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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP997-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH H. SHOEDER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE MICHAEL H. BLOOM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Keith H. Shoeder drove his lawn mower on the highway while intoxicated. The State charged him with operating a motor vehicle while under the influence of an intoxicant (OWI) as a fourth offense. Shoeder moved to dismiss the complaint, arguing that his riding lawn mower is an "all-terrain vehicle" exempt from OWI penalties. Did the circuit court properly deny the motion to dismiss?

The circuit court reasoned that Shoeder's riding lawn mower is a "motor vehicle" as used in the OWI statute.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the briefs will adequately address the issue and thus does not request oral argument. Publication may be warranted to clarify that a riding lawn mower is a "motor vehicle" as used in the OWI statute.

INTRODUCTION

In this, his fourth OWI case, Shoeder got creative. He drank to the point of intoxication and drove his lawn mower home from the bar on a county highway. He now claims that the State cannot prosecute him for OWI, based on an inventive argument that he really drove an all-terrain vehicle on that May afternoon. The circuit court did not buy it.

Nor should this Court. The Legislature has exempted certain types of "off road vehicles" from the reach of the OWI statute, and an "all-terrain vehicle" is one of them. Shoeder did not drive an "all-terrain vehicle." He drove a riding lawn mower. Canons of statutory construction and common sense establish as much. Because a riding lawn mower meets the

definition of "motor vehicle" as used in the OWI statute, and because it is not exempted from the OWI statute's reach, the State appropriately charged Shoeder in this matter.

STATEMENT OF THE CASE

On a May afternoon in 2017, Oneida County dispatch advised Deputy Brewer that it had received an anonymous call that Shoeder had driven to a bar on a lawn mower. (R. 1:3.) Deputy Brewer responded to the call and saw Shoeder riding his lawn mower on the shoulder of the highway. (R. 1:3.) Deputy Brewer activated his lights and siren, but Shoeder did not stop. (R. 1:4.) Shoeder then drove on the front lawn of the Lake Park Condominiums. (R. 1:4.) Deputy Brewer pursued Shoeder on foot. (R. 1:4.)

When Deputy Brewer eventually caught Shoeder, he immediately noticed a strong odor of intoxicants. (R. 1:4.) Shoeder's speech was thick and difficult to understand; he also seemed dazed and confused. (R. 1:4.) Following field sobriety tests, Deputy Brewer arrested Shoeder for OWI. (R. 1:5–6.) Shoeder consented to a blood draw. (R. 1:6.) His blood alcohol concentration was .119. (R. 11:2.)

The State charged Shoeder with OWI as a fourth offense. (R. 1:1.) Shoeder moved to dismiss the charge.[1] (R. 6.) He argued that the criminal complaint fails to state probable cause that he committed OWI because it alleges that he operated a lawn mower—in his view, a riding lawn mower is not a "motor vehicle" as used in the OWI statute. (R. 6:1–2; 16:2–5.) Shoeder contended that his lawn mower is an "all-terrain vehicle" exempt from OWI penalties. (R. 16:2–

[1] Following Shoeder's filing of his motion to dismiss, the State amended the complaint to add a charge of operating with a prohibited alcohol concentration (PAC), as a fourth offense. (R. 11:1.)

5.) The State countered that a riding lawn mower is a "motor vehicle" for purposes of OWI, based on a plain reading of the relevant statutes. (R. 15:2–4.)

The circuit court, the Honorable Michael H. Bloom, presiding, denied Shoeder's motion. (R. 43.) The court reasoned that a riding lawn mower fits the expansive definition of "motor vehicle" as used in the OWI statute, Wis. Stat. § 346.63(1)(a). (R. 43:7–12.) It noted that an "all-terrain vehicle" requires a seat designed to be straddled by the operator, which Shoeder's lawn mower does not have. (R. 43:8.) It further distinguished Shoeder's lawn mower from an "all-terrain vehicle" on the basis that all-terrain vehicles must be registered with the State, whereas lawn mowers do not. (R. 43:10.)

Shoeder then filed a petition for leave to appeal the circuit court's non-final order denying his motion, which this Court denied. (R. 18.)

Thereafter, Shoeder pled no contest to OWI as a fourth offense. (R. 44:3, 9.) The State dismissed the PAC charge. (R. 44:2.) The circuit court withheld sentence and ordered 3 years' probation, with 120 days' county jail time as a condition of probation. (R. 44:16.) The court stayed the probation and jail time pending appeal. (R. 44:18.)

Shoeder appeals.

STANDARD OF REVIEW

Whether a riding lawn mower is a "motor vehicle" as used in Wis. Stat. § 346.63(1)(a) involves statutory interpretation, which presents a question of law that this Court reviews de novo. *See State v. Reyes Fuerte*, 2017 WI 104, ¶ 18, 378 Wis. 2d 504, 904 N.W.2d 773.

ARGUMENT

The circuit court properly denied Shoeder's motion to dismiss the OWI charge.

A. Relevant law

1. Statutory interpretation

Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, [the Court] ordinarily stop[s] the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning . . . ." *Id.* It "is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* ¶ 46; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (1st ed. 2012) ("If possible, every word and every provision is to be given effect. . . . None should be ignored.").

Moreover, 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 statues; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. *See also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 176 (the surplusage canon "must be applied with judgment and discretion, and with careful regard to context"). This means that scope, context, and purpose are all relevant to a plain-meaning interpretation of a statute, assuming that the scope, context, and purpose are discernable "from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Kalal*, 271 Wis. 2d 633, ¶ 48.

If the above "process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the

statue is applied according to this ascertainment of its meaning." *Kalal*, 271 Wis. 2d 633, ¶ 46 (citation omitted). "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* "Thus, as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Id.* ¶ 51.

While numerous canons of statutory construction may be relevant to a plain-meaning interpretation of a statute, no canon of interpretation is absolute. *See State v. Popenhagen*, 2008 WI 55, ¶ 42, 309 Wis. 2d 601, 749 N.W.2d 611.

2. OWI and traffic statutes

Several statutes guide this Court's resolution of the issue presented. The first is the OWI statute, which provides that "no person may drive or operate a motor vehicle while [u]nder the influence of an intoxicant." Wis. Stat. § 346.63(1)(a).

A different statute defines "motor vehicle" for purposes of the OWI statute.[2] Wisconsin Stat. § 340.01(35) provides, "'Motor Vehicle' means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail." It continues, "'Motor vehicle' includes, without limitation, a commercial vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails." Wis. Stat. § 340.01(35). Finally, it states, "A snowmobile, an all-terrain vehicle, a utility terrain vehicle,

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[2] Chapter 346 defines its words and phrases through Wis. Stat. § 340.01. *See* Wis. Stat. § 346.01(1).

and an electric personal assistive mobility device shall be considered motor vehicles only for purposes made specifically applicable by statute." Wis. Stat. § 340.01(35).

Since a "motor vehicle" must first constitute a "vehicle," it is necessary to define "vehicle," too. Wisconsin Stat. § 340.01(74) provides: "'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains." Like the definition of "motor vehicle," the definition of "vehicle" continues, "A snowmobile, an all-terrain vehicle, a personal delivery device, and an electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute." Wis. Stat. § 340.01(74).

As the above statutes indicate, an "all-terrain vehicle" receives special treatment in Wisconsin. Relevant here, an "all-terrain vehicle" is *not* considered a "motor vehicle" under the OWI statute. *See* Wis. Stat. § 346.02(11). An "all-terrain vehicle" is "a commercially designed and manufactured motor-driven device that has a weight, without fluids, of 900 pounds or less, has a width of 50 inches or less, is equipped with a seat designed to be straddled by the operator, and travels on 3 or more low-pressure tires or non-pneumatic tires." Wis. Stat. § 340.01(2g).

B. Shoeder's riding lawn mower is not an "all-terrain vehicle" exempt from OWI penalties.

The circuit court properly denied the motion to dismiss because Shoeder's riding lawn mower is a "motor vehicle" as used in the OWI statute—not an "all-terrain vehicle" exempt from OWI penalties.

