

RECEIVED
06-13-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2021AP1163 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOMINIC A. CALDIERO,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

ERICA L. BAUER
Attorney at Law
State Bar No. 1049684

Bauer Law, LLC
1835 E. Edgewood Dr., Ste. 105 #303
Appleton, WI 54913
(920) 570-7488
erica@bauerlawllc.com

Attorney for Defendant-Appellant-
Petitioner

TABLE OF CONTENTS

ISSUE PRESENTEDPage 3

CRITERIA SUPPORTING REVIEWPage 4

STATEMENT OF THE CASEPages 4-6

ARGUMENTPages 7-10

I. This case presents a real and significant Issue of constitutional law because Caldiero was convicted of the prohibited alcohol concentration offense where the State lacked authority to charge him with that crime.....Pages 7-8

II. The Court of Appeals' holding in this case conflicts with existing law because the statutory interpretation adopted by the Court would produce an absurd result.....Pages 8-10

CERTIFICATION AS TO FORM/LENGTH

CERTIFICATE OF COMPLIANCE 809.19(12)

CERTIFICATION OF FORM OF APPENDIX

The defendant-appellant-petitioner, Dominic A. Caldiero (“Caldiero”), hereby petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § 809.62 to review the final decision of the Court of Appeals, District IV, in the State of Wisconsin v. Dominic Caldiero, Appeal No. 2021AP1163-CR, filed on April 28, 2022, which affirmed the judgment of conviction, entered in Waupaca County Circuit Court Case 2019CT34, the Honorable Judge Raymond S. Huber, presiding. The defendant filed a timely motion to reconsider the decision, which was denied by an order entered on May 19, 2022.

ISSUE PRESENTED

Caldiero’s vehicle was stopped on January 11, 2019, in the afternoon. The result of his blood draw was 0.07. He had two prior impaired driving offenses on his record and therefore was subject to a 0.08 restriction unless he was subject to an ignition interlock order under sec. 343.301, Wis. Stats.

When Caldiero was sentenced for his second offense, the judge imposed an immediate 13-month revocation of his driving privileges and stated that during that 13-month revocation period, he was required to install an ignition interlock device on any vehicles that he would drive.

Issue Presented: Was Caldiero subject to an ignition interlock order pursuant to sec. 343.301, Wis. Stats., on January 11, 2019?

The trial court and the Court of Appeals answered no.

CRITERIA SUPPORTING REVIEW

This Court should grant review because the issues set forth in this case present real and significant questions of constitutional law. Wis. Stat. § 809.62(1r)(a) (2022). When a defendant is improperly charged by a defective criminal complaint, any conviction resulting from that defective charge must be reversed. *State v. Williams*, 527 N.W.2d 338, 343, 190 Wis.2d 1, 13 (Wis. App. 1994).

In addition, the Court of Appeals' holding in this case conflicts with existing law. A reviewing court must interpret statutes "in such a way as to avoid an absurd or unreasonable result." *State ex rel. Sielen v. Circuit Court for Milwaukee County*, 176 Wis. 2d 101, 106, 499 N.W.2d 657 (Wis. 1993); citing *State v. Moore*, 167 Wis. 2d 491, 496, 481 N.W.2d 633 (Wis. 1992). Section 343.301, Wis. Stat., provides both a restriction on his operating privilege and a requirement that he install an ignition interlock device on any vehicle registered to him, regardless of his use of that vehicle. However, the holding in this case that the two are mutually exclusive produces an absurd and unreasonable result that is contrary to the plain language of the statute.

STATEMENT OF THE CASE

On January 14, 2021, at approximately two o'clock in the afternoon, Caldiero was pulled over. (R. 19). According to the officer, Caldiero did not stop at a stop-sign. His blood test came back at 0.072, below the standard 0.08 limit. (R. 19:1).

Caldiero was charged with violating sec. 346.63(1)(b), Wis. Stats. because the State alleged that he was subject to an order under sec. 343.301, Wis. Stats. (R. 19:2). If he was subject to such an order, then his prohibited alcohol limit was

0.02. Caldiero has been convicted of two prior impaired driving offenses, making this charge only his third offense.

Caldiero was convicted of his second offense on September 21, 2015. (R. 19; R. 119). At the sentencing hearing for the second offense, the trial court ordered that Caldiero's operating privilege was revoked for 13 months, effective immediately. (App. 11; R. 35:9). Caldiero's certified driving record reflects the same. (R. 119).

