STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18AP2412

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

AMAN D. SINGH,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS J MCNAMARA, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication. This court may decide this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

Singh was convicted of an Implied Consent violation (refusal) in the State of Illinois on September 12, 2001. (R. 3, p. 1, 7). On May 13, 2005, Singh was convicted of Operating While under Influence (2nd) in Dane County Circuit Court Case No. 2004CT882. (R. 19, p. 1). Singh did not file a direct appeal with the circuit court, but did petition the circuit court for a writ of *coram nobis* on February 16, 2015. (R. 21, p. 1). Dane County Circuit Court Judge Stephen Ehlke denied Singh's petition on March 9, 2015. (R.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2017-18 edition.

22, p. 1). This court affirmed Judge Ehlke's denial of relief in Appeal #15AP850.

Mr. Singh's filed a subsequent request for relief in Appeal #17AP1609. He argued that the judgement of conviction for this second OWI should be vacated because this prosecution violated the prohibition against double jeopardy in § 345.52. The sole statute under which Mr. Singh claimed relief was § 973.13. (R. 25, p. 5).

When the State failed to respond to Mr. Singh's appeal, this court held that the State abandoned its position on Mr. Singh's appeal and therefore summarily reversed Judge Ehlke's decision. This court held that Mr. Singh was entitled to the one remedy allowed under § 973.13: "voiding of any penalty in excess of the statutory maximum." This court stated that § 973.13 "does not provide for vacation of the conviction or relief from the valid portion of the sentence." This court remanded this matter to the circuit court for further proceedings consistent with its opinion. (R. 25, p. 5).

On remand, Dane County Circuit Court Judge Nicholas McNamara held a hearing on September 21, 2018. The circuit court made clear to Mr. Singh that § 973.13 does not permit vacation of his conviction, which is consistent with this

court's holding. (R. 38, p. 10.) Judge McNamara signed an order stating any excessive sentence was void, as that is the only remedy allowed Mr. Singh under § 973.13. (R. 30, p. 1; R. 38, p. 8).

ARGUMENT

I. MR. SINGH's INTERPRETATION OF THIS COURT'S OPINION IN APPEAL #17AP1609 EXPLICITLY CONTRADICTS THIS COURT'S OWN LANGUAGE.

In the first section of his appeal, Mr. Singh summarizes his interpretation of this court's opinion in Appeal #17AP1609 by claiming that, "at a bare minimum" the court's opinion "does not appear to hold that the entire sentence that was originally imposed is void and excessive." (R. 39, p. 3). This interpretation of the court's decision is based not on the court's words. Rather, Mr. Singh puts forth an unsupported argument that this court's reversal of the lower court's denial of Singh's motion to vacate the judgement of conviction means he is not subject to any penalties at all.

In its opinion, this court never stated that Mr. Singh's 2004 OWI conviction was overturned or vacated (and that therefore any penalty against Mr. Singh is excessive), which is what Mr. Singh appears to claim. In fact, this court specifically wrote that § 973.13 "does not provide for vacation of the conviction or relief from the valid potion of the sentence." (R. 25, p. 5).

Mr. Singh's interpretation of this court's opinion contradicts this court's own explanation regarding Mr. Singh's available relief. The court did not find that the entire sentence was void, but rather that the only remedy available to Mr. Singh was the voiding of "any penalty in excess of the statutory maximum" This court further clarified that since the penalties in this case were full served years ago, this matter may be moot. (R. 25, p. 5).

A. Mr. Singh's Suggestion That The Final Three Sentences in Paragraph 11 in *Singh* Should Be Treated as Dicta is Baseless.

Mr. Singh asks this court to consider three quarters of the final substantive paragraph in its opinion as mere editorializing that has no direct application to its final decision. He asks this court to find completely irrelevant its discussion as to what relief is available to Mr. Singh based on its decision.

This makes little sense. From his very first filing, Mr. Singh's issue before the court was not simply the merits of his motion to vacate the judgement of conviction, but rather what that meant. In other words, Mr. Singh made plan that he was not just engaging in an intellectual exercise. Rather, Mr. Singh sought specific remedies in the

form of no penalties as a result of his second OWI conviction, which would include vacating the conviction itself. (R. 29, p. 2).

In its opinion, the court found in favor of Mr. Singh. It then explained what remedies were available to Mr. Singh under the sole statute he cited. Despite Mr. Singh's claims, no reasonable reading of the court's statement would suggest this statement of black letter law is advocacy in favor of the state.

II. THE STATE AGREES THAT ANY EXCESSIVE FINES SHOULD BE REFUNDED TO MR. SINGH.

Refunding any fine in excess to the statutory maximum is a proper remedy under § 973.13 as deemed by both this court and the circuit on remand. The State makes no argument against this remedy and agrees that it is proper.

