STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 22 AP 495-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNY E. CLARK,

DEFENDANT-APPELLANT.

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

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This opinion should not be published as this appeal shall be decided by one judge under Wis. Stat. § 752.31(2). Wis. Stat, § 809.23(1)(b)(4).

Oral argument is not necessary as the briefs should fully present the issues on appeal pursuant to Wis. Stats. §§ 809.22 and 809.23.

STATEMENT OF THE ISSUES

The primary issue revolves around the State's use of an out-of-state administrative suspension of a driver's license as a sentence enhancer under Wis. Stat. § 343.307(1)(d). Ms. Clark asserts that the trial court's reliance on *State v. Carter*, 2010 WI 132, 330 Wis. 2d 1, 794 N.W.2d 213, is unfounded and thus, that no precedent controls. The State argues, and the trial court found, that *State v. Carter* is controlling authority and that it allows the use of out-of-state administrative suspensions as sentence enhancers under Wisconsin law.

In addition, Ms. Clark claims that allowing the State to amend its charge to use the administrative suspension as an enhancer was too prejudicial to her. The State asserts that the change was not too prejudicial and should be allowed.

ARGUMENT

I. *State v. Carter* Is Binding Authority And Allows The State To Use Clark's Suspensions As Sentence Enhancers

A. Applicable Law and Standard of Review.

Questions of law are decided by *de novo* review. *Olson v. Town of Cottage Grove,* 2008 WI 51*,* 309 Wis. 2d 365, 749 N.W.2d 211. In this case, the facts are not in dispute. The disagreement here is whether *State v. Carter* is directly controlling, and, if so, if it allows the State to amend its complaint to use an out-of-state administrative suspension

as a sentence enhancer. These are questions of law, and thus are reviewed *de novo*.

B. The Cases Have Identical Issues and Rely on the Same Statute.

The issue in *Carter* is identical to the issue here: whether out-of-state administrative suspensions can be used as sentence enhancers under Wisconsin law, specifically Wis. Stat. § 343.307(1). Both cases involve the State amending charges of Operating While Intoxicated to include the prior out-of-state administrative suspensions as enhancers, and in both cases, the court specifically looked to Wis. Stat. § 343.307(1)(d) and concluded that the State was justified in doing so.

C. The Holding in *Carter* Was Not Limited to Refusals.

Contrary to Ms. Clark's assertions, *State v. Carter* nowhere limits the holding to out-of-state refusals to submit to chemical testing. Ms. Clark misstates, without a cite, that the Court limited its inquiry into 1(d) to refusals. *Brief of Appellant, at 10.* The Court specifically stated that it was looking at section 1(d) in order to determine if the defendant's "operating privilege suspensions" could be penalty enhancers. *Carter, ¶ 28.* This in no way limits the discussion to refusals; it instead broadly covers all suspensions. This point is made even clearer by the Court having just found that, although the State in *Carter* claimed that the suspensions were due to refusals, the Court did not have sufficient evidence to determine that refusals are what caused the suspensions. *Id., ¶ 27.* In other words, before even considering section 1(d), the Court had already determined that, even though refusals *could* count as penalty enhancers, the State did not meet its burden to show that the defendant had *actually* refused to submit to chemical testing. *Id., ¶ 24.* Thus, the rest of the Court's discussion assumes that the reason for the suspensions is unknown, which means that the Court did not limit its reasoning or holding to refusals.

Both the reasoning and holding in *Carter* support this reading as well. Ms. Clark uses citations to paragraphs 24 and 27 to support her assertions about the holding. However, the holding is not found in paragraphs 24 – 27: these paragraphs are meant to dismiss the State's claim that refusals were the cause of the suspensions. The finding discussed in these paragraphs is important, because if the case were about refusals, the relevant statute subsection would have been 1(e). But since this was not about refusals, subsection 1(d) applies. When the Court declares its ruling in paragraph 65, it mentions *suspensions*, not *refusals*.

In addition, Ms. Clark wrongly identifies 1(d) as the subsection of the statute that has the legislative history discussed by the *Carter* Court. *Brief of Appellant, at 10.* In fact, it is subsection 1(e) that was identified as intended to count out-of-state refusals. *Carter, ¶ 40.* Because the Court had already dismissed the State's claim that these suspensions were based on refusals and because both the *Carter* Court and the trial court in this case came to their conclusions by analyzing subsection 1(d), the legislative history of subsection 1(e) is only relevant insofar as a court could infer legislative intent about 1(d) by the legislative history of 1(e). However, the *Carter* Court found that "there is no indication in the legislative history that the addition of subsection (1)(e) was intended as a limitation to the scope of out-of-state convictions counted under subsection (1)(d)." *Id., ¶ 41.* Thus, there is no reason that the legislative history of 1(e) should influence this Court's ruling in this case.

D. Ms. Clark's Minnesota Suspensions Are Convictions Under Wisconsin Law, and Thus Can Be Used as Sentence Enhancers.

The *Carter* Court, looking to Wis. Stat. § 340.01(9r) to define the word "conviction," determined that convictions include "a determination that a person has violated or failed to comply with the law in an authorized administrative tribunal." *Carter*, ¶ 51.

