STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT FOUR

State of Wisconsin,

Plaintiff – Respondent,

vs.

APPEAL # 18 AP 2412

Aman Deep Singh,

Defendant – Appellant.

REPLY BRIEF

Aman Deep Singh
Defendant – Appellant

I. THE STATE CONCEDES THAT THE OPINION FROM THE PRIOR APPEAL IS THE LAW OF THE CASE.

The State concedes that the opinion from 17AP1609, a summary reversal of a trial court order denying Singh's motion to vacate the judgment of conviction, should be treated as the law of the case. "While unfortunate and not demonstrative of its typical diligence and professionalism, the State does not have a substantive explanation other than human error. Thus, the State accepts the Court of Appeal's decision in #17AP1609 to grant relief under § 973.13 after summarily reversing the lower court's position denying Mr. Singh's motion to vacate his judgment of conviction." (Respondent brief, pg 12)

II. THE 17AP1609 JUDGMENT VOIDED THE ENTIRE SENTENCE. THE STATE LOST THE OPPORTUNITY TO ARGUE OTHERWISE WHEN IT FAILED TO FILE A BRIEF.

As the opinion noted, Singh's argument in the prior appeal was that his entire sentence was excessive. "Singh claimed that he received an excessive sentence because his prosecution for second offense OWI was invalid and, thus, any sentence would be excessive." *Singh* ¶3. The appeal was summarily reversed. Therefore, the law of the case, the essential holding of 17AP1609, is exactly that – that any sentence is excessive. That was the basis for granting § 973.13 relief.

The State's now appears to suggest that the prior opinion did not void the entire sentence but merely commuted it to the statutory maximum. Singh's argument was that the statutory maximum was no sentence at all, so either way, no valid sentence remains. If this is not true, then what is the statutory maximum for a second offense OWI conviction after a judgment on the merits in the first offense prosecution in light of § 345.52(1)? The State lost its opportunity to challenge Singh's answer to this question when it failed to file a respondent brief in the prior appeal. Even if this were not the case, the State fails to offer an answer here as well. The State agrees that Singh's original sentence was held excessive and was commuted to the statutory

maximum, but it offers no answer of its own as to what exactly it thinks the statutory maximum in this situation is other than Singh's answer – no sentence at all.

III. THE STATE'S BRIEF CONFUSES THE TWO DIFFERENT DEFINITIONS OF 'CONVICTION'.

The State's brief repeatedly confuses the two different definitions of 'conviction' and improperly uses them interchangeably. As a result, it is difficult to follow the arguments the State makes. The State seizes upon language from ¶11 of the 17AP1609 opinion where this court writes that §973.13 does not provide for vacating the conviction, but the State misjudges which of the two definitions of conviction was intended by this comment.

As discussed in §4 of Singh's brief-in-chief, the word conviction is ambiguous, with two substantively different recognized definitions. "Like courts in other jurisdictions, Wisconsin courts have repeatedly recognized that conviction can refer either to the finding of guilt or to the entire procedural process resulting in a judgment and sentence." *State v. Johnson*, 2005 WI App 202, ¶11, 287 Wis. 2d 313, 704 NW2d 318. Furthermore, 'conviction' as used in 'judgment of conviction' refers to the second definition. A judgment of conviction cannot be based only on a guilty verdict [i.e. the first definition of conviction] but must also include a valid sentence. "A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence ...." Section 972.13(3). Obviously, a judgment of conviction cannot be entered until these events have occurred. Indeed, subsec. (6) of the statute sets out a model form for a judgment of conviction and it includes all of the provisions required by subsec. (3). See § 972.13(6), STATS." *Mikrut v. State*, 212 Wis. 2d 859, 868-69, 569 N.W.2d 765 (Ct. App. 1997).

"The word "conviction" is capable of conveying two meanings. As our supreme court has stated: The term "conviction" is used in common language, and sometimes in the statutes, in two different senses. "In its most common use it signifies the finding of the jury that the person is guilty, but it is frequently used as implying a

judgment and sentence of the court upon a verdict or confession of guilt."" *State v. Wimmer*, 152 Wis. 2d 654, 658, 449 N.W.2d 621 (Ct. App. 1989).

In other words, without a legal sentence, a 'judgment of conviction' is invalid. This is true even if the verdict itself is sound. A guilty verdict without a valid sentence is a 'conviction' under the first definition, but it is not a 'conviction' under the second definition. The State's brief fails to recognize this distinction, which makes its arguments difficult to follow.

