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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 REPLY BRIEF

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INTRODUCTION

In his response to the State's Brief-in-Chief in this case, Overvig argues four things: the trial court had the authority to apply Wis. Stat. § 346.65(2)(cm), the legislature intended broad application of the statute, the rule of lenity applies, and that the discretion of the trial court is an issue. (Resp't Br.) However, contrary to Overvig's misinterpretation, the State is not asserting that Wis. Stat. § 346.65(2)(cm) does not apply in St. Croix County. (Resp't Br. 5.) The State's argument is that the statute does not apply in this case; that is the purpose for the State's appeal. (*See generally* Pet'r's Br. 4.)

ARGUMENT

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

A. THE STATUTE DOES NOT APPLY SIMPLY BECAUSE A TREATMENT COURT EXISTS IN THE SENTENCING COURT'S COUNTY, NOR SIMPLY BECAUSE THE OFFENDER SUCCESSFULLY COMPLETES PROBATION THAT INCLUDES ALCOHOL TREATMENT.

Overvig acknowledges that Wis. Stat. § 346.65(2)(cm) contemplates treatment courts.[1] The crux of Overvig's argument, apparently, is that "the statute applies whenever the County [sic] has a drug treatment court." (Resp't Br. 5.) He repeats, "[t]he statute does not specifically require the use of a drug court," just that one exists. (Resp't Br. 7.)

This interpretation ignores the entire purpose of the statute, which is explained in the Wisconsin Legislative Council Act Memo for 2009 Wis. Act 100 ("Memo"): Act 100 allows "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." ¶ 6. Therefore, when the county "use[s] a program" - and the offender is actually in the program and completes it - the statute applies. The court in *Williams* described Wis. Stat. § 346.65(2)(cm) as "allowing a reduction of the confinement period if the offender completes 'a probation period that

[1] In its Brief-in-Chief, the State consistently used the phrase "Treatment Court" when referencing what the *Williams* court described as a "probation treatment program." 355 Wis. 2d at 605-06. Meanwhile, Overvig uses the phrases "drug treatment court" and "drug court" interchangeably. We are all indisputably referring to the same thing.

includes alcohol and other drug treatment' in certain counties." 2014 WI 64, 355 Wis. 2d 581, 602, 852 N.W.2d 467. The "certain counties" referred to means those counties that have a treatment court program like the one that existed in Winnebago County. The mere existence of a treatment court program in a county, like St. Croix County, does not mean the statute automatically applies even if Treatment Court is not ordered. That would be an absurd result which would circumvent a primary goal of statutory interpretation. *E.g.*, *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, 144, 271 Wis. 2d 633, 681 N.W.2d 110. Overvig's interpretation is based purely and solely on the language of the statute and nothing else; he fails to consider the statutory history, legislative history, context, and purpose of Wis. Stat. § 346.65(2)(cm). Overvig's method of statutory interpretation is not the proper method; the State explained the proper procedure for statutory interpretation in its Brief-in-Chief.

Despite the crux of Overvig's argument, however, he also posits that Wis. Stat. § 346.65(2)(cm) is applicable whenever a person successfully completes alcohol treatment and successfully completes probation that includes drug or alcohol treatment.[2] (Resp't Br. 7.) Again, this can only be true if the treatment includes treatment court, given the context, history, and purpose of the statute.

[2] Overvig misunderstands the State's argument when he alleges that "the State is wrong that the statute requires successful completion of probation prior to entry of a mandatory minimum sentenced [sic]." (Resp't Br. 6.) That is not the State's argument. The "period of imprisonment" is "reduced" after successful completion of probation that includes alcohol and drug treatment which, given the interplay of the relevant statutes and history, must include treatment court. (Memo.) Wis. Stat. § 346.65(2)(cm) states: "[I]f the person successfully completes a period of probation that includes alcohol and other drug treatment, the period of imprisonment shall be" reduced. In other words, the offender must serve the minimum term of imprisonment; additional imprisonment time may be ordered but stayed pending successful completion of Treatment Court.

B. THE LEGISLATURE INTENDED WIS. STAT. § 346.65(2)(CM) TO BE APPLIED IN LIMITED CIRCUMSTANCES.

Overvig next argues that the legislature intended the statute to be applied broadly but provides limited support and legal authority for his position. (Resp't Br. 7-9.) He highlights "Section 46 of 2009 Wisconsin Act 109 [sic]" to make the sweeping assertion that the legislature meant to "enable courts to enter lesser sentences whenever the defendant completes a probation period that includes alcohol and other drug treatment." (Resp't Br. 8-9.) True, Act 100 expanded the applicability of Wis. Stat. § 346.65(2)(cm); however, as the State explained in its Brief-in-Chief, Act 100 is only available for application in limited circumstances. (10-11.) Overvig's argument is a leap that once again ignores the context, history, and purpose of the statute.

C. THE RULE OF LENITY IS INAPPLICABLE IN THIS CASE.

Next, without even arguing that Wis. Stat. § 346.65(2)(cm) is ambiguous, Overvig argues that the rule of lenity applies. (Resp't Br. 9.) Overvig proclaims that the rule of lenity is appropriate because the legislature did not specify that "probation must be completed prior to entry of the alternative minimum sentence." (Resp't Br. 10.) First, even if true, this does not make the statute ambiguous. Second, Overvig's proclamation is not true and not a logical interpretation of the statute. Overvig's undeveloped argument that the rule of lenity automatically applies should go unheeded for another reason: the statute's legislative history, as, again, outlined by the State in its Brief-in-Chief, clarifies the intent of the legislature. "[T]he rule of lenity applies only if two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." *State v. Villamil*, 2017 WI 74, ¶ 27, 377

Wis. 2d 1, 14, 898 N.W.2d 482, 488 (citation omitted). So even if the statute is ambiguous, the intent of the legislature is clarified by legislative history. For these reasons, the rule of lenity does not apply in this case.

D. COURT DISCRETION IS NOT AN ISSUE IN THIS CASE BECAUSE THE ISSUE INVOLVES STATUTORY INTERPRETATION.

Overvig's argument regarding the circuit court's discretion in this case is misplaced. The issue at hand is not one regarding the trial court's discretion because this Court's review is de novo: "The interpretation and application of statutes to undisputed facts are questions of law which we decide de novo." *State v. Eastman*, 220 Wis. 2d 330, 334–35, 582 N.W.2d 749, 751 (Ct. App. 1998) citation omitted.

CONCLUSION

For the reasons herein and outlined in the State's Brief-in-Chief, the circuit court erred when it applied Wis. Stat. § 346.65(2)(cm) to Overvig's sentencing. The circuit court was aware that the statute applies in limited circumstances and that there were "hoops that got to be jumped through." (R. 37, 3:6-17; R. 38, 23:19-23.) The circuit court knew the purpose of the statute but applied it anyway, because it believed it could, simply because it had done so once before. (R. 38, 23:9-14.) The circuit court erred. Therefore, this Court should remand to the circuit court for resentencing consistent with the legislative intent of Wis. Stat. § 346.65(2)(cm).

Dated this ___ day of April, 2020.

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 1,246 words.

Dated this ____ day of April, 2020.

Signed:

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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 April, 2020.

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