The Minnesota law at issue here directly mirrors the Illinois zero tolerance suspensions statutory framework in *Carter*. *See Id.,* ¶ 52. Both involve a law enforcement officer making an initial determination that someone has broken a law, an automatic affirmation of the suspension by a State official, and an opportunity to appeal the suspension. This process fulfills the requirement that a determination be made that a person has violated the law and that that determination was made in an authorized administrative tribunal. Thus, the ruling in *Carter* that this process is sufficient to constitute a conviction under Wisconsin law is directly controlling, and Clark's Minnesota suspensions are also convictions under Wisconsin Law.

Convictions under the law of another jurisdiction that prohibit any of the behavior in Wis. Stat. 343.307(1)(d) can be counted as sentence enhancers. Wis. Stat. 343.307(1). Behaviors prohibited by subsection (1)(d) include operating a motor vehicle while intoxicated or under the influence of a controlled substance, which is what Ms. Clark was determined to have done. Thus, Ms. Clark's Minnesota suspensions can be counted as sentence enhancers in this case.

II. The Trial Court Did Not Abuse Its Discretion When Allowing The State To Amend Its Complaint

A. Standard of Review

Discretionary decisions are reviewed for erroneous exercise of discretion, and the standard is deferential. *Indus. Roofing Servs. v. Marquardt*, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898. In reviewing a lower court's determination using this standard, a reviewing court will ask if the lower court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a "demonstrated rational process to reach a conclusion that a reasonable judge could reach." *Id., ¶ 84.*

B. Ms. Clark's Rights Were Not Prejudiced by the Amendment

Wis. Stat. §971.29(1) permits amendment after arraignment with leave of the circuit court provided the defendant's rights are not

prejudiced. Rights of the defendant which may be prejudiced by an amendment are the right to a speedy trial, the right to notice, and the right to an opportunity to defend. *Whitaker v. State,* 83 Wis. 2d 368, 374, 265 N.W.2d 575, 579 (1978).

First, the right to a speedy trial was not implicated: no trial was scheduled and one did not occur. Thus, Ms. Clark's reliance on *Neudorff* – a case that prohibited an amendment to a complaint on the morning of trial – is misplaced.

The right to notice was not prejudiced as the charge did not change from the original complaint. Contrary to Ms. Clark's assertion, she was never charged with a first offense. At the time of application for amending the complaint, the basis for charging the OWI as a second was a conviction, and the circuit court had not ruled on Ms. Clark's collateral attack motion against the prior conviction. The amended complaint kept the charge as a second, only changing the basis for the second from a conviction to an administrative suspension.

Nor was the right to have an opportunity to defend prejudiced. When the elements of the crime are the same, the defendant necessarily has notice and opportunity to prepare a defense against both. *Moore v. State,* 55 Wis. 2d 1, 197 N.W.2d 820 (1972). Only when the elements of the respective offenses are "too different" can there be prejudice to the defendant. *State v. Neudorff,* 170 Wis. 2d 608, 489 N.W.2d 689 (1992). Since none of the elements changed in this amendment, it could not have prejudiced Ms. Clark.

Ms. Clark relies on the magnitude difference between an OWI first (a civil forfeiture offense) and an OWI second (a criminal offense) to say that the amendment was "inherently prejudicial." *Brief of Appellant, at 12.* This argument fails for two reasons. First, a magnitude difference is not one of the rights protected from amending a complaint in *Whitaker*. And second, even if the right were protected, the magnitude did not differ in the original complaint and the amended complaint, as both contained a charge of OWI second.

Thus, Ms. Clark has failed to adequately establish that any right was prejudiced.

C. The Trial Court Did Not Abuse Its Discretion in Allowing the Amendment

Ms. Clark nowhere asserts that the trial court applied the wrong legal standard or that it did not use a rational process to reach a conclusion that a reasonable judge could reach. Instead, Ms. Clark asserts that, by failing to consider that after the collateral attack motion the charge was now an OWI first, that the court did not examine a relevant fact. *Brief of Appellant, at 12.*

However, the court did examine this fact, and came to a reasonable conclusion – that because Ms. Clark had already been preparing a defense against an OWI second, it would not be prejudicial to allow the State to amend the complaint with a different basis for charging the OWI as a second. R. 51 8:22-9:8. In other words, the court followed the process required in *Marquardt* and determined that there was no prejudice to Ms. Clark. This determination is a reasonable conclusion well within the court's discretion.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the finding of the trial court that the State is able to use out-of-state administrative suspensions as sentence enhancers and that the amendment to the complaint was not prejudicial to Ms. Clark.

Dated this 15th day of July, 2022.

Respectfully submitted,

Electronically signed by Andrew Tyler
Andrew Tyler
Law Student Intern, acting under WI SCR Chapter 50
Under the supervision of Gideon Wertheimer

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,267 words.
Signed:

Electronically Signed by Andrew Tyler
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