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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.

DEFENDANT-APPELLANT-PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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ARGUMENT

I. Neither the footnote in this Court's decision in *State v. Jackson*[1] nor unpublished the decision of the court of appeals in *State v. Culver*[2] has any bearing on the issue in this case.

The State's new argument is based on a footnote in this Court's decision in *State v. Jackson*, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d. 872. *Jackson* involved a question about bifurcation of sentences for unclassified felonies under TIS-I. As an aside in a footnote, the Court observed:

> Under TIS–II, only a few unclassified felonies remain. These include operating an automobile while intoxicated with a minor passenger (third or fourth offense), Wis. Stat. § 346.65(2)(f) (2001–02), and the felony enhancement of committing domestic abuse during the 72–hour period following a domestic abuse incident. Wis. Stat. § 939.621 (2001–02). Therefore, the 75% rule has limited application for future cases.

Id., ¶ 37 n.8.

The State finds support for its argument in this footnote and the way the court of appeals interpreted

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[1]2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872.

[2]2018AP799-CR, 2019 WL 3334373 (Wis. Ct. App. July 25, 2019).

it in its unpublished opinion in *State v. Culver*, 2018AP799-CR, 2019 WL 3334373 (Wis. Ct. App. July 25, 2019). In *Culver*, the court of appeals was answering the question whether a fifth offense OWI was a classified or unclassified felony once the penalty was enhanced under Wis. Stat. § 346.65(2)(f), the child passenger enhancer. Although a fifth offense OWI was a classified felony (Class G) under Wis. Stat. § 346.65(2)(am)5, the court concluded that once the child passenger enhancer was applied, the result was an unclassified felony, and the prison sentence must be bifurcated accordingly. *Id*., at ¶ 22. The court in *Culver* engaged in no statutory construction, but instead concluded that its decision was governed by the *Jackson* footnote, which the court read as conclusively establishing that when the child passenger enhancer was applied, the result was an unclassified felony.

The court recognized that the *Jackson* footnote referred only to third and fourth offenses. However, the court disregarded this. The court said:

> It is not apparent to us why the *Jackson* footnote includes the "third or fourth offense" parenthetical. But we perceive no possible reason why the application of WIS. STAT. § 346.65(2)(f) to a fifth offense would be the application of an enhancer to a classified crime, but the application of § 346.65(2)(f) to a third or fourth offense would be an unclassified crime. At the time of *Jackson*, as in 2006, and today for that matter, the subsections in § 346.65(2)specifying penalties based on the

> number of prior convictions provide no apparent basis to distinguish a third offense or a fourth offense from a second offense or a fifth offense for purposes of deciding whether the crimes are classified or unclassified.

Id., at ¶ 24. Actually, the reason why this Court referred to only third and fourth offenses in the *Jackson* footnote is easily understood. When *Jackson* was decided in 2004, a fourth offense OWI, like a third offense, was still a misdemeanor. A fourth offense did not become a felony until 2012. See Wis. Stat. §346.65(2)(am)4m. (2011-2012).

The *Jackson f*ootnote was simply referring to the effect of penalty enhancers that converted misdemeanors to felonies.[3] This Court was merely recognizing that there are a few penalty enhancers that increase the incarceration to more than 12 months when they are applied to misdemeanor offenses and convert them into felonies. This Court cited two examples—the child passenger enhancer and the domestic violence enhancer under Wis. Stat. §939.621. The footnote contained nothing more than the mundane observation that when that happens, the felony that results is an unclassified one.

The State attempts to fashion a new argument out of a footnote that tells us nothing new. It has

[3] The *Jackson* footnote actually did not answer the question the *Culver* court was grappling with at all, and it seems that *Culver* was simply wrongly decided.

always been clear that the child penalty enhancer converted Mr. Neill's third offense from a misdemeanor to a felony. There has never been any question that the resulting felony is an unclassified one. Whenever a penalty enhancer converts a misdemeanor to a felony, the resulting felony is unclassified. The State's argument fails because the State is unable to explain why that should matter in this case.

The State does not explain how the unclassified nature of the resulting felony bears on how to apply the two fine enhancements. The State simply argues that because the child passenger enhancer results in an unclassified felony, that means that the two fine enhancements must be applied sequentially rather than concurrently, and that they must be multiplied by each other. But the State does not explain how that conclusion follows. How would the state's position be different if the felony that resulted from the enhancement were a classified one?

The State relies in part on some imprecise language from *Culver*. The issue before the court was simply how to bifurcate the prison sentence for a fifth offense where the penalty was enhanced due to the presence of a child passenger. This required determining whether the felony that resulted when the child passenger enhancement was applied was a classified one or an unclassified one. However, in framing the issue before it, the court said it was deciding whether OWI-with-a-minor-passenger, Wis. Stat. §346.65(2)(f), is an unclassified crime, or a

penalty enhancer layered on top of an underlying classified crime." 2018AP799-CR, ¶3. Elsewhere, the court described the issue as "whether Wis.Stat. §346.65(2)(f) is a penalty enhancer added to an underlying classified crime, or instead defines an unclassified crime." *Id.*, at ¶4. Thus, the court set up a false dichotomy. *Either* §346.65(2)(f) acts as a penalty enhancer *or* it creates an unclassified felony, when it actually does both.

This false dichotomy language led the State to argue that because §346.65(2)(f) results in an unclassified felony, it is not a penalty enhancer at all. Thus, the State described its *Jackson/Culver* argument in its October 11, 2019 letter to this Court as an argument that when §346.65(2)(f) is applied to a third offense OWI, "it does not act as a penalty enhancer; it instead creates a new crime—OWI as a third offense with a child in the vehicle." In its supplemental brief, the State maintains that the *Culver* court correctly concluded that when it resulted in a unclassified felony, §346.65(2)(f) "was not a penalty enhancer." (Supplemental Brief at 2).

There is no actual basis for this false dichotomy created by the language of *Culver* and relied upon by the State. The fact that the application of a penalty enhancer results in an unclassified felony does not mean that the penalty enhancer is not a penalty enhancer. Section 346.65(2)(f) is a subsection of the OWI penalty statute, positioned alongside the penalty enhancer for high alcohol concentration. The other example, cited in the *Jackson* footnote is Wis.

Stat. §939.621, entitled "Increased penalty for certain domestic abuse offenses." These are penalty enhancers. Whenever a penalty enhancer converts a misdemeanor to a felony, it results in a felony that is unclassified, but that does not mean that it is not a penalty enhancer.

It is worth noting that the notion that §346.65(2)(f) is not a penalty enhancer and that third offense OWI with a child in the vehicle is somehow a new, free-standing offense was expressly rejected by both the circuit court and the court of appeals in this case. (40:3-4; Slip op., at 4).

Two penalty enhancers apply to Mr. Neill's third offense OWI. The question is how they are to be applied to the fine—sequentially and multiplied by each other, sequentially and added, or concurrently. The fact that one of those enhancers converts Mr. Neill's offense to an unclassified felony is not new and changes nothing. This Court's footnote in *Jackson* and the court of appeals' use of it in *Culver* do not bear at all on the question before the Court here.

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 28th day of October, 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 1,372 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 28th day of October, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender