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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP475

In the Matter of the Refusal of Jack Ray Zimmerman, Jr.:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JACK RAY ZIMMERMAN, JR.,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING, TRIAL COURT CASE NO. 19-TR-2191

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. WHETHER VIOLATIONS OF WIS. STAT. §§ 940.09 & 940.25(1) ON MR. ZIMMERMAN'S DRIVER RECORD WHICH PRE-DATE JANUARY 1, 1989 WERE PERMISSIBLY USED AS PENALTY ENHANCERS IN THE INSTANT CASE?

Trial Court Answered: YES. The circuit court concluded that the addition of the "lifetime plus" language[1] which was added to Wis. Stat. § 346.65(2)(am)[2] was unambiguous on its face regardless of the fact that prior amendments to the law had precluded the counting of violations which occurred prior to January 1, 1989. R24 at pp. 3-6; D-App. at 104-06.

II. WHETHER, IF HIS PRIOR CONVICTIONS WERE NOT PROPERLY COUNTED, THE MISINFORMATION THE ARRESTING OFFICER PROVIDED TO MR. ZIMMERMAN ON THE NIGHT OF HIS ARREST REGARDING HIS STATUS AS A REPEAT OFFENDER IMPERMISSIBLY INTERFERED WITH HIS ABILITY TO MAKE A DECISION WHETHER TO SUBMIT TO AN IMPLIED CONSENT TEST?

Trial Court Answered: NO. The lower court concluded that, given its finding on the former issue, Mr. Zimmerman's argument regarding any misinformation he received on the night of his arrest was moot. R24 at p.6; D-App. at 107.

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[1]"Lifetime plus" is the shorthand nomenclature used by the lower court to refer to the language in, for example, § 346.65(2)(am) which provides in pertinent part that the counting of prior offenses for purposes of penalty enhancement shall count "convictions under ss. 940.09(1) and 940.25(1) in a person's **lifetime, plus** the total number of . . . convictions counted under s. 343.307(1) . . . ."

[2]At the time this provision of the statutes was affected by 1999 Wis. Act 109, it was numbered as § 346.65(2)(b). It has since been renumbered as § 346.65(2)(am). Subsection (2)(am) is the reference Mr. Zimmerman will use throughout this Brief since it represents the current incarnation of the law.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law. The issue presented herein is of a nature that can be addressed by the application of long-standing canons of statutory construction and legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the issue herein rarely complicates any case involving impaired driving. It is of such an esoteric and uncommon occurrence that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE CASE

Mr. Zimmerman was charged in Washington County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on July 10, 2019. R1; R13 at ¶ 2.

Mr. Zimmerman retained private counsel and subsequently filed a request for a refusal hearing. R5. A hearing on the lawfulness of Mr. Zimmerman's refusal was held on September 26, 2019, before the Circuit Court for Washington County, the Honorable James K. Muehlbauer presiding. R9; R35.

Deputy Joseph Conery, the arresting officer in the instant matter, was the single witness called to testify on behalf of the State. R35 at pp. 3-21. At the conclusion of the evidentiary portion of the hearing, counsel for Mr. Zimmerman made two legal arguments, including, *inter alia*: (1) Mr. Zimmerman's prior convictions for violations of Wis. Stat. §§ 940.09 & 940.25(1) should not have been counted as penalty enhancers in his case because they occurred prior to January 1, 1989; and (2) Mr. Zimmerman was misinformed by the

arresting officer that he would be prosecuted as a third offender, which misinformation adversely impacted his right to make an informed decision regarding whether he should submit to implied consent testing. R13; R19; R23.

The circuit court rejected both of Mr. Zimmerman's arguments, and by Conviction Status Report dated February 4, 2020, ordered Mr. Zimmerman's operating privilege revoked for a period of three (3) years. R25; D-App. at 101.

It is from that adverse judgment that Mr. Zimmerman appeals to this Court by Notice filed March 10, 2020. R32.

