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COURT OF APPEALS

DISTRICT II

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.

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN WASHINGTON COUNTY CIRCIUT COURT, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED **Page**

WISCONSIN STATUTES CITED

WISCONSIN ACTS CITED

STATEMENT OF THE ISSUES

1) Whether the State correctly charged Mr. Zimmerman with Operating While Intoxicated- Third Offense when his prior two convictions were for OWI Homicide and OWI Great Bodily Harm for an offense occurring in 1988?

   The Trial Court answered in the affirmative stating that the plain language contained in Wis. Stat. §346.65(2)(am) and §343.307(1)(a) for Homicide and Injury OWI convictions are clearly a separate category of offenses to be counted during a person's lifetime. R24 at 5.

2) Whether the information provided to Mr. Zimmerman about the level of offense at the time of his arrest by Deputy Conery impacted his decision to submit to a chemical test?

   The Trial Court answered in the negative stating that given the ruling on the issue of number of prior countable offenses for Mr. Zimmerman, this issue was moot. R24 at 6.

STATEMENT ON ORAL ARGUMENT AND PUBLICIATION

Plaintiff-Respondent State of Wisconsin ("the State") will not be requesting oral argument or publication of the Court's decision. This fact pattern is unique enough that it will not arise in a substantial number of Operating While Intoxicated cases in the future and believes that the briefs will adequately address the issues.

STATEMENT OF CASE AND FACTS

The State agrees that the facts and procedural history of the case provided by Mr. Zimmerman are correct for purposes of answering the questions presented to the Court. The State does not have any additional facts to provide that would aid in the Court's decision.

STANDARD OF REVIEW

The questions presented here are questions of statutory interpretation. The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

ARGUMENT

I. THERE IS NO AMBIGUITY IN WIS. STAT 346.65(2)(AM) AS THE STATUTE CLEARLY STATES THAT THE NUMBER OF CONVICTIONS FOR VIOLATIONS OF WIS. STAT §940.09(1) & 940.25(1) MUST BE COUNTED FOR A PERSON'S LIFETIME.

Mr. Zimmerman alleges that the convictions for Homicide by OWI, contrary to section 940.09(1)(a), and Cause Great Bodily Harm by OVWI, contrary to section 940.25(1)(a), as reflected in the Judgment of Conviction for Racine County Circuit Court case number 88CF692, for an offense that occurred on November 12, 1988, is not a countable offense pursuant to section 346.65(2). Because the plain language of section 346.65(2)(am)2.-7. requires counting of all convictions under sections 940.09(1) and 940.25 in the person's lifetime, Mr. Zimmerman's argument is incorrect and he was correctly charges with Operating While Intoxicated as a Third Offense.

Common to the subsections of section 346.65(2) 2017-18 is the following language: "…if the number of convictions under Wis. Stat.§§ 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under section 343.307(1), equals… ." When interpreting a statute, this court must start with the language of the statute. *State v. Dawson,* 195 Wis. 2d 161, 167, 536 N.W.2d 119, 121 (Ct. App. 1995). A plain reading of section 346.65(2) distinguishes convictions under section 940.09(1) and 940.25 from those counted under section 343.307(1). The statute also states clearly that 940.09(1) and 940.25 convictions must be counted for a subject's lifetime.

This interpretation is supported by the statutes and acts related to sections 343.307 and 346.65(2)(b)-(e), which are currently numbered as sections 346.65(2)(am)2.-7. The 1997-1998 version of section 346.65(2)(b)-(e)[1] makes no reference to

[1] 1997-1998 Wis. Stat. §346.65 (2) (b)-(e) reads as follows:

> (b) Except as provided in par. (f), shall be fined not less than $300 nor more than $1,000 and imprisoned for not less than 5 days nor more than 6 months if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 2 within a 10-year period. Suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

sections 940.09(1) or 940.25; rather, it prescribes a penalty based solely upon the number of offenses counted under section 343.307(1). 1997 Wis. Act 237, section 9348(2f), which was effective June 17, 1998,[2] modified sections 346.65(2)(b)-(e) and restricted offenses countable under chapter 343 and sections 346.65(2)(b)-(e) to offenses that occurred on or after January 1, 1989. However, sections 346.65(2)(b)-(e) 1997-1998 did not make any reference to offenses in sections 940.09(1) or 940.25, and there is no reference to the word "lifetime" in 1997 Wis. Act 237 section 9348.

