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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2019AP001786 - CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ERIC JEAN OVERVIG,

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF
CONVICTION ENTERED IN
ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE EDWARD F. VLACK,
PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE

Does Wisconsin Statute § 346.65(2)(cm) apply at sentencing for an operating a motor vehicle while intoxicated third offense when no treatment program is ordered at sentencing?

The trial court relied on Wisconsin Statute § 346.65(2)(cm) even though the offender was not ordered to complete a treatment program.

This Court should conclude that the trial court erred as a matter of law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the Court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

The State of Wisconsin appeals a sentence for operating a motor vehicle while intoxicated third offense (OWI 3rd) in which the circuit court erroneously applied Wis. Stat. § 346.65(2)(cm). The Honorable Edward F. Vlack, St. Croix County Circuit Court, applied the above statute and sentenced Eric Jean Overvig to a period of probation with 20 days jail as a condition. (R. 25.) Overvig was not ordered to complete Treatment Court but he was required to "comply with any treatment." (R. 38, 27:8.) The State appeals this sentence.

STATEMENT OF FACTS

On July 2, 2018, Wisconsin State Trooper Josh Pinkos responded to a driving complaint and initiated a traffic stop on a vehicle driven by Eric Jean Overvig in the village of Woodville, St. Croix County, Wisconsin. (R. 10.) When the trooper opened the driver's door he smelled a strong odor of intoxicant and saw a small bottle of alcohol in the driver's door. *Id.* at 3, ¶ 1. Overvig told Trooper Pinkos that he had "drank too much and did not want to endanger anybody." *Id.* He also told the trooper that he had started drinking that morning. *Id.* Trooper Pinkos noticed Overvig had glossy eyes and slurred speech, swayed when he stepped out of the vehicle, and had to lean against the vehicle to maintain his balance. *Id.* The trooper

administered standardized field sobriety tests and a preliminary breath test, with a result of .251 g/100 mL, to Overvig. *Id.* at 3-4. Overvig submitted to an evidentiary test of his blood, the result of which was .302 g/100 mL. (R. 10.)

Overvig was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration, both as third offenses. *Id.* Overvig pled guilty to the OWI 3rd on August 5, 2019. (R. 25.)

The Honorable Edward F. Vlack sentenced Overvig to nine months of county jail but stayed it, placed him on probation for two years with 120 days of conditional jail but stayed 100 days. *Id.* An alcohol assessment is listed on the Judgment of Conviction but was not actually ordered at sentencing. *Id.* at 27:5-7.

Prior to the plea and sentencing hearing, Overvig submitted a letter on his behalf, asserting that Wis. Stat. § 346.65(2)(cm) should apply to him because of his initiative and follow-through in recovery, and because he "is truly an exceptional person deserving of an exceptional outcome." (R. 18 ¶ 2.) Overvig sent a follow-up letter to the court, asking if the court would apply § 346.65(2)(cm). (R. 19.) The court set a hearing to address the request. At that hearing, the court stated, "All I'm saying is that if the statute allows some deviation, I've used that in the past. I recognize maybe the County doesn't have some quote/unquote program. I've done it in the past. Whether or not it's going to happen in this case, I don't know. But if I think the circumstances warrant it, I'll do it." (R. 37, 3:6-11.) The court concluded the short hearing with, "The bottom line is, I don't feel like I'm precluded from not [sic] using that. And I recognize that there might be some hoops that got to be jumped through in order to do it. But if it's available, I've done it in the past. Done; takes care of that." *Id.* 3: 13-17.

At sentencing, Overvig's counsel argued that Wis. Stat. § 346.65(2)(cm) should apply because Overvig was "deserving

of the outcome described" in the statute. (R. 38, 14:14.) The State argued against it, citing 2009 Wisconsin Act 100 and its inapplicability to Overvig. *Id.* at 22. Overvig's counsel argued that the 14 days provided for in Wis. Stat. § 346.65(2)(cm) "is the statutory minimum." *Id.* at 23:4. The court stated, "I think in fairness to everybody, I recognize what that statute says, and I recognize the expected program and that would be in the county that utilized that, and I recognize that St. Croix County is not one of those counties. But I have to divulge that I have done this in one case before, because I just said, 'I'm going to do it.'" *Id.* 23:9-14. The State indicated that the county does have a Treatment Court track for alcohol-related offenses and the judge reiterated, "I just want to make sure everybody is aware of that because of the time I did it the first time, I just said I'm going to do it. So, I mean it just seems to me I recognize we're supposed to jump through these hoops and have this special program, blah, blah, blah." *Id.* 23:19-23.

Later, during the sentencing phase, the court told Overvig, "Now also listen carefully because there's this minimum jail time. I'm going to recognize the minimum in one respect is 45 days, the other minimum if we have this program is 14 days. So what I'm going to do is 20 days. . . . it's probably going to turn out to be about 14 days." *Id.* 25:23-26:11. The court did not order an AODA or any evaluation, stating, "I'm not going to order any other evaluations[,]" but did order that Overvig "comply with any treatment." (R. 38, 27:5-9.) Prior to that, the court had asked Overvig what treatment he was currently receiving, to which he responded that he goes to "AA." *Id.* 21:12-14. The judge recognized Overvig's current treatment as AA, stating, "I'm more concerned about you continuing with your treatment, paying for the treatment you need. I appreciate right now it's AA . . ." *Id.* 26:15-17. The court did not order any treatment program or Treatment Court.

The State now appeals from the court's application of Wis. Stat. § 346.65(2)(cm) to Overvig's sentence.

ARGUMENT

THE TRIAL COURT ERRED IN APPLYING WIS. STAT. § 346.65(2)(cm) AT OVERVIG'S SENTENCING.

A. STANDARD OF REVIEW.

Statutory interpretation presents a question of law. Therefore, appellate review is de novo. *See State v. Stenklyft*, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769.

B. RULES OF STATUTORY CONSTRUCTION.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, 144, 271 Wis. 2d 633, 681 N.W.2d 110.

Interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.*, 663. (citation omitted). The court gives statutory language its "common, ordinary, and accepted meaning." *State v. Schmidt*, 2004 WI App 235, ¶ 15, 277 Wis. 2d 561, 691 N.W.2d 379. Further:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, 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 statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.

Kalal, 271 Wis. 2d 633, ¶ 46 (citations omitted).

Plain meaning analysis may include a review of the statute's history, as part of the context analysis, to confirm the plain meaning. *Richards v. Badger Mutual Insurance*

Company, 2008 WI 52, 122, 309 Wis. 2d 541, 749 N.W.2d 581. Additionally, legislative history, including reports and memoranda prepared by the Legislative Council, may also be considered by this reviewing Court. *See State v. Jensen*, 2010 WI 38, ¶¶ 48-49, 51, 324 Wis. 2d 586, 782 N.W.2d 415. This Court may also consider the contextually manifest purposes of Wis. Stat. § 346.65(2)(cm). *See Kalal*, 271 Wis. 2d 633, ¶¶ 48-49.

If, after examining the language, context, history, structure, and purpose of the statute, the statute's plain meaning is ambiguous, the Court may again consult extrinsic sources like legislative history to resolve that ambiguity. *Id.* "A statute is ambiguous if it is capable of being interpreted by reasonably well-informed persons to have two or more distinct meanings." *State v. Crowe*, 189 Wis. 2d 72, 76, 525 N.W.2d 291 (Ct. App. 1994). "It is not enough that there is a disagreement about the statutory meaning. . . . 'Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.'" *Kalal*, 271 Wis. 2d 633, 664 (citation omitted).

C. STATUTORY LANGUAGE.

On December 22, 2009, Governor Doyle signed 2009 Wisconsin Act 100 ("Act 100") into law. *Available at* https://docs.legis.wisconsin.gov/2009/related/acts/100.pdf. Act 100 made several changes to Wisconsin's OWI laws. Pertinent to this appeal, Act 100 amended the OWI penalties statute, Wis. Stat. § 346.65 and the probation statute, Wis. Stat. § 973.09.

Wisconsin Stat. § 346.65(2)(am) (2009-10) sets out penalties for violating Wis. Stat. § 346.63(1), which prohibits operating a motor vehicle while under the influence of an intoxicant or other drug, operating a motor vehicle with "a detectable amount of a restricted controlled substance in his or her blood," and operating a motor vehicle "with a prohibited alcohol concentration."

The specific provision applicable to Overvig's sentence is subsection (2)(am)3., which provides that a person who violates § 346.63(1) shall be "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 . . ."