STATEMENT OF FACTS

On July 10, 2019, the above-named Appellant, Jack Zimmerman, was operating his motor vehicle in Washington County when Deputy Thomas Conery of the Washington County Sheriff's Office received a report of a vehicle which had been swerving. R35 at 18:7-12. After receiving a specific license plate number, Deputy Conery learned that the registered owner, Mr. Zimmerman, had a revoked operating privilege. R35 at 19:1-3. Deputy Conery caught up to Mr. Zimmerman's vehicle and initiated a traffic stop. R35 at 21:23 to 23:23.

After making contact with Mr. Zimmerman, Deputy Conery observed that he had bloodshot eyes and slurred speech. R35 at 25:1-14. Based upon this information, Deputy Conery asked Mr. Zimmerman to perform field sobriety tests, to which request Mr. Zimmerman consented. R35 at 28:4-6; 30:5-8. Mr. Zimmerman allegedly failed the standardized battery of field sobriety tests. R35 at 34:12-20.

Upon completing the field sobriety tests, Deputy Conery placed Mr. Zimmerman under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R35 at 34:21-23. At the time he took Mr. Zimmerman into custody, Deputy Conery informed Mr. Zimmerman that this was

his "third offense" for operating a motor vehicle while intoxicated. R35 at 50:11-18.

Once seated in the rear of the deputy's squad, Deputy Conery read the Informing the Accused form [hereinafter "ITAF"] to Mr. Zimmerman and asked him whether he would be willing to submit to an evidentiary chemical test of his breath. R35 at 35:10-14; 37:4-8. Mr. Zimmerman responded "No" to the deputy's question. R35 at 37:9-13. Mr. Zimmerman was then issued a Notice of Intent to Revoke Operating Privilege. R1

STANDARD OF REVIEW ON APPEAL

The threshold question presented to this Court concerns whether the convictions for violations of Wis. Stat. §§ 940.09 & 940.25(1) which occurred prior to January 1, 1989 may permissibly be counted as penalty enhancers under §§ 346.65 & 343.307(1) in a prosecution for either operating a motor vehicle while intoxicated or for improperly refusing to submit to a chemical test. Questions relating to the application of statutory law to an undisputed set of facts are reviewed by this Court *de novo*. *Lands' End, Inc. v. City of Dodgeville*, 2014 WI App 71, ¶ 52, 354 Wis. 2d 623, 848 N.W.2d 904; *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

The second question presented to this Court is similarly based upon an undisputed set of facts, and as such, merits *de novo* review as well. *Wilke*, 152 Wis. 2d at 247.

ARGUMENT

I. CONVICTIONS FOR VIOLATIONS OF WIS. STAT. §§ 940.09(1) & 940.25(1) WHICH OCCURRED PRIOR TO JANUARY 1, 1989 WERE NOT INTENDED TO BE COUNTED AS PENALTY ENHANCERS IN OPERATING WHILE INTOXICATED RELATED CASES.

A. Framing the Issue Raised Herein.

The Wisconsin statute dealing with the counting of prior convictions under the penalty-enhancement provision applicable herein is § 346.65(2)(am). This section provides in pertinent part that violations which are counted under § 343.307(1)(a) shall include convictions for violations of §§ 940.25(1)(1) and 940.09(1) "in the person's lifetime." Wis. Stat. § 346.65(2)(am)3. The "lifetime" counting of convictions for violations of §§ 940.25(1)(1) and 940.09(1) was first introduced into the language of § 346.65(2)(am) by 1999 Wis. Act 109, §§ 43-46 [hereinafter "Act 109"].

It is Mr. Zimmerman's position that the notion of "lifetime" counting described in Act 109, however, did not actually include the accused's entire natural life. Earlier legislation, in the form of 1997 Wis. Act 237, provided a date before which violations under § 346.65(2)(am) could *not* be counted. *See* 1997 Wis. Act 237, § 9348(2f)[hereinafter "Act 237"]; D-App at 110.