Thereafter, the legislature took direct and specific action to address the viability of counting convictions under sections 940.09(1) and 940.25. The legislature passed 1999 Wis. Act 109, which was effective May 18, 2000,[3] in which sections 43-46 amended sections 346.65(2)(b)-(e) to include offenses counted under section 343.307 **plus** "the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime" (emphasis added). 1999 Wis. Act 109 added the offenses under sections 940.09(1) and 940.25 as countable offenses with a lifetime lookback period, therefore specifically distinguishing them from those enumerated in section 343.307(1).

In enacting 1999 WI Act 109, the legislature clearly delineated its intent to make convictions under sections 940.09(1) and 940.25 countable for a person's lifetime. Because

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(c) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and 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.

(d) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 4, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(e) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 6 months nor more than 5 years if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 5 or more, except that suspen

[2] "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication." Wis. Stat. §991.11 (2017-18). 1997 Wisconsin Act 237 has a date of publication of June 16, 1998.

[3] *Id.* 1999 Wisconsin Act 109 has a date of publication of May 17, 2000.

that clear intent is reflected in the plain language of sections 346.65(2)(am)2.-7., the correct and only interpretation of the law is that the lookback period for predicate OWI offenses counted under section 343.307(1) is limited to those that occurred on or after January 1, 1989, and 940.09(1) and 940.25 convictions must be counted for a person's lifetime. Thus, the reading of the statute is unambiguous and Mr. Zimmerman was correctly charged with Operating While Intoxicated as a Third Offense.

II. MR. ZIMMERMAN WAS CORRECTLY ADVISED OF HIS OFFENSE LEVEL AT ARREST AND THAT DID NOT AFFECT HIS ABILITY TO MAKE A CHOICE ABOUT SUBMITTING TO A CHEMICAL TEST.

Mr. Zimmerman alleges that the convictions for Homicide by OWI, contrary to section 940.09(1)(a), and Cause Great Bodily Harm by OVWI, contrary to section 940.25(1)(a), as reflected in the Judgment of Conviction for Racine County Circuit Court case number 88CF692, for an offense that occurred on November 12, 1988, is not a countable offense pursuant to section 346.65(2). For the reasons outlined in the argument section above, the State believes that Deputy Conery correctly advised Mr. Zimmerman of the offense level and consequently there was no misleading information given to Mr. Zimmerman when he was asked to submit to a chemical test.

However, if the Court assumes for the sake of Mr. Zimmerman's position that Deputy Conery's statement at arrest is imputed to the information conveyed in complying with section 343.305(4) in reading the Informing the Accused Form, the three-prong *Quelle* inquiry governs the Court's analysis[4].

[4]The Wisconsin Supreme Court clarified a series of decisions regarding the Implied Consent Law in *Washburn County v. Smith*. 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243. In *Smith*, the Wisconsin Supreme Court addressed, *inter alia*, the trial court's conclusions at a refusal hearing, pursuant to section 343.305(9)(a)5, that the Mr. Zimmerman improperly refused to submit to chemical testing. *Id.* In examining the caselaw to date regarding refusals, the court evaluated and then summarized a series of decisions to conclude that, in circumstances where a law enforcement officer fails to provide statutorily-required information to a Mr. Zimmerman—an omission—*Wilke* governs a court's decision-making process. *Id.* at ¶¶ 93, 94. However, in situations where a law enforcement officer provided information in addition to all the statutorily-required information under section

a. Quelle Analysis

The *Quelle* and *Ludwigson* courts set forth a three-prong test to evaluate an officer's compliance with the implied consent law in circumstances where an officer has provided information in excess of the statutory language of section 343.305(4):

> (1) Has the law enforcement officer not met or exceeded his or her duty under § 343.305(4) and 343.305(4m) to provide information to the accused driver;
>
> (2) Is the lack or oversupply of information misleading;
>
> (3) Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

State v. Ludwigson, 212 Wis. 2d 871, 875, (Ct. App. 1997).

b. Has the Law Enforcement Officer Not Met, or Exceeded His or Her Duty Under § 343.305(4) and 343.305(4m) to Provide Information to the Accused Driver?