In ¶11 of the 17AP1609 opinion, this court opined that § 973.13 provides for sentencing relief only, and not withdrawal of a guilty plea. It is in that context that the court said, "the statute does not provide for the vacation of the conviction." In this quote, 'conviction' is the first definition, the guilty plea only. § 973.13 relief relates to the sentence, not the plea. However, since the summary reversal voided the entire sentence as Singh had requested, the remand mandate required vacating the 'judgment of conviction'. [The second definition of 'conviction'.] Without a valid sentence, a judgment of conviction is void because it is based on the plea alone. "§ 972.13(3) recites what a judgment of conviction must include; and § 972.13(6) sets out a model judgment of conviction form. Thus, a valid judgment of conviction cannot be entered against a defendant until all of these necessary ingredients exist. The amended judgment of conviction in case No. 85-CF-240 attempts to recite a judgment of conviction against Mikrut based upon his plea alone. As our analysis of the statute reveals, this is impossible. Therefore, even if the amended judgment were judicially sanctioned, it was incorrect." *Mikrut v. State*, 212 Wis. 2d 859, 869-70, 569 N.W.2d 765 (Ct. App. 1997).

IV. THE FINAL THREE SENTENCES OF ¶11 ARE DICTA.

In the prior appeal, this court held that the State abandoned its opposition to Singh's arguments by failing to file a Respondent brief and summarily reversed the trial court order denying Singh's motion to vacate the judgment of conviction. It

remanded the case for further proceedings. Under these circumstances, the final three sentences of ¶11, where the opinion discusses the scope of §973.13, are dicta. This unbriefed exposition has no effect on the summary reversal sanction, which emphasized that the appeal could not be decided on the record alone and that this court would not advocate on behalf of the State.

As demonstrated in *State v. Holloway*, 202 Wis. 2d 694, 551 N.W.2d 841 (Ct. App. 1996), the scope of § 973.13 is not limited to merely voiding the excess. And as explained in the previous section, it can be careless and confusing to use the term 'conviction' without acknowledging that word has two substantively different definitions. In #17AP1609, Singh argued that his 'judgment of conviction' should be vacated because the sentence was void in its entirety. Without a valid sentence, there can be no judgment of conviction. A void sentence invalidates a judgment of conviction even if the guilty plea is valid and unchallenged. There are two different definitions of 'conviction'. The final three sentences of ¶11 were unnecessary and only caused confusion as to what it really means to 'vacate a conviction'.

On page 13 of its respondent brief, the State argues that even when this court decides an appeal entirely on procedural grounds, it is within its authority to go above and beyond that and express its opinion on unbriefed questions of statutory interpretation. Sure, but it is unnecessary and there are perils, as this case demonstrates. This court summarily reversed a prior trial court order denying Singh's motion to vacate the judgment of conviction based on an excessive sentence. The expectation on remand should have been straightforward ... vacating the judgment of conviction because it ordered a void excessive sentence. Instead, citing the unnecessary dicta from ¶11, the trial court affirmed the judgment of conviction and Singh remains subject to the same sentence this court has already held is void as excessive. This entire second appeal became necessary solely because the trial court misinterpreted the unbriefed language in ¶11 of the prior opinion that this court should acknowledge was dicta unnecessary to the resolution of the summary reversal.

V. THE STATE CONCEDES THAT THE TRIAL COURT ERRED BY LEAVING THE ORIGINAL JUDGMENT OF CONVICTION INTACT.

On page 7 of its brief, the State writes, "On the related but separate note, the State does not take a position on amending the judgement of conviction. We acknowledge an amended judgement of conviction may be necessary to reflect this court's previous ruling that voided any penalty in excess of the statutory maximum".

As explained above in §2 of this reply brief, Singh's argument in the prior appeal and here is that the statutory maximum is no sentence. Nowhere in the State's brief does it identify a specific statutory maximum for Singh's scenario above zero. Singh believes the State lost its opportunity to argue otherwise when it failed to file a respondent brief in Appeal #17AP1609. Even if it did not, it proposes no specific statutory maximum here either. If Singh's sentence was not commuted to zero, then what exactly was it commuted to? The State offers no answer.