Section 9348(2f) of Act 237, entitled "Counting of Offenses," provided in pertinent part that "[t]he treatment of sections . . . 346.65(2)(am)(b), (c), (d) and (e) . . . of the statutes . . . **preclude[s] the counting offenses that occurred before January 1, 1989**, as prior convictions, suspensions or revocations." *Id*. (emphasis added). It should not be lost on this Court that § 9348(2f) of Act 237 *expressly* and *specifically* included affirmative language that the counting of offense prior to January 1, 1989 **under § 346.65(2)(am)**—the statute at issue herein—was precluded.

As noted above, the subsequent Act 109 added language to the penalty provision of § 346.65(2)(am) which included "lifetime" counting of violations for §§ 940.09(1) & 940.25(1). Importantly, however, Act 109 *never expressly changed* the rule regarding

counting of convictions for violations which occurred prior to January 1, 1989 as set forth in § 9348(2f) of Act 237. The notion set forth in § 9348(2f) remains unmolested by Act 109 and fully applicable herein.

B. The Language Precluding Counting of Offenses Which Occurred Prior to January 1, 1989 Was Never Amended or Redacted.

If the legislature made the effort and took the responsibility to clearly express in § 9348(2f) of Act 237 when the look-back period was to begin for counting penalty-enhancing offenses, then why would it not do the same thing in Act 109 if it intended there to be a change in the way prior felony offenses under §§ 940.09(1) & 940.25 were to be counted? What sense does it make for a legislature in one Act to very plainly state when a look-back period begins, but when changing that very period, *fail to express the change in the Act modifying the original period*? This is an inexplicable logical inconsistency which can only be resolved if one takes the approach that the subsequent Act was never intended to modify the original. The State cannot cite to any enabling language in Act 109 which can give rise to an interpretation that suddenly the language in § 9348(2f) is to be disregarded. Mr. Zimmerman, however, can point directly to enabling language in the Act which he proffers as providing the correct interpretation of the law, namely § 9348(2f). Section 9348(2f) is unambiguous. The State, however, does not have such a reference. The State's interpretation is a far cry from the express authority upon which Mr. Zimmerman relies. Mr. Zimmerman posits that the change in the law under Act 109 was nothing more than a clarification that violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule expressed in § 346.65(2)(am)2.,[3] but rather, were to be counted for the person's

[3]This penalty provision provides that if an individual has one prior violation which would be counted under § 343.307(1), and that violation occurred more than ten years prior to the violation for which the individual is currently being prosecuted, it may not be counted as a penalty enhancer. Reference to this particular application of the penalty-enhancement rule, and its relevance to Mr. Zimmerman's position, is discussed in more detail in Section II., *infra*.

lifetime *begging with the date of January 1, 1989 expressly set forth in Act 237*.

II. EVEN IF THIS COURT CONCLUDES THAT CONVCITIONS FOR VIOLATIONS OF §§ 940.09(1) & 940.25(1) WHICH OCCURRED PRIOR TO JANUARY 1, 1989 ARE TO BE COUNTED, AN AMBIGUITY EXISTS WHICH MUST BE RESOLVED IN FAVOR OF THE DEFENDANT UNDER THE RULE OF LENITY.

A. Mr. Zimmerman's Interpretation of the Law Is "Reasonably Possible."

There is an adage which is regularly drilled into the psyche of every first year law student which was generally popularized by the Philosopher of Law, Professor Chaïm Perelman, which states that when it comes to the interpretation of law, "reasonable minds will differ."[4] C. Perelman, *Justice,* p.96 (Random House 1967). As Prof. Perelman observed, if two interpretations are "*reasonably possible*," an ambiguity exists in the law. *Id*. at p.94. Mr. Zimmerman proffers that his interpretation of whether violations for convictions which occurred prior to January 1, 1989 is "reasonably possible," and because it is, an ambiguity exists in the law. This is an especially significant conclusion because it means this Court is obligated to proceed under the Rule of Lenity.

Before addressing the law as it relates to the Rule of Lenity, Mr. Zimmerman will further demonstrate how the issue with respect to whether the counting of prior convictions for violations of §§ 940.09(1) & 940.25(1) after January 1, 1989 under §§ 343.307(1) & 346.65(2)(am) is clouded by uncertainty.

The first notable fact which gives rise to reasonable minds differing with respect to the counting of prior convictions is the fact that Act 109 never expressly amended, changed, or rescinded the language in § 9348(2f) of Act 237.

Second, if "lifetime" counting was to have a "look-back" period greater than that of other violations, the silence of the

[4]This is the general approximation expounded in law school of what Prof. Perelman was stating in his text and not his exact words.

Legislative Reference Bureau's [hereinafter "LRB"] analysis of the change in the law speaks volumes. 1999 Wis. Act 109 arose out of 1999 Senate Bill 125 [hereinafter "SB 125"]. The engrossed version of SB 125 contains no language or analysis whatsoever regarding any change the Wisconsin Legislature intended with respect to the counting of violations which occurred prior to January 1, 1989. It is a well-settled canon of statutory construction that the LRB's analysis of a Bill is indicative of legislative intent. *State v. Freer*, 2010 WI App 9, ¶ 22, 323 Wis. 2d 29, 779 N.W.2d 12, citing *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408. Because counting convictions arising prior to January 1, 1989 is a *significant departure* from the longstanding manner in which they had previously been counted in Chapters 343 and 346, it would seem that the Legislature should have indicated it intended a different interpretation of the term. The absence of a statement of intent in this regard should be interpreted as an intention on the part of the Legislature that the term be used as it has always been understood.

A third serious problem with the notion that the limiting language in Act 237 was simply abandoned is that if the period has changed between Act 237 and Act 109, where is the required due process notice to the public? Constitutional "notice" is rooted the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2007). Because deprivations of life or liberty may result from the failure to satisfy the concept of notice, the Supreme Court has held that the Fourteenth Amendment is implicated in circumstances wherein a legislature has failed to give notice to the public regarding a change in the law. *See, generally, Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). In describing the due process requirement of "notice," the United States Supreme Court has observed:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451, 444 (1939). If the foregoing holding is to carry any weight or have any meaning, the very fact that the Parties in this case are arguing over whether the legislature did or

did not intend to count violations of §§ 940.01(1) & 940.25 which occurred before January 1, 1989 means that the Parties are "speculat[ing] as to the meaning of a penal statute." If this is so, then the notion of constitutional due process notice has not been satisfied, and this Court is obligated to adopt the interpretation of the statute in which it left Act 237 unchanged and unaffected. *See* Section II.B., *infra.*

Fourth, further evidence from the legislative history of Act 109 makes Mr. Zimmerman's point about the law being ambiguous even more certain. In a "Drafter's Note" which was part of the legislative history associated with Act 109, Attorney Robert Nelson, who was Legal Counsel for the Wisconsin Department of Transportation, plainly and unambiguously inquires of SB 125's sponsors whether convictions for violations of §§ 940.09(1) & 940.25 are ***not*** to be counted if they "occurred before December 31, 1988 [*sic*] . . . ." D-App. at 111. Attorney Nelson further inquires of the legislators who drafted the SB 125 whether that "[i]s . . . what is wanted," wondering whether "those [violations] that occurred" before January 1, 1989, should now be counted. *Id*. Not only does this question expressly acknowledge that even serious felony-related operating while intoxicated convictions occurring prior to January 1, 1989, were never intended to be counted, but more importantly, since the legislature never expressly revoked its previous implementation language in § 9348(2f) of Act 237, the *only* conclusion which can be drawn is this: The counting period for violations of §§ 940.09(1) & 940.25 begins on January 1, 1989, and the ten-year exclusion rule should not apply to those violations regardless of when the individual is next charged with an operating while intoxicated-related offense. Put another way, by asking the legislature whether it "wanted" violations of §§ 940.09(1) & 940.25 to now count if they occurred before January 1, 1989, Attorney Nelson of the Legislative Reference Bureau recognized that this ***was***, at the time he drafted his Note, the current status of the law—violations for 940.09(1) & 940.25 prior to January 1, 1989, simply ***did not count***. The silence on the part of the legislature in Act 109 with respect to expressly changing the language in § 9348(2f) speaks volumes about its intentions since this issue was brought to the legislature's attention by Attorney Nelson.

Finally, the last item which gives rise to an ambiguity in the law which could cause "reasonable minds to differ" relies simply upon common sense. If the legislature took the time, effort, and responsibility to plainly express in § 9348(2f) of Act 237 when the look-back period was to begin for counting penalty-enhancing offenses, then why would it not do the same thing in Act 109 if it intended there to be a change in the way prior felony offenses under §§ 940.09(1) & 940.25 were to be counted? What sense does it make for a legislature in one Act to very clearly state when a look back period begins, but when changing that very period, *fail to express the change in the Act modifying the original period*? This is an inexplicable logical inconsistency which can only be resolved if one takes the approach that the subsequent Act was never intended to modify the original. Mr. Zimmerman posits that his interpretation that the change in the law under Act 109 was nothing more than a clarification that violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule, but rather, were to be counted for the person's lifetime *beginning with the date of January 1, 1989 expressly set forth in Act 237*, as the more logically consistent interpretation.

All of the foregoing factors demonstrate that it is perfectly *reasonable* for those implementing the law to disagree on precisely which violations of §§ 940.09(1) & 940.25(1) are to be counted. Because reasonable minds can differ as to what is counted versus what is not counted, the law in this matter becomes subject to the Rule of Lenity as discussed below.

B. Application of the Rule of Lenity.

In any case in which the penalties for the underlying offense are to be enhanced by prior offenses, it is the State which bears the burden of establishing the prior offenses as the basis for the imposition of enhanced penalties. *State v. Wideman*, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996). Seeking to enhance a penalty, however, remains subject to the Rule of Lenity. It is well known that:

> The principle objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. The court must ascertain the legislature's intent from the language of the statute in relation to its context, scope, history, and the objective

> intended to be accomplished. Statutes relating to the same subject matter should be read together and harmonized when possible. **Furthermore, when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused**.

State v. Cole, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700 (emphasis added).

The Wisconsin Supreme Court expounded at length as to precisely how the Rule of Lenity is to be applied in *State v. Morris*, 108 Wis. 2d 282, 322 N.W.2d 264 (1982), when it observed:

> When a criminal statute is ambiguous and is not clarified by resort to legislative history, this court has applied the canon of construction that **penal statutes should be construed strictly against the party seeking to exact statutory penalties and in favor of the person on whom statutory penalties are sought to be imposed. As a corollary of this principle of construction, in case of doubt concerning the severity of the penalty prescribed by the statute, the court will favor a milder penalty over a harsher one.** We explained the public policy on which this canon of construction is premised in *State v. Wilson*, 77 Wis. 2d 15, 28, 252 N.W.2d 64 (1977), as follows:
>
> "The canon of strict construction is grounded on policy. Since it is within the power of the lawmakers, the burden lies with them to relieve the situation of all doubts. 3 *Sutherland on Statutory Construction*, sec. 59.03, p. 7 (3d ed. 1968-1973). And 'since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it.' *Id.* p.8."

Morris, 108 Wis. 2d 289-90 (emphasis added).