Here, it is undisputed that Deputy Conery complied with section 343.305(4) by reading the statutory language verbatim. The issue before the Court is whether Deputy Conery's statement regarding offense of arrest *at the time of arrest* was misleading information that affected Mr. Zimmerman's ability to make an informed choice about chemical testing at the time the Informing the Accused Form was read. Mr. Zimmerman cites no authority for the premise that being (allegedly) misinformed of an OWI offense level at the time of arrest, but not at the time the Informing the Accused is read, is a statutory or constitutional violation. Rather, Mr. Zimmerman cites multiple cases that outline due process requirements in other contexts and analogizes those contexts to this facts pattern, arguing that Mr. Zimmerman acted under incorrect information because he was misinformed about "the level of offense he was facing. . . and its resulting consequences." Despite Mr. Zimmerman's efforts, these analogies fail because Mr. Zimmerman was neither misinformed about the level of the offense nor the resulting consequences. The State asserts this scenario is distinguishable

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343.305(4)—an addition—the three-prong *Quelle* inquiry as interpreted in *Ludwigson* governs a court's decision-making process. *Id.* at ¶ 72.

from *Quelle/Ludwingson*, however, for purposes of this argument assumes that the statement is considered excess information.

c. Is the Oversupply of Information Misleading?

A statement regarding the OWI offense level at the time of arrest is inconsequential to the content of the Informing the Accused form and is therefore not misleading information. The Informing the Accused form, which Deputy Conery read to Mr. Zimmerman verbatim, no additions and no omissions, advised Mr. Zimmerman of the following information related to penalties:

> "If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refused to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties."

The evidence in the record indicates this is the information Deputy Conery conveyed to Mr. Zimmerman regarding the "penalties." Notably, Deputy Conery did not convey any of the specifics alleged by Mr. Zimmerman in his motion: maximum periods of incarceration; duration of license revocation; amount of fines. Certainly the information in the Informing the Accused form advised Mr. Zimmerman he faced suspension or revocation of his driving privilege and the potential for "other penalties," but nothing more specific. The information Deputy Conery read to Mr. Zimmerman would have been exactly the same irrespective of the OWI offense level.

Mr. Zimmerman asks this Court to conclude that Mr. Zimmerman believed he was subject to a specific set of defined penalties involving incarceration, fines, and license revocations, that are specific to the offense level of arrest, but there is no evidence to support that conclusion. The evidence in the record is that Mr. Zimmerman was made aware of the content of the Informing the Accused form, nothing more and nothing less, and that information is accurate irrespective of whether it is a third offense or second offense. Moreover, this information was factually true: there is no dispute Mr. Zimmerman had two prior OWI convictions on his record. Thus, considering the totality of

the circumstances, Mr. Zimmerman was not misinformed nor misled.

d. Has the Failure to Properly Inform the Driver Affected His or Her Ability to Make the Choice About Chemical Testing?

For the reasons outlined in Subsection C above, Deputy Conery's statement at arrest did not affect Mr. Zimmerman's ability to make a choice about chemical testing as he was correctly advised of the offense level.

CONCLUSION

Mr. Zimmerman was correctly charged with Operating While Intoxicated as a Third Offense as the statute clearly states that convictions under Wis. Stat.§§ 940.09(1) and 940.25 are to be counted for a person's lifetime. Because Mr. Zimmerman was correctly charged with a third offense, Deputy Conery did not advise Mr. Zimmerman of any misleading information when he asked Mr. Zimmerman to submit to a chemical test and Mr. Zimmerman refused. Therefore, the State respectfully requests that this Court affirm the Trial Court's ruling with regards to both issues presented.

Dated this 8th day of September, 2020.

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 word count of this brief is 2640.

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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 s. 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 8th day of September, 2020.

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CERTIFICATION OF MAILING

Pursuant to Sec. 809.80(3)(b), Stats., I hereby certify that on the 8th day of September, 2020, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the original and ten (10) copies of the Plaintiff-Respondent's Response to the Brief of Appellant addressed to the following named person at the following post office address:

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Further, I hereby certify that on the 8th day of September, 2020, in the City of West Bend, Washington County, Wisconsin, I mailed in a properly enclosed postage-paid envelope the three (3) copies of the Plaintiff-Respondent's Response to the Brief of Appellant addressed to the following named person at the following post office address:

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Dated this 8th day of September, 2020.

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