Act 100 also provided some individuals convicted of certain OWI-offenses the opportunity for a reduced minimum period of confinement. *See* Wis. Stat. §§ 346.65(2)(bm)-(dm), sub.(2j)(bm), (cm), (cr), (3r). These offenses include second, third, and fourth OWIs, operating a commercial motor vehicle with a prohibited alcohol concentration as a second, third, and fourth offense, and certain OWIs causing injury. *Id.* Pertinent to this appeal, Wis. Stat. § 346.65(2)(cm) was amended to read:

> In any county that opts to offer a reduced minimum period of imprisonment for the successful completion of a probation period that includes alcohol and other drug treatment, 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, the fine shall be the same as under par. (am) 3., but the period of imprisonment shall be not less than 45 days, except that if the person successfully completes a period of probation that includes alcohol and other drug treatment, the period of imprisonment shall be not less than 14 days. A person may be sentenced under this paragraph or under par. (bm) or (dm) or sub. (2j) (bm), (cm), or (cr) or (3r) once in his or her lifetime.

After Act 100, the probation statute now provides, in pertinent part, that:

> (d) If a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation under par. (a) if the court requires, as a

> condition of probation, that the person be confined under sub. (4) for at least that mandatory or presumptive minimum period....

Wis. Stat. § 973.09.

D. STATUTORY AND LEGISLATIVE HISTORY.

Prior to Act 100, the penalty structure for a third offense OWI was imprisonment "for not less than 30 days nor more than one year in the county jail . . ." Wis. Stat. § 346.65(2)(am)3. (2007-08). Prior to Act 100, Wis. Stat. § 346.65(2)(cm), which began with "In Winnebago County," was, obviously, only applicable to Winnebago County. (2007-08). Finally, prior to Act 100, the probation statute did not allow for probation on OWI second and third offenses. Wis. Stat. § 973.09(1) (2007-08).

A "Wisconsin Legislative Council Act Memo" ("Memo") prepared by Senior Staff Attorney Don Salm in January 2010 explains the most significant changes to Wisconsin's OWI laws brought by Act 100. Wisconsin Legislative Council Act Memo for 2009 Wis. Act 100 (Jan. 8, 2010), *available at*

https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act100.

The Memo notes that a "major change" includes "[p]ermitting any county, at its option, to develop and use a program (currently permitted in Winnebago County) providing a sentencing option that allows the period of imprisonment of an OWI-related violator to be reduced if the violator successfully completes a period of probation that includes alcohol and drug treatment." *Id.* ¶ 6. A chart entitled "Probation and General Sentencing Provisions" explains the alternative sentencing options of the pre-Act 100 law and the Act 100 law in greater detail. *Id.* at 3.

Pre-Act 100, the alternative sentencing option provided for a reduced minimum confinement term, only available in Winnebago County, for "2nd and 3rd OWI offenders who complete probationary period that includes alcohol and other drug treatment." *Id.* The Memo details that Act 100 "[e]xtends [the] Winnebago sentencing option to any county with a program similar to the Winnebago program." *Id.* The "Winnebago program" referred to is called the "Safe Streets Treatment Options Program," which is part of their "Safe Streets Initiative." *Safe Streets Initiative*, Winnebago County, https://www.co.winnebago.wi.us/human-services/divisions/behavioral-health/safe-streets-initiative (last visited Dec. 11, 2019). Winnebago began this initiative as a pilot program in 2006; it involves an "intense and monitored program of treatment, rehabilitation, and strict supervision." *Id.* While Act 100 expanded the use of Wis. Stat. § 346.65(2)(cm), it is only intended for individuals who complete "a program similar to the Winnebago program." (Memo at 3.)

The Wisconsin Supreme Court has analyzed some of the effects of Act 100 in *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467. While the court did not evaluate Wis. Stat. § 346.65(2)(cm), it did describe the statute as "allowing a reduction of the confinement period if the offender completes 'a probation period that includes alcohol and other drug treatment' *in certain counties*." *Id.* at 602 (emphasis added).

E. STRUCTURE, CONTEXT, AND PURPOSE.

The structure, context, and purpose of the OWI penalty statute provide more clarity with which to interpret Wis. Stat. § 346.65(2)(cm). With Act 100, the mandatory minimum confinement period for OWIs actually increased. Wis. Stat. § 346.65(2)(am). The penalty statute subsections note the carve out exception for the mandatory minimums. For example, for

an OWI 3rd, Wis. Stat. § 346.65(2)(am)3. states: "Except as provided in pars. (cm) . . ."