Applying the foregoing principles to the instant case yields but one, and only one, conclusion: Because reasonable minds can differ as to whether offenses for violations under §§ 940.09(1) & 940.25(1) which occurred prior to January 1, 1989 ought to be counted as penalty enhancers in drunk driving related prosecutions, the Rule of Lenity requires this Court to "favor a milder penalty over a harsher one." In this instance, that means that Mr. Zimmerman's license may

not be revoked for three years, as the lower court did believing him to be a "third offender," and further, means that this Court must consider that the erroneous information he was provided at the time of his arrest by Deputy Conery interfered with his ability to make an informed decision about whether to submit to an implied consent test when requested to do so. *See* Section III., *infra*.

III. IF THIS COURT CONCLUDES THAT MR. ZIMMERMAN WAS MISCHARGED, DEPUTY CONERY'S INFORMING HIM THAT HE WAS A "THIRD OFFENDER" IMPERMISSIBLY INTERFERED WITH HIS RIGHT TO MAKE AN INFORMED DECISION REGARDING WHETHER HE SHOULD SUBMIT TO AN IMPLIED CONSENT TEST.

As described in Section II., *supra*, the United States Supreme Court has stated that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta*, 306 U.S. at 444. Being apprised of what a State commands is a function of due process, and more specifically, of the procedural due process requirement that a statute provide a person with proper "notice." In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the United States Supreme Court recognized that due process emanated from more than mere legislative enactments, but rather, it grew out of a constitutional fundament. The High Court described it thusly: "The right to due process 'is conferred not by legislative grace, but by constitutional guarantee.'" *Id*. at 541, quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

At its core, fundamental fairness is a constitutional doctrine which finds its purchase in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24 (1981). While the soil from which the concept of fundamental fairness springs is well tilled, the notion of fundamental fairness itself is not given to a tight definition or rigid rule. The *Lassiter* Court has remarked upon the nebulous nature of fundamental fairness in this way:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[Unlike] some legal rules," this Court has said, due process "is not a technical

> conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25. As the Supreme Court noted in *Matthews v. Eldridge*, 424 U.S. 319 (1976), due process, in the context of fundamental fairness, "'is flexible and calls for such procedural protections as the particular situation demands.'" *Id*. at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Instructive on the issue of whether a suspect's constitutional rights are violated when the individual is misled with respect to the elements of the crime with which he is being charged is the line of cases which address the adequacy of plea colloquies when the elements of the crime have been misrepresented to the defendant. For example, in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the Wisconsin Supreme Court observed that there need not be a "ritualistic recital" of the elements of the crime with which an accused is charged in order to ensure that the individual understands, in a constitutionally knowing and intelligent way, what they are facing in terms of a prosecution. Rather, the *Bangert* court held that the defendant should receive "real notice of the nature of the charge" against them. *Id*. at 283, citing *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976).

The due process concept of "real notice," as espoused by the Supreme Court, means that the accused should understand, under the totality of the circumstances, whether the substance of the charge has been accurately conveyed to him. *Henderson*, 426 U.S. at 644. If the substance of a charge is *not* accurately conveyed, an accused cannot understand the nature of the charge against him and therefore cannot act in a constitutionally intelligent way through no fault of his own. *Bangert*, 131 Wis. 2d at 286.

Mr. Zimmerman posits that there is nothing more fundamental or basic about the nature of either an operating while intoxicated or

refusal charge than knowing whether one will be subject to a prosecution for being a second or a third offender. The record in the instant case unequivocally reveals that Mr. Zimmerman was acting under the false belief that he would be facing a prosecution for being a third offender when, in fact, he can only be charged with operating while intoxicated and unlawfully refusing a test as a *second* offense.[5] It cannot be gainsaid that there exist enormous differences between the penalties associated with the former over the latter. This case does not present a circumstance in which a maximum fine was misdescribed by a few tens of dollars. Mr. Zimmerman's case is one in which he was misinformed about *an element which must be proven by the State* and which involves significant differences between the minimum and maximum periods of incarceration, license revocation, and fines which may be imposed.

