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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.

REPLY 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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ARGUMENT

Ms. Clark respectfully requests that this Court reverse the decision of the trial court granting the State's motion to enhance sentence.

I. *STATE V. CARTER* IS NOT DISPOSITIVE.

A. The holding of *State v. Carter* does not apply to Ms. Clark's case.

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 Wisconsin OWI.¹ The suspension counted under Wis. Stat. § 343.307(1)(d) for penalty enhancement under Wis. Stat. § 346.65(2).² 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. The Court states as much when it holds: “We conclude that the two prior suspensions of Carter’s operating privileges under the Illinois ‘zero tolerance’ law are convictions within the meaning of Wis. Stat. §§ 343.307(1)(d) and 340.01(9r).”³ Consequently, it is incorrect that *Carter* is binding authority.

Moreover, the State refers to the Minnesota law at issue.⁴ Any arguments about the Minnesota law for refusing a chemical test mirroring the Illinois zero tolerance law in *Carter* are incorrect, as *Carter* addressed whether a conviction or

¹ *State v. Carter*, 2010 WI 132, ¶ 24, 330 Wis. 2d 1, 794 N.W.2d 213.

² *Id.* ¶ 27.

³ *Id.* ¶ 65.

⁴ State's Response Brief at 3-4.

finding under Wis. Stat. § 343.307(1)(d) constituted a countable OWI offense, not Wis. Stat. § 343.307(1)(e). Furthermore, the State fails to supply any type of citation for its argument that, “The Minnesota law at issue here directly mirrors the Illinois zero tolerance suspensions statutory framework in *Carter*.”⁵ The State may not assert any facts or law without citation to the record or without legal support.⁶

II. ALLOWING THE STATE TO AMEND THE CRIMINAL COMPLAINT FROM A FORFEITURE TO A MISDEMEANOR OFFENSE PREJUDICED MS. CLARK.

A. The court erroneously allowed the State to amend the criminal complaint.

The State argues that Ms. Clark’s right to have an opportunity to defend herself was not prejudiced here.⁷ The State cites to *Moore v. State*, which does not address Wis. Stat. § 971.29(1).⁸ Nor does *Moore* address the scenario here: an amendment from a traffic ordinance to a misdemeanor charge. The court permitted the amended charge after it granted the defense’s collateral attack motion. Thus, the defense was on notice that the offense became a traffic ordinance. It is untrue that the charge “did not change from the original complaint.”⁹ The record belies that

⁵ State’s Brief at 7.

⁶ *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981); *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n. 1, 306 N.W.2d 292 (Ct. App. 1981).

⁷ State’s Brief at 5.

⁸ *Id.*; *Moore*, 55 Wis. 2d 1, 197 N.W.2d 820 (1972).

⁹ State’s Brief at 5.

assertion, given that the State moved to amend the criminal complaint.¹⁰ The amendment here was inherently prejudicial.

¹⁰ R.17.

CONCLUSION

For the reasons stated above and in her initial filing, 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, August 3, 2022.

Respectfully submitted,

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 681 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: August 3, 2022.

Signed,

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