Turning to Wis. Stat. § 346.65(2)(cm) and the surrounding statutes, the language therein supports that these subsections should be used sparingly. First, the statute subsections only apply to certain counties, as is apparent from the very first sentence of the statute, "Any county that opts to offer a reduced minimum period of imprisonment." *Id.* Second, this alternative sentencing is only available to those who engage in the "successful completion of a probation period that includes alcohol and other drug treatment." *Id.* Third, a person may take advantage of the alternative sentencing option only "once in his or her lifetime." *Id.* Finally, only certain types of OWI offenses are eligible for offenders to qualify for the exception.

Wisconsin's penalty structure for OWI offenses illustrates an escalating mandatory minimum sentence for each subsequent OWI conviction. In fact, Act 100 increased the status of an OWI 4th from a misdemeanor to a felony. Wis. Stat. § 346.65(2)(am)4. At the same time, Act 100 expanded the use of probation for OWI offenders, and the alternative sentencing options for certain OWI offenders. The purposes of such structures include punishment, treatment, and public protection. Such a structure, "would allow for treatment during confinement in [] a probation treatment program as contemplated by Wis. Stat. § 346.65(2)(bm)–(dm) . . ." *Williams*, 355 Wis. 2d 581, 605–06. So, while Act 100 increased the mandatory minimum confinement periods for OWIs, its expansion of probation and the reduced minimum confinement option emphasizes the importance and reward of successful and intensive treatment.

Act 100 amended Wis. Stat. § 346.65(2)(cm) so that any county that had a program like Winnebago County could offer alternative sentencing below the mandatory minimum. The reduced minimum is only available if the offender *successfully*

completes a period of probation, and the period of probation includes alcohol or other drug treatment. The structure of the OWI penalty statute "would allow for treatment during confinement in either a probation treatment program as contemplated by Wis. Stat. § 346.65(2)(bm)-(dm) or a program like the Alcohol or Other Drug Abuse (AODA) program for offenders sentenced to prison." *Williams*, 355 Wis. 2d 581, 605-06 (footnotes omitted).

In this case, the court did not order Overvig to complete Treatment Court. The court seemed to have not known or overlooked that St. Croix County even had a Treatment Court track for alcohol-related offenses. (R. 38: 23.) The Court did not order Overvig to complete a "probation treatment program." The court did not order Overvig to complete an AODA or any other evaluation. *Id.* 27:5-9. The court did not order that Overvig successfully complete anything. The court merely ordered Overvig to "comply with any treatment" as part of probation. *Id.* 27:8. That is not enough. The purpose of Wis. Stat. § 346.65(2)(cm) is to give offenders a benefit for successfully completing a rigorous treatment program while on probation. The court's failure to order that for Overvig contravenes the purpose of the statute. Furthermore, "AA" is not a "probation treatment program."

Additionally, the court improperly considered the treatment Overvig *had already completed* as a basis to apply Wis. Stat. § 346.65(2)(cm). *Id.* 26:4-7. That also contravenes the purpose of the statute. Had the legislature intended the court consider up front treatment when applying this statute, it would have said so.

In this case, the court relied on its previous application of Wis. Stat. § 346.65(2)(cm) as a basis for using it again, even though the court acknowledged multiple times that its previous application was not based on anything: "I have done this in one case before, because I just said, 'I'm going to do it.'" *Id.* 23:13-

14. Again, the court stated, "I just want to make sure everybody is aware of that because of the time I did it the first time, I just said 'I'm going to do it.'" *Id.* 23:19-21. Courts should not apply the statute just because they think they can. Wisconsin Stat. § 346.65(2)(cm) exists for a reason and for use in only certain circumstances. This is not one of them.

F. AMBIGUITY.

"A statute is ambiguous if it is capable of being interpreted by reasonably well-informed persons to have two or more distinct meanings." *Crowe*, 189 Wis. 2d 72, 76. This Court should not search for ambiguity, but if this Court finds that the statute is ambiguous, extrinsic sources like legislative history may again be consulted. *Kalal*, 271 Wis. 2d 633. As explained above, such an examination should result in a finding that the statute's ambiguity must be resolved by concluding that it is only applicable to individuals sentenced to a treatment program like Treatment Court as part of their probation.

CONCLUSION

The circuit court erred when it applied Wis. Stat. § 346.65(2)(cm) to Overvig's sentencing.

Therefore, this Court should remand to the circuit court for resentencing.

Dated this ___ day of December, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,293 words.

Dated this ____ day of December, 2019.

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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 Wis. Stat. § (Rule) 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 ____ day of December, 2019.

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