Because the misinformation provided to Mr. Zimmerman by Deputy Conery affected Mr. Zimmerman's understanding of the penalties to which he was exposed, it is important to recognize that long-standing Wisconsin common law holds that when a defendant establishes that he has been erroneously informed about the penalties to which he is subject, he does *not* need to establish that he suffered any actual harm. The mere fact that the penalties were misstated is sufficient to invoke a sanction against the State. *See, e.g., State v. Wilke*, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989)(sanctions imposed even though "there was no apparent link between" the misinformation and the decision to refuse); *County of Eau Claire v. Resler*, 151 Wis. 2d 645, 446 N.W.2d 72 (Ct. App. 1989)(loss of presumptions applied when "information concerning penalties" is not properly given); *State v. Schirmang*, 210 Wis. 2d 324, 565 N.W.2d 225 (Ct. App. 1997)(defendant not required to demonstrate how misstatement of applicable penalties affected his decision regarding taking the test), *overruled on other grounds, Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (*Wilke* "no nexus" analysis applies when statutorily required information not provided); *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774 (suppression is the remedy for erroneously advising

[5]This, of course, assumes that the Court agrees with the propositions set forth in either or both Sections I. & II. of Mr. Zimmerman's Brief.

suspect regarding consequences of refusing to submit to chemical test regardless of actual effect on accused's decision).

The notion that a defendant need not establish any "actual harm" when the penalties (i.e. whether one will be prosecuted as second or third offender) to which he is exposed are inaccurately set forth was most recently articulated by Justice Abrahamson in *Washburn v. Smith*, 2008 WI 23:

> The *Schirmang* court of appeals interpreted *Wilke* as holding that an officer necessarily fails to substantially comply with Wis. Stat. § 343.305(4) whenever the officer misstates penalties that would actually affect the driver given the driver's record. *Schirmang's* characterization of *Wilke* is not an accurate statement of the *Wilke* holding. The *Wilke* case involved a law enforcement officer's failure to give the defendant one component of the statutorily required information (relating to penalties), and the *Wilke* court of appeals rested its decision on this fact. According to *Wilke*, if the circuit court determines that the officer failed to inform the accused in compliance with the statute, the circuit court "'shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question.' Sec. 343.305(9)(d)." **The *Wilke* opinion says nothing about misstatements of penalties that would actually affect the driver.**

Washburn v. Smith, 2008 WI 23, ¶ 63 (emphasis added). Based upon the foregoing notions, the fact that Mr. Zimmerman was misinformed by the deputy in this case of the correct level of offense (and by logical extension the penalties) is sufficient to preclude the State from revoking his operating privileges for allegedly unlawfully refusing to submit to an implied consent test. *Id.*; *Wilke*, 152 Wis. 2d at 245.

Given that he was not provided with correct information regarding the offense for which he was being detained and arrested, the concept of constitutional "notice" can hardly be said to have been satisfied in this case.

CONCLUSION

Because offenses which occurred prior to January 1, 1989 were impermissibly counted as penalty enhancers in the instant case, Mr. Zimmerman was misinformed regarding his status as a "third offender" and this misinformation impermissibly interfered with his

right to make an informed decision regarding whether he should submit to an implied consent test. As such, Mr. Zimmerman respectfully requests that this Court remand this matter to the circuit court with directions to strike his convictions for violations which occurred prior to January 1, 1989 as penalty enhancers and enter an order finding that he did not improperly refuse to submit to an implied consent test, and further order that his operating privilege be reinstated.

Dated this 1st day of June, 2020.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby 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. The text is 13-point type and the length of the brief is 6,848 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by overnight mail on June 1, 2020. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 1st day of June, 2020.

MELOWSKI & ASSOCIATES, LLC

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP475

In the Matter of the Refusal of Jack Ray Zimmerman, Jr.:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JACK RAY ZIMMERMAN, JR.,

Defendant-Appellant.

APPENDIX

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