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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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.

The State correctly asserts that both enhancers apply to Mr. Neill's offense because "when the facts support multiple penalty enhancers, 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. The State correctly describes the question presented by this case as "how to apply" the enhancers. (Response Brief at 14). It does not follow that if both enhancers apply, they must be multiplied by each other.

The State argued in the circuit court Wis. Stat. §346.65(2) is not ambiguous. (38). On Appeal, the State argued that the statute is ambiguous. Before this Court, the State returns to its original position and argues that there is no ambiguity. (Response Brief at 8). The State explains that in retrospect, it has concluded that the circuit court and court of appeals correctly concluded that the statute is unambiguous. (State's Response at 9). However, the State then advances a theory about how to construe the statute that bears little resemblance to either its earlier arguments or the reasoning of either the circuit court or court of appeals.

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:

> 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)(am) sets forth the applicable minimum and maximum fine amounts. Section 346.65(2)(am)3., which applies to Mr. Neill says:

> 3. *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,

> except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

As Mr. Neill has argued, the child passenger enhancer and the alcohol concentration enhancer both expressly modify "the applicable minimum and maximum fines" "under par. (am). . ." Paragraphs (am) 2. To 7., in turn set forth the minimum and maximum fines that apply based on the number of prior offenses. The language in each of these paragraphs that states that the fine amounts set forth apply "[e]xcept as provided in pars. (cm), (f), and (g)," is an acknowledgment that the fine amounts may be modified by the penalty enhancements.

But under the State's new theory, the key to construing the statute lies in those words — "Except as provided in pars. (cm), (f), and (g)." (Response at 11). Based largely on those words, the State envisions a circular process: The minimum and maximum applicable fines for Mr. Neill under 346.65(2)(am)3 are $600 and $2000. But since those are only the fines "except as provided in pars. (cm), (f), and (g)," when one penalty enhancer is applied, that must change the fine amounts under section 346.65(2)(am)3 that are "applicable" to Mr. Neill. Therefore, when the second penalty enhancer is then applied, it is applied to new "applicable minimum and maximum fines" "under par. (am)"

The principal problem with this theory is that there is nothing in the statute to suggest that the legislature intended this circular process for applying

the two penalty enhancer subsections. There is nothing to suggest that the language "[e]xcept as provided in pars. (cm), (f), and (g)," has the effect the State says it does.

It is clear enough from the plain language that when the legislature referred in the penalty enhancing provisions to the "applicable minimum and maximum fines under par. (am)2. to 7", it was referring to the minimum and maximum fine amounts listed in those paragraphs. And in those paragraphs when the legislature referred to the fine amounts "[e]xcept as provided in pars. (cm), (f), and (g)," the legislature was acknowledging that there were penalty enhancers that could apply. None of this language directs a judge to apply one enhancer, consider the enhanced amounts to be the new "applicable minimum and maximum fines under par. (am)" and then circle back and apply the second enhancer to the new minimum and maximum fine amounts.

If anything, the State's new theory goes some distance toward identifying a potential ambiguity in the statute. If this Court concludes that the process the State advocates may have been what the legislature intended, then that is very far from clear. If the State has now offered a way to interpret the statute that is reasonable, then the choice between that interpretation and the one offered by Mr. Neill must be made arbitrarily. In such an instance the Court must "simply guess" at the meaning of the statute, and the rule of lenity should apply. *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.

The State argues that Mr. Neill's interpretation of the statute renders surplusage the language of each paragraph under subsection §346.65(2)(am) that notes that the applicable fine amounts apply "[e]xcept as provided in pars. (cm), (f), and (g)." But, again, this language is not surplusage. It is merely an acknowledgement that there are penalty enhancers that can alter the fine amounts.

In fact, the State's proposed construction results in surplusage. Each enhancer says it is multiplying the minimum and maximum fines "under par. (am)." If that language does not direct the reader to the fine amounts – the numbers listed in the paragraphs under subsection (am) and indicate that it is those numbers that each enhancer is acting upon, then why is it there? The legislature could easily have simply said "the minimum and maximum fines are doubled" or quadrupled.

The State argues that Mr. Neill's proposed interpretation of the statute does not give separate effect to the fine enhancement for having a child passenger, and, therefore, it cannot be right. (Response Brief at 15). But it simply does not follow that the legislature cannot have intended this result. After all, the child passenger enhancer is not

primarily a fine enhancement provision. Its principal effect is to double the minimum and maximum imprisonment. And in a third offense case such as Mr. Neill's, it changes the very nature of the offense from a misdemeanor to a felony and allows for a sentence to the Wisconsin State Prison System.

It is clear that the legislature intended to provide a substantially greater penalty enhancement for having a child passenger than for having a high alcohol concentration. Why, then are the fines quadrupled for the elevated alcohol concentration but only doubled for having a child passenger? The answer is obvious. In the child passenger enhancement provision, the fine enhancement is of secondary importance. Given that, it is not unreasonable to conclude that the legislature was not concerned with giving separate effect to this secondary provision when the defendant's fine was already being quadrupled under paragraph (g)3.

It does not follow that because Mr. Neill does not propose the harshest possible construction of the statute, his construction must be wrong. It is fair to assume that the legislature intended separate punishment for the two aggravating factors that the penalty enhancers describe. That intent is effectuated by Mr. Neill's proposed construction. But there is nothing in the language of the statute to suggest that the legislature ever contemplated, much less intended an eight-fold increase in the fine for someone in Mr. Neill's position.

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 3rd day of September, 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 1,447 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 3rd day of September, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender