STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 22 AP 495 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JENNY E. CLARK,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER
ENTERED ON DECEMBER 17, 2021, BY THE
LACROSSE COUNTY CIRCUIT COURT,
THE HONORABLE ELLIOTT LEVINE PRESIDING.

Respectfully submitted,

JENNY E. CLARK,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

I. WHETHER THE STATE MAY ENHANCE THE SENTENCE OF A DEFENDANT WITH AN OUT-OF-STATE ADMINISTRATIVE SUSPENSION IN AN OPERATING WHILE IMPAIRED CASE.

CIRCUIT COURT: YES.

II. WHETHER THE STATE MAY AMEND THE CRIMINAL COMPLAINT POST-ARRAIGNMENT FROM A CIVIL TRAFFIC OFFENSE TO A CRIMINAL OFFENSE.

CIRCUIT COURT: YES.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's granting of the State's motion to enhance sentence with an administrative suspension and motion to amend the criminal complaint.

On November 20, 2020, the La Crosse County District Attorney's Office charged Clark with operating while intoxicated and operating with a prohibited alcohol concentration, both as a second offense.[1] On February 8, 2021, Clark moved to prohibit use of her prior conviction from Houston County, Minnesota to enhance her sentence. On March 12, 2021, the State responded to the defense motion. In the State's response, the State referenced ***State v. Carter*** to support its position that an administrative suspension may supply the basis for enhancing an OWI sentence.[2] The State also moved to amend the complaint to include an administrative suspension from the prior Minnesota case.[3]

On April 22, 2021, Clark filed a brief in response to the State.[4] Clark noted the State misapplied ***State v. Carter*** and ***State v. Machgan***, neither of which addressed an administrative suspension like that of Clark's.[5] Both ***Carter*** and ***Machgan*** addressed implied consent findings for refusing a chemical test, which was not the same scenario as that of Clark's.

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[1] R.3.
[2] R.18 at 2-3.
[3] R.17.
[4] R.22.
[5] *Id.*; ***Carter***, 2010 WI 132, 330 Wis. 2d 1, 794 N.W.2d 213; ***Machgan***, 2007 WI App 263, 306 Wis. 2d 752, 743 N.W.2d 832.

On June 16, 2021, the Court presided over an evidentiary hearing in this matter.[6] Following testimony, the Court granted the defense's motion to prohibit use of the drunk driving criminal conviction to enhance Clark's sentence.[7] The Court did not rule on the issue of the administrative proceeding supplying the basis for the prior conviction, deferring its ruling to a later date.[8]

On August 13, 2021, the Court presided over an oral ruling on the issue of the administrative proceeding.[9] The Court relied upon Wis. Stat. § 307(1)(d), which allows a finding of an excess or specific range of alcohol concentration of another jurisdiction to be used as a prior conviction.[10] The Court also relied upon Wis. Stat. § 340.01(9r), which defined conviction as an unvacated adjudication of guilt or a determination that a person has violated an authorized administrative tribunal.[11] The Court held that "***State v. Carter*** does make it clear that you can look at administrative suspensions."[12] The Court noted that Clark did not retain a right to counsel in a civil administrative process, so "the issues that were raised on the earlier hearing [regarding waiver of right to counsel] do not really apply."[13]

[6] R.52.
[7] *Id.*
[8] R.52 at 41.
[9] R.51.
[10] *Id.* at 6.
[11] *Id.*
[12] *Id.* at 7.
[13] *Id.*

On December 17, 2021, Clark pled guilty to operating while under the influence of an intoxicant, second offense. That same day, the court pronounced sentence.[14]

On March 28, 2022, Clark appealed her conviction to this Court.[15]

[14] R.47.
[15] R.54.

ARGUMENT

Clark respectfully requests that this Court reverse the decision of the trial court granting the State's motion to amend the complaint with the administrative suspension and to amend post-arraignment.

I. *STATE V. CARTER* DOES NOT SUPPORT THE STATE USING AN OUT-OF-STATE ADMINISTRATIVE SUSPENSION THAT IS NOT A REFUSAL AS A COUNTABLE PRIOR CONVICTION.

A. Standard of Review

Interpreting and applying a statute to undisputed facts are questions of law that this Court decides independently of the circuit court.[16] A trial court's findings of fact are reviewed for clear error.[17]

B. *State v. Carter* is not dispositive.

The counting statute for prior out-of-state convictions, Wis. Stat. § 343.307(1)(d), notes:

> Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or ~~a~~ controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detect~~a~~able amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

In ***State v. Carter***, the Court noted that the legislature allowed out of state suspensions for absolute sobriety violations to be used to enhance penalties for a

[16] ***State v. Popenhagen***, 2008 WI 55, ¶ 32, 309 Wis. 2d 601, 749 N.W.2d 611.
[17] ***Id.***

Wisconsin OWI.[18] The suspension counted under Wis. Stat. § 343.307(1)(e) for penalty enhancement under Wis. Stat. § 346.65(2).[19] In examining Wis. Stat. § 343.307(1)(d), the Court limited its holding to a refusal judgment for failing to submit to a chemical test could be construed as a countable prior. Consequently, it is incorrect that ***Carter*** is "binding authority dispositive" here.[20]

In ***Carter***, the Court examined the legislative history of Wis. Stat. § 343.308(1)(d).[21] The Court began by noting that the scope of the statute was broad, with the legislature removing the requirement that only drunk driving-type offenses from other states may be counted.[22] In examining the legislative history, legislators wished to address "counting out-of-state refusals" in enacting Wis. Stat. § 343.308(1)(d).[23] There is no mention of out-of-state administrative suspensions in the legislative history. In fact, it appears the sole purpose of enacting Wis. Stat. § 343.308(1)(d) was to begin counting out-of-state refusal judgments.[24]

Moreover, though the legislature wished for Wis. Stat. § 343.308(1)(d) to be broadly construed, there is no binding decision interpreting Wis. Stat. § 343.308(1)(d) such that it permits the State to do what it did in Clark's case. Consequently, the circuit court improperly granted the State's motion to amend the criminal complaint.

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[18] ***Carter***, 2010 WI 132, ¶ 24.
[19] ***Id.*** ¶ 27.
[20] R.18 at 3.
[21] ***Carter***, 2010 WI 132, ¶ 39.
[22] ***Id.***
[23] ***Id.*** ¶ 40.
[24] ***Id.***

II. THE COURT IMPERMISSIBLY ALLOWED THE STATE TO AMEND THE CRIMINAL COMPLAINT POST-ARRAIGNMENT.

A. Standard of Review

This Court interprets a statute and applies undisputed facts independently of the circuit court.[25] This Court reviews a trial court's decision to allow the amendment under an erroneous exercise of discretion standard.[26]

B. Ms. Clark was prejudiced by the State amending the complaint five months after her arraignment.

In a misdemeanor case, a case is charged upon the filing of a criminal complaint.[27] Wis. Stat. § 971.29 allows the State to amend the charging document before trial and within a reasonable time after arraignment if the defendant's rights are not prejudiced. The rights include being provided notice of the charge, not being denied a speedy trial, and the opportunity to prepare for trial.

In circuit court, the court ruled that Ms. Clark was not prejudiced by the amended complaint.[28] The court noted that "[T]he defendant was originally defending an OWI second [offense] anyway, so it really doesn't change the penalties."[29] However, the court failed to consider that the State moved to amend the complaint after losing the collateral attack motion to prohibit the use of Ms.

[25] ***State v. Valadez***, 2016 WI 4, ¶ 27, 366 Wis. 2d 332, 874 N.W.2d 514.
[26] ***State v. Dums***, 149 Wis. 2d 314, 325, 440 N.W.2d 814 (Ct. App. 1989).
[27] Wis. Stat. § 967.05(1)(a); Wis. Stat. § 967.05(2).
[28] R.51 at 9.
[29] *Id.* at 8-9.

Clark's prior drunk driving conviction. Thus, Ms. Clark's situation had changed from what it was initially—the court allowed the State to amend the case from an OWI first offense to an OWI second offense. That prejudiced Ms. Clark, as the matter went from a civil forfeiture offense to a criminal offense. There can be no dispute that it is inherently prejudicial to allow the State to amend the complaint from a noncriminal to a criminal offense in this scenario. Ms. Clark's total exposure changed from a violation that involved no jail time to an offense requiring mandatory jail time.

In ***State v. Neudorff***, this Court considered whether an amendment from possession of cocaine with intent to deliver charge to that of conspiracy to deliver cocaine was prejudicial.[30] This Court concluded that the elements of the respective offenses "are too different to permit an amendment from one to the other on the morning of trial."[31] Thus, though the offense remained a drunk driving offense, the change in the magnitude of the offense violated Ms. Clark's right to notice and right to defend her case at trial.

[30] ***Neudorff***, 170 Wis. 2d 608, 489 N.W.2d 689 (Ct. App. 1992).
[31] ***Id.*** at 619.

CONCLUSION

For the reasons stated above, Ms. Clark respectfully requests that this Court reverse the circuit court's order granting the State's motion. She asks this Court to remand the matter for further proceedings.

Dated at Middleton, Wisconsin, June 15, 2022.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: June 15, 2022.

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State Bar No.: 1098168

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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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
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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.

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Dated: June 15, 2022.

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