The trial court further ordered that during Caldiero's immediate, 13-month period of revocation, that he was ordered to "operate vehicles equipped with ignition interlock devices." (App. 22-24; R. 35:10). The court did not enter any other ignition interlock order(s) at the time.

Prior to trial, Caldiero moved to dismiss the prohibited alcohol concentration offense. (R. 14; R. 25). Caldiero argued that he was not subject to an order under sec. 343.301(2m), Wis. Stats. because the order either never went into effect, or it had expired. Wis. Stat. § 343.301(2m) (2013-14). As such, Caldiero argued that the trial court did not have jurisdiction to convict him of count four.

Caldiero maintained his innocence and had a trial on that charge. The jury was asked to decide whether the State had presented evidence to convince the jury beyond a reasonable doubt, whether Caldiero had been driving while he had a level of alcohol in his bloodstream that was above 0.02. (R. 66; R. 68).

At trial, evidence was presented that Caldiero's blood-alcohol content when tested was 0.072. (R. 78). The jury returned a verdict of guilty. (R. 65).

On appeal, Caldiero filed a post-conviction motion, again arguing that if he was not subject to a requirement to have an ignition interlock device installed, he was also not

subject to a 0.02, lesser, prohibited alcohol concentration.
(App. 25-28)

The trial court denied Caldiero's post-conviction motion to dismiss a second time. In doing so, the trial court found that "Caldiero was under an obligation until such time as he had applied for and been granted some type of license which was a triggering point for when his period would expire." (App. 24; R. 135:14).

The trial court's finding was entered as a written order. (App. 25; R. 129). Caldiero appealed. (R. 131; R. 140).

The Court of Appeals held that Caldiero was still subject to an order under sec. 343.301, Wis. Stats., because he had not reinstated his license and therefore, the 13-month restriction had not yet begun. The Court of Appeals held that sec. 343.301 required two separate things: the installation of an ignition interlock device on vehicles owned by a defendant and a restriction on a defendant's right to drive a vehicle without such a device. (App. 12)

In essence, the Court of Appeals held that the two requirements were exclusive of one another and only the requirement that Caldiero have the device installed had begun immediately when he was sentenced on his second offense, but that the restriction on his ability to drive without a device had not yet begun.

Caldiero now petitions this Court to review his case and set aside the judgment convicting him of driving with a prohibited alcohol concentration.

ARGUMENT

- 1. This case presents a real and significant issue of constitutional law because Caldiero was convicted of the prohibited alcohol concentration offense where the State lacked authority to charge him with that crime.**

When a defendant is improperly charged by a defective criminal complaint or information, any conviction resulting from that defective charge must be reversed. *State v. Williams*, 190 Wis.2d 1, 13, 527 N.W.2d 338, 343 (Wis. App. 1994). Whether a verdict is supported by sufficient evidence is a question of law. *State v. Booker*, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676.

Caldiero was not subject to an ignition interlock order at the time of his arrest. Therefore, he was subject to a 0.08 limit and his blood-alcohol content of 0.07 does not support the resulting conviction.

When Caldiero was sentenced for his second impaired driving offense, the trial court's order pursuant to sec. 343.301, Wis. Stats. was imposed immediately:

I will revoke his driving privileges for a period of 13 months.

...

I will make the revocation effective forthwith.

...

I will revoke your driving privileges for a period of 13 months. If I didn't indicate, the revocation is 13 months. I will direct that during that period of revocation you operate vehicles equipped with ignition interlock devices.

(App. 23-24). The sentencing court for his second offense ordered that Caldiero's operating privilege was revoked for 13 months and that he be required to equip *any vehicles* he

used with an ignition interlock device, effective immediately (in September of 2015). Therefore, Caldiero was no longer subject to the order in 2019 because it expired in 2016.

2. The Court of Appeals' holding in this case conflicts with existing law because the statutory interpretation adopted by the Court would produce an absurd result.