To constitute a "motor vehicle" as used in the OWI statute, Shoeder's riding lawn mower must first meet the definition of "vehicle." *See* Wis. Stat. § 340.01(35). It does. As

evidenced by Shoeder's actions in this case (R. 1:3), his lawn mower is a "device in, upon, or by which any person . . . may be transported . . . upon a highway." Wis. Stat. § 340.01(74).

Since Shoeder's lawn mower meets the definition of "vehicle" under Wis. Stat. § 340.01(74), the remaining question is whether it is self-propelled—that feature makes it a "motor vehicle" as used in the OWI statute. Wis. Stat. § 340.01(35) (defining "motor vehicle" as a "vehicle . . . which is self-propelled"). It is. According to its specifications, it has a fast, "hydrostatic transmission." (R. 15:9.) And Shoeder's actions in this case demonstrate that his lawn mower was self-propelled at the time that Deputy Brewer stopped him. (R. 1:3–4.)

Thus, Shoeder's riding lawn mower is a "motor vehicle" as used in the OWI statute, unless an exception applies. *See State v. Koeppen*, 2014 WI App 94, ¶¶ 10–14, 356 Wis. 2d 812, 854 N.W.2d 849 (utilizing the definitions of "vehicle" and "motor vehicle" to conclude that a "motor bicycle" is a "motor vehicle" for purposes of the OWI statute, before considering whether an exception applied). The exception at issue here concerns an "all-terrain vehicle." (R. 16:2–5.) As noted, an "all-terrain vehicle" is not a "motor vehicle" for purposes of the OWI statute. *See* Wis. Stat. § 346.02(11).

Under the plain language of Wis. Stat. § 340.01(2g), Shoeder's riding lawn mower is not an "all-terrain vehicle." To constitute an "all-terrain vehicle" exempt from OWI penalties, a vehicle must satisfy five requirements. It must: (1) be a commercially designed and manufactured motor-driven device, (2) have a weight, without fluids, of 900 pounds or less, (3) have a width of 50 inches or less, (4) have a seat designed to be straddled by the operator, and (5) travel on three or more low-pressure or non-pneumatic tires. Wis. Stat. § 340.01(2g).

It is not necessary to examine all of the above factors because Shoeder's riding lawn mower does not meet the fourth factor—it does not have a seat designed to be straddled by the operator. (R. 16:7.) To hold that Shoeder's lawn mower is an "all-terrain vehicle" despite not having a straddled seat is to render factor four surplusage, which this Court should not do. Where the Legislature sets out specific requirements in a statute, this Court must give those requirements effect. *See Cty. of Dane v. Labor & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 35, 315 Wis. 2d 293, 759 N.W.2d 571 ("Here, the statute contains a number of requirements which must be satisfied before disfigurement compensation is awarded, and we must give those requirements effect."); *accord DaimlerChrysler Servs. N. Am. LLC v. Wis. Dep't of Revenue*, 2006 WI App 265, ¶ 20 n.5, 298 Wis. 2d 119, 726 N.W.2d 312 (rejecting the defendant's reading of the statute because it rendered a statutory requirement surplusage).

As discussed, the surplusage canon is not absolute. It "must be applied with judgment and discretion, and with careful regard to context." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 176. *See also Kalal*, 271 Wis. 2d 633, ¶ 46. But context only confirms the State's interpretation of Wis. Stat. § 340.01(2g) as not encompassing Shoeder's riding lawn mower. The straddled-seat language is meant to describe an all-terrain vehicle, *not* a riding lawn mower. *See* Wis. Stat. § 340.01(2g) (defining "all-terrain vehicle"). Thus, the State's interpretation adheres to the fair meaning of the text, which is preferable. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 355–56.

Moreover, a closely related statute supports the common-sense position that a riding lawn mower is not an "all-terrain vehicle." Wisconsin Stat. § 23.33—the statute that Shoeder prefers to be prosecuted under (Shoeder's Br. 2–3)—borrows its definition of "all-terrain vehicle" from Wis.