Once again, the State points out that Mr. Singh's claim that any sentence against him is excessive was expressly denied in this court's opinion in Appeal #17AP1609. This court found that is not a potential remedy under § 973.13. (R. 25, p. 5).

III. THE COURT SHOULD DENY MR. SINGH'S REQUEST TO VACATE THE JUDGEMENT AGAINST HIM.

Mr. Singh devotes several pages explaining why his conviction should be vacated, but fails to explain why or how the law allows such a remedy.

The remedy for an excessive sentence is explicitly set in § 973.13. That statute provides: "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess *shall be void* and the sentence shall be valid only to the extent of the maximum term authorized by statute and *shall stand commuted without further proceedings*." Despite this court's explanation regarding the limited remedies allowed under § 973.13, Mr. Singh cites *State v. Holloway*, 202 Wis. 2d 694, 698-700 (Ct. App. 1996) in arguing that this statute allows a much broader potential remedy. In *Holloway*, this court found that courts are not prohibited from adjusting aspects of sentences beyond just the duration of a sentence. *Holloway*, 202 Wis. 2d at 698. In *Holloway*, the court clarified that courts have the discretion to revisit a sentence "so long as the new sentence is within that permitted by the law." *Id*. at 700. In the context of *Holloway*, the court determined that the sentencing court was permitted under §

973.13 to alter the structure of sentences from concurrent to consecutive in order to effectuate its intent. *Id* at 698-699.

Nowhere in the *Holloway* decision or any decision cited by Mr. Singh does any court hold that a possible remedy under § 973.13 is vacating a conviction. Mr. Singh fails to cite any authority that provides the relief he seeks under § 973.13. Mr. Singh's situation falls outside the plain test of § 973.13.

On the related but separate note, the State does not take a position on amending the judgement of conviction. We acknowledge an amended judgement of conviction may be necessary to reflect this court's previous ruling that voided any penalty in excess of the statutory maximum.

IV. THE COURT SHOULD DENY MR. SINGH'S REQUEST TO WITHDRAW HIS NO CONTEST PLEA

Mr. Singh appears to argue that he should be permitted to withdraw his plea because he believes this court voided his entire sentence, as opposed to just the penalty in excess of the statutory maximum. He further argues that any sentence imposed by a court for his OWI 2nd offense is barred by § 345.52. Mr. Singh's sole supporting evidence

is his belief that this court's previous ruling barred the imposition of any sentence at all, stating that "no valid sentence could have ever been imposed."

Mr. Singh's claim flies in the face of the express and explicit words of this court, which only voided excessive penalties. The court denied Mr. Singh's claim that his conviction should be vacated or that he is not subject to any criminal penalties at all.

Additionally, Mr. Singh fails to provide any explanation as to how we was the victim of ineffective assistance of counsel. He appears to suggest that his lawyer should have notified him that he was not subject to any conviction or penalty, but fails to explain why he was subject to no penalty in light of this court's previous rulings or how a reasonably prudent attorney would have been aware of this supposed fact.

V. MR. SINGH IS NOT ENTITLED TO RELIEF UNDER A STATE V. DALTON, 2018 WI 85, AND FAILS TO ESTABLIH § 343.307(1)(d), (e), AND (f) ARE UNCONSTITUTIONAL.

Mr. Singh argues that *State v. Dalton*, 2018 WI 85, 914 N.W. 2d 120 precludes use of his previous refusal to submit to a blood test when determining his prior OWI history. He submits (without official or supporting documentation) that the State of Wisconsin charged him with a second offense OWI in 2004 because he previously refused a blood test in Illinois resulting in a driver's license suspension. Therefore, as Mr. Singh posits, this offense should not have counted as a second offense OWI.

Per *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), Mr. Singh's argument under *Dalton* can only be raised if the underlying refusal was based on a blood draw. *Birchfield* made a strong distinction between breath and blood refusals. In that case, the court confirmed that one can assign criminal penalties for a refusal to submit to a breath test. *Dalton*, too, only applies to blood draws. If the officers who arrested the defendant in his previous Illinois offense offered him a breath test, then his argument fails automatically, on its face.

Mr. Singh states that he refused to submit to a blood test. However, this argument fails – and should be summarily denied – because he has not made any initial showing that *Dalton* even applies to his situation. Without any evidence or credible supporting documents Mr. Singh fails to establish that the *Birchfield* and *Dalton* precedents may apply to him. Thus, he is not entitled to this court conducting an analysis of his situation.

However, even if the court believes Mr. Singh's statement alone entitles him to an examination for potential relief by this court, Mr. Singh fails to make his case.