At the time he was sentenced for his second offense, Section 343.301(1q), Wis. Stat. provided for a mandatory, ignition interlock restriction on Caldiero's driving privileges for a period of twelve to eighteen months. Wis. Stat. § 343.301(1q) and (2m) (2013-14). The legislature had set a maximum term for which any defendant could face a driving restriction and that maximum was eighteen months.

The statute provided that the sentencing court "may order the installation of an ignition interlock device ... immediately." (*Id.*) In the present case, the trial court ordered Caldiero to immediately install an ignition interlock device on any vehicles he would use.

To find that Caldiero was required to immediately face a restriction of his driving privileges in September of 2015 and still be subject to the order in 2019 would mean that he was subject to the order for more than the maximum proscribed period of time (eighteen months). Furthermore, it is inconsistent with the plain language of the statute and is inconsistent with the order entered by the second offense sentencing court.

The Court of Appeals' interpretation of the statute provides for an unreasonable and an absurd result.

When Caldiero was sentenced for his second impaired driving offense, the sentencing court specifically ordered that Caldiero was restricted from driving vehicles not equipped

with an ignition interlock device during the period of his revocation (13 months). The order was effective immediately. Therefore, Caldiero was subject to an ignition interlock order beginning in 2015, by order of that sentencing court.

As the Supreme Court properly held, “Under the doctrine of separation of powers, it is for the legislature to prescribe the penalty for a particular crime and the manner of its enforcement.” *State v. Dowdy*, 338 Wis.2d 565, 808 N.W.2d 691, 2012 WI 12 (Wis. 2012); citing *State v. Horn*, 226 Wis.2d 637, 646, 594 N.W.2d 772 (1999). The trial court only had jurisdiction to convict Caldiero if he was truly subject to an order pursuant to sec. 343.301, Wis. Stats.

The original sentencing court for Caldiero’s second offense had authority to fashion an order if authorized from sec. 343.301, Wis. Stats. *State v. Sepulveda*, 119 Wis.2d 546, 553, 350 N.W.2d 96 (1984). Section 343.301 permitted the trial court to enter a limited order that was effective for only twelve to eighteen months. Wis. Stat. § 343.301 (2013-14).

To continue the order forward into 2019 means that Caldiero was subject to a restriction of his driving privileges for more than eighteen months, which was not authorized by the statute. Wis. Stat. § 343.301 (2013-14). Therefore, the Court of Appeals holding is erroneous.

In sentencing Caldiero for his second offense, the court clearly ordered that he was required to “*operate vehicles equipped with ignition interlock devices*” immediately during the 13-month revocation of Caldiero’s driving privileges were restricted (in September of 2015). (App. 23-24). The trial court did not merely order the installation of an ignition interlock device, it placed a restriction on his operating privilege effective immediately at that time.

Either the sentencing court entered an invalid order at that time, for which Caldiero cannot be subject or the order expired. Either way, he was not subject to a lawful, legitimate

order pursuant to sec. 343.301, Wis. Stats. when he was stopped in January of 2019. Therefore, the trial court lacked jurisdiction to convict and sentence him.

For all the reasons stated herein, Caldiero respectfully requests that this Court grant his petition for review and overturn his judgment of conviction entered for the prohibited alcohol offense.

Dated this 13th day of June, 2022.

Respectfully submitted,

Attorney Erica L. Bauer
State Bar No. 1049684

Bauer Law, LLC
1835 E. Edgewood Dr., Ste. 105 #303
Appleton, WI 54913
(920) 570-7488
erica@bauerlawllc.com

Attorney for Defendant-Appellant-
Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 1,905 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Signed and dated this 13th day of June, 2022.

Attorney Erica L. Bauer
State Bar No. 1049684

Bauer Law, LLC
1835 E. Edgewood Dr., Ste. 105 #303
Appleton, WI 54913
(920) 570-7488
erica@bauerlawllc.com

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF FORM OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit courts' reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

Signed and dated this 13th day of June, 2022.

Attorney Erica L. Bauer
State Bar No. 1049684

Bauer Law, LLC
1835 E. Edgewood Dr., Ste. 105 #303
Appleton, WI 54913
(920) 570-7488
erica@bauerlawllc.com

Attorney for Defendant-Appellant-Petitioner