Stat. § 340.01(2g). *See* Wis. Stat. § 23.33(1)(b). It imposes a registration requirement on all-terrain vehicles before their operation within the state. *See* Wis. Stat. § 23.33(2)(a). As Shoeder concedes (Shoeder's Br. 7), there is no registration requirement for riding lawn mowers in this state. This furthers the distinction between the two vehicles. More importantly, however, it shows that construing Wis. Stat. § 340.01(2g) as covering riding lawn mowers would lead to an unreasonable result: it would impose a registration requirement on riding lawn mowers where the Legislature has not expressly done so. This Court must decline to adopt such an interpretation. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

One more statutory canon bears mentioning here. "The verb *to include* introduces examples, not an exhaustive list." Scalia & Garner, *Reading Law: The interpretation of Legal Texts* at 132. The Legislature broadly defined "motor vehicle," as used in the OWI statute. *See* Wis. Stat. § 340.01(35) ("'Motor vehicle' *includes, without limitation*, a commercial vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails."). It did not so define "all-terrain vehicle." *See* Wis. Stat. § 340.01(2g). Therefore, as the circuit court recognized, since the Legislature has not defined "riding lawn mower," logic dictates that the vehicle falls within the more expansive definition set forth in Wis. Stat. § 340.01(35). (R. 43:7–12.)

For these reasons, and consistent with common sense, this Court should hold that Shoeder's riding lawn mower is not an "all-terrain vehicle" exempt from OWI penalties.

On appeal, Shoeder concedes that his riding lawn mower is a "motor vehicle" for purposes of the OWI statute, unless it constitutes an "all-terrain vehicle." (Shoeder's Br. 3.) He appears to advance several arguments as to why his riding lawn mower is an "all-terrain vehicle." Shoeder's arguments all fail.

First, Shoeder seems to suggest that the Legislature intended to exempt all "off road vehicles" from the reach of the OWI statute when it enacted Wis. Stat. § 346.02(11). (Shoeder's Br. 3–4.) For starters, the Legislature's intent in enacting the statutory exception does not matter. *See* Scalia & Garner, *Reading Law: The interpretation of Legal Texts* at 391–96 (discussing the "false notion that the purpose of interpretation is to discover intent"). *See also Kalal*, 271 Wis. 2d 633, ¶ 46. It is the meaning of the words that the Legislature chose that matters, *see id.*, and the Legislature chose to specify which types of "off road vehicles" escape the reach of the OWI statute. *See* Wis. Stat. § 346.02(11) (excluding all-terrain and utility terrain vehicles). *See also* Wis. Stat. § 346.02(10), (12) (exempting snow mobiles and electric personal assistive mobility devices). And even if it were necessary to consult with legislative history materials (it is not), Shoeder's proffered materials do not establish that the Legislature sought to exempt all "off road vehicles" when it enacted Wis. Stat. § 346.02(11). (A-App. 112–36.) Shoeder prefers that "[t]he purpose of the vehicle should define its classification" as it relates to the OWI statute (Shoeder's Br. 3–5), but that is not his call—it is the Legislature's.

Second, Shoeder argues that the straddled-seat requirement of Wis. Stat. § 340.01(2g) is "no longer commonsensical, simply due to the progression of ATV designs that have occurred since the [statute's] creation." (Shoeder's Br. 3.) The State interprets this as an argument that this Court should render the straddled-seat requirement surplusage. To support his position, Shoeder offers two pictures that purportedly show all-terrain vehicles with "step through seating which no longer requires straddling." (Shoeder's Br. 4; A-App. 110–11.) The State does not agree that these pictures fail to show straddled seating. Merriam-Webster defines "straddle" as "to stand, sit, or walk with the legs wide apart." https://www.merriam-

webster.com/dictionary/straddle (accessed October 31, 2018). Shoeder's pictures show seating that would require a person to sit with his legs wide apart. (A-App. 110–11.)