Considering a refusal as defined by the Implied Consent law as a prior for counting purposes, which is supported by § 343.307(1)(d), (e), and (f), is not the same as explicitly increasing the confinement portion of a sentence. Additionally, in a roundabout manner, Mr. Singh appears to be asking this court to a) extend *Dalton* beyond its actual holding, and b) claim that § 343.307(1)(d), (e) and (f) are unconstitutional without having to meet the high burden that a constitutionality claim generally requires.

When a court addresses the issue of whether or not a statute passes constitutional muster, the presumption is in favor of constitutionality. Respect for a co-equal branch of government demands that statutes must be presumed to be constitutional, and will not be found to be unconstitutional unless their invalidity is established beyond a reasonable doubt. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16-18; *State v. Cole*, 2003 WI 112, ¶¶ 11, 17 (and cases cited). A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 2005 WI 32 at ¶ 17; *Cole*, 2003 WI 112 at ¶ 11. When faced with a claim that a statute which reflects the considered will of the people is unconstitutional, a court cannot become mired with the merits of the legislation, but must instead afford due deference to the determination of the Legislature. *State v. Cole*, 2003 WI 112, ¶ 18.

Resolution of the issue in this case requires statutory interpretation. In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common,

ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

This matter also concerns the constitutionality of a statute. Per *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451 (citations omitted), *cert. denied*, 133 S. Ct. 59 (2012), "The constitutionality of a statutory scheme is a question of law that [an appellate court] review[s] de novo. Every legislative enactment is presumed constitutional. As such, [an appellate court] will 'indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [an appellate court] must resolve that doubt in favor of constitutionality.' Accordingly, the party challenging a statute's constitutionality faces a heavy burden. The challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt."

It is also important to note how the high burden underlining this standard. The Wisconsin Supreme Court has

held that it is "not sufficient for a party to demonstrate 'that the statute's constitutionality is doubtful or that the statute is probably unconstitutional.' Instead, the presumption can be overcome only if the party establishes 'that the statute is unconstitutional beyond a reasonable doubt.'" *Wisconsin Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citations omitted). "This presumption and burden apply to as-applied constitutional challenges to statutes as well as to facial challenges." *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227. A facial challenge to the constitutionality of a statute cannot prevail unless "the law cannot be enforced 'under any circumstances.'" *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (quoted source omitted).

Mr. Singh has not met the basic requirements to establish that § 343.307(1)(d), (e) and (f) are unconstitutional. Therefore, this claim should be denied.

CONCLUSION

Despite this court's repeated requests, the State failed to respond to Mr. Singh's appear in #17AP1609. While unfortunate and not demonstrative of its typical diligence and professionalism, the State does not have a substantive explanation other than human error. Thus, the State accepts the Court of Appeal's decision in #17AP1609 to grant relief under § 973.13 after summarily reversing the lower court's position denying Mr. Singh's motion to vacate his judgement of conviction. As both this court and the circuit court on remanded explained to Mr. Singh, the only remedy allowed under this statute is the voiding of any penalty that exceeds the statutory maximum. As this court stated, "the statute invoked by Singh on appeal, WIS STAT § 973.13, provides only one remedy: voiding any penalty in excess of the statutory maximum. The statute does not provide for vacation of the conviction or relief from the valid portion of the sentence." (R. 25, p. 5).

Mr. Singh is asking this court to uphold its decision in Appeal #17AP1609, but treat as dicta its entire explanation of the relief allowed under the statute cited by Mr. Singh. His argument is that these final three sentences are "unnecessary to the resolution of the case,

which was a summary reversal sanction instead of deciding on the merits." Without citation or explanation, Mr. Singh further claims that "the final three sentences… may be also be an inaccurate statement of the law."

Even when deciding in favor of a party based on procedural reasons (as opposed to substantive reasons), this court is obviously within its authority to determine what if any remedies are available under the statute cited by the prevailing party. The State asks this court to uphold its entire decision, including the section explaining what are available under the statute cited by Mr. Singh.

At the September 21, 2018 hearing, Dane County Circuit Court Judge McNamara held that "the judgement of conviction will say that pursuant to 973.13 any penalty in excess of statutory maximum is void." (R. 38, p. 14.) Earlier in this hearing, Judge McNamara clarified to Mr. Singh "it's expressly not" the appellate court's mandate to vacate the judgement of conviction. (R. 38, p. 13.) He further clarified that the appellate court's decision allows only one remedy, which is to void any penalty in excess of the statutory maximum. (R. 38, p. 8.)

The State asks this court to uphold Judge McNamara's rulings, as they are expressly consistent with this court's holding in #18AP2412. (R. 25, p. 5).

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Signed,

_____
Attorney

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I hereby certify that:

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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 ____ day of _____, _____.

_____
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