (40: 4; App. 114). The court of appeals gave a nod to this reasoning without expressly adopting it. (Slip op., ¶ 13; App. 104). There

is no rule of statutory construction that directs courts to interpret OWI statutes in the manner that will result in the harshest possible penalties.[3] In fact, if the statute is ambiguous, as the State has claimed, the rule of statutory construction that applies is precisely the opposite.

When doubt exists as to the meaning of a criminal statute, "a court should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Cole,* 2003 WI 59, ¶ 13, 262 Wis.2d 167, 663 N.W.2d 700. Stated otherwise, the rule of lenity is a canon of strict construction, ensuring fair warning by applying criminal statutes to "conduct clearly covered." *United States v. Lanier,* 520 U.S. 259, 266 (1997).

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[3] The circuit court found this language in *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 600 (2014), and *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595. *Williams*, involved Wis. Stat. §346.65(2)(am)6, which provided that for a seventh, eighth, or ninth OWI, "[T]he confinement portion of a bifurcated sentence imposed on the person under s. 973.01 shall be not less than 3 years." The question was whether a three-year mandatory minimum sentence was required or whether a sentencing court could impose a non-prison sentence and avoid the mandatory minimum. This Court noted the trend toward harsher mandatory minimums "as the number of OWI's increases" as an indication that the legislature did not intend to exempt seventh and subsequent offenses from such minimums. 2014 WI 64, ¶30. In *Booth*, the Court noted the same trend in discussing the "exposure to progressively more severe penalties for each subsequent OWI conviction," which is "the central concept underlying the mandatory OWI escalating penalty scheme." 2016 WI 65, ¶ 24.

However, the rule of lenity applies only if a "grievous ambiguity" remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must "simply guess" at the meaning of the statute. *State v. Guarnero*, 2015 WI 72, ¶¶ 25-27, 363 Wis. 2d 857, 867 N.W.2d 400, citing *United States v. Castleman,* 572 U.S. 157, 172-173 (2014), *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110.

Here, Mr. Neill asserts that the plain language of the statute directs the courts to apply the two fine enhancers by multiplying each one by the base minimum and maximum fine amounts under §346.65(2)(am). Thus, the statute is unambiguous. When each fine enhancement is applied to the $600 base amount, the greater result—$2,400—swallows the lesser—$1,200. However, if Mr. Neill is wrong, and the statute is ambiguous, then it is grievously so.

As relates to the manner of applying multiple fine enhancements, there are three possible interpretations of the statute. Only Mr. Neill's answer has a basis in the statute's plain language. If the Court rejects that answer, then there is no basis at all in the statutory language to choose from among the three options. In support of its interpretation, the majority of the court of appeals could say only that there was no statutory language precluding it. (Slip op. ¶22; App. 107). As Judge Kessler pointed out, there is no language in the statute supporting the

majority's interpretation either. (Slip op., dissent, ¶27; App. 110). There is no basis for choosing that interpretation over the one favored by Judge Kessler.

Judge Kessler's interpretation is truer to the statutory language than the majority's, since it involves applying each enhancer to the base fine amount as the statute directs. Still, there is nothing in the statute's language to suggest the addition of two separate fine amounts. And there is no basis for rejecting Mr. Neill's interpretation except a vague notion that the two enhancers *should* have some separate effect on the total fine. Nor is there anything about the "context, structure and purpose" of the statute that answers the question. *Guarnero*, 2015 WI 72, ¶¶ 25-27, 363 Wis. 2d 857. In other words, the Court must "simply guess" at the meaning of the statute. *Id.*

If the statutory scheme is ambiguous, then the Court should apply the rule of lenity and interpret the statute in favor of Mr. Neil. *Cole,* 2003 WI 59, ¶ 13, 262 Wis.2d 167. The result is a minimum fine of $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 July, 2019.

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 3,747 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 July, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

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.

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 one or more initials or other appropriate pseudonym or designation 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 18th day of July, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

APPENDIX

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