At any rate, even if Shoeder's proffered pictures show all-terrain vehicles without straddled seating, they do not help Shoeder's surplusage argument. As noted, the surplusage canon "must be applied with judgment and discretion, and with careful regard to context." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 176. Judgment and discretion may dictate overlooking the straddled-seat requirement in a case where a device marketed as an all-terrain vehicle is not equipped with a straddled seat. That result would be consistent with fair-reading textualism, because the straddled-seat requirement is meant to describe an "all-terrain vehicle." Wis. Stat. § 340.01(2g). But this case is different. Shoeder's device is marketed as a riding lawn mower. (R. 15:9.) Ignoring the straddled-seat requirement in favor of a riding lawn mower simply does not adhere to the fair meaning of the text.

To further support his position that this Court should treat the straddled-seat requirement as surplusage, Shoeder relies on this Court's unpublished decision in *State v. Hill*. (Shoeder's Br. 5–6.) There, the State registered Hill's motor vehicle as a utility-terrain vehicle. *State v. Hill*, 2013AP2549-CR, 2014 WL 1797661, at *1 (Wis. Ct. App. May 7, 2014). The State later charged Hill with OWI based on his intoxicated use of the utility-terrain vehicle on the highway. *Id.* Hill argued that he could not be charged with OWI because he was operating a utility-terrain vehicle. *Id.* The State argued that Hill's vehicle was not a utility-terrain vehicle because it did not satisfy one of the requirements of the statutory definition, i.e., it lacked a steering wheel. *Id.*

This Court deemed the State's position "absurd" because the State had registered Hill's vehicle as a utility-terrain vehicle. *Hill*, 2014 WL 1797661, at *2–3. Though not

expressly stated, the Court's decision appears to have been based on principles of equitable estoppel.[3] Specifically, it reasoned that the "state cannot apply a statutory definition one way so as to collect a registration fee and then turn around and interpret the same definition another way so as to increase the applicable penalties for a law violation." *Id.* at *2.

Here, as noted, the State has not registered Shoeder's riding lawn mower as an all-terrain vehicle, because it is not an all-terrain vehicle. Thus, *Hill* is inapposite and provides no persuasive value or support for Shoeder.

Third, Shoeder argues that "since a riding lawn mower is not defined anywhere in the Wisconsin Statutes, perhaps the time has come for it to be." (Shoeder's Br. 7.) Of course, that is not this Court's job. *Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594, 527 N.W.2d 301 (1995) ("it is not the function of this court to usurp the role of the legislature"). *See also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at 349–51 (discussing the "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue").

Fourth and finally, Shoeder maintains that "because the vehicle could not be registered, licensed, titled or in any way legally operated on a public roadway, it would be an absurd result to consider the lawn mower to be a motor vehicle" for purposes of the OWI statute. (Shoeder's Br. 6.)

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[3] Equitable estoppel generally precludes one party from taking a position that another party relies on and then changing that position to the detriment of the relying party. *See Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, ¶ 33, 291 Wis. 2d 259, 715 N.W.2d 620.

He submits that "[a] riding lawn mower is just that, an implement to be used off road for the purposes of cutting grass, not to transport persons or people on a public roadway." (Shoeder's Br. 7.) The State agrees that Shoeder's riding lawn mower is designed for the purpose of cutting grass. But Shoeder chose to use it as a self-propelled device to transport himself on the highway to a bar. *That* is what matters for purposes of whether the State properly charged Shoeder with OWI, *see* Wis. Stat. §§ 340.01(35), (74) and 346.63(1)(a), not whether Shoeder's riding lawn mower could be "registered, licensed, titled or in any way legally operated on a public roadway." (Shoeder's Br. 6.)

For the above reasons, Shoeder has failed to show that his riding lawn mower is an "all-terrain vehicle" exempt from the OWI statute.

CONCLUSION

This Court should affirm Shoeder's judgment of conviction.

Dated this 6th day of November, 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 3,551 words.

Dated this 6th day of November, 2018.

_____
KARA L. MELE
Assistant Attorney General

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 6th day of November, 2018.

_____
KARA L. MELE
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