This court should not advocate on behalf of the state to come up with an answer. That issue was already decided in the prior appeal. However, if the statutory maximum is zero, then there can be no valid judgment of conviction here. A JOC cannot be based on a guilty plea alone. "A conviction under WIS. STAT. § 343.307 must meet the requirements of WIS. STAT. § 972.13(3). In order to be a valid judgment of conviction, a sentence must have been imposed." *State v. Skibinski*, 2001 WI App 109, ¶10, 244 Wis. 2d 229, 629 N.W.2d 12. "We have also concluded that "a conviction does not occur until a sentence is imposed" for the purposes of calculating the number of convictions for operating while intoxicated." *State v. Johnson*, 2005 WI App 202, ¶18, 287 Wis. 2d 313, 704 NW2d 318. (citing *State v. Matke*, 2005 WI App 4, ¶ 12, 278 Wis. 2d 403, 692 N.W.2d 265) "The amended judgment of conviction in case No. 85-CF-240 attempts to recite a judgment of conviction against Mikrut based upon his plea alone. As our analysis of the statute reveals, this is impossible. Therefore, even if the amended judgment were judicially sanctioned, it was incorrect." *Mikrut v. State*, 212 Wis. 2d 859, 869-70, 569 N.W.2d 765 (Ct. App. 1997).

The State concedes that the JOC should be amended to reflect the sentence commutation from the prior appeal. However, since the prior appeal commuted the sentence to no sentence at all, no JOC is possible.

VI. THE STATE CONCEDES THE ENTIRE FINE SHOULD BE RETURNED TO SINGH.

The State agrees with Singh that fines are criminal penalties and that excessive fines fall under the scope of § 973.13. [Respondent Brief, pg 3, "The State agrees that any excessive fines should be refunded to Mr. Singh."] Singh argued that the entire fine imposed was excessive. The State does not offer a non-zero statutory maximum fine for Singh's scenario. Therefore, the issue should be deemed conceded and the entire fine should be refunded to Singh.

VII. THE PLEA SHOULD BE WITHDRAWN.

Singh argues that his plea should be withdrawn for a number of reasons: 1) there is no sentence in this case. 2) his plea was unknowing because the trial court did not inform him that his maximum sentence was no sentence. 3) his counsel was ineffective for not moving to dismiss based on the fact that no valid sentence could be imposed and the prosecution itself violated § 345.52.

The State's counter-arguments are the same for each of Singh's grounds for plea withdrawal ... that Singh's hypothesis that he was never subject to criminal penalties is incorrect. This question was already briefed in §2 above. Singh's argument for relief in 17AP1609 is that his statutory maximum was zero; and the State was deemed to have abandoned its opposition to this position based on a failure to brief and the matter was summarily reversed. Furthermore, the State has not specified anywhere in its Respondent brief here what exactly it believes Singh's

statutory maximum is above zero. Since the State does not explain what it believes Singh's statutory maximum is if not zero, its arguments are wholly conclusory.

VIII. SINGH IS ENTITLED TO RELIEF UNDER *STATE V. DALTON.*

Singh alleges that his OWI conviction was enhanced to a second offense based on a blood test refusal as the predicate prior offense. Singh argues that *State v. Dalton*, 2018 WI 85 does not permit this.

A. THE STATE IS WRONG ABOUT THE PLEADING BURDEN.

On page 8 of its brief, the State argues that Singh has not met the pleading burden because he has not provided any evidence or credible supporting documents. The State cites no caselaw for its theory of pleading burden. This argument is frivolous on its face; it is the State's burden to prove that Singh is subject to a repeater enhancer, it is not Singh's burden to prove that he is not. The only pleading requirement for a defendant raising a § 973.13 claim is the bare allegation that the State failed to properly prove the repeater status. "Importantly, our decision represents only a narrow exception to *Escalona-Naranjo* and is only applicable when a defendant alleges that the State has neither proven nor gained the admission of the defendant about a prior felony conviction necessary to sustain the repeater allegation." *State v. Flowers*, 221 Wis. 2d 20, 30, 586 N.W.2d 175 (Ct. App. 1998) Singh's argument here is that the State failed to prove he is subject to a repeater enhancer because the predicate offense the State alleged cannot be counted under *Dalton*. That is enough, it is the State's burden to prove that Singh was subject to the repeater. "It is the State which alleged Flowers' repeater status and which sought an enhanced penalty based on that status. The state must carry the burden to make good the charge in the essential particulars." *Flowers* at 28.

Singh's motion was denied by the trial court without a hearing, but not on the grounds that Singh failed to include evidence or supporting documentation. Singh's

allegation is that it was the State which failed to introduce evidence or supporting documentation proving that Singh was properly subject to the repeater beyond a reasonable doubt.

B. IF *DALTON* APPLIES, THE STATE CONCEDES THAT THE REPEATER ALLEGATION WAS NOT PROPERLY PROVEN.

On page 7, the State theorizes that Singh's interpretation of *Dalton* would not apply if Singh refused a breath test. Singh has alleged that he refused a blood test. Implicit in this discussion is the State's concession that the record in this case at the time of sentencing was silent as to whether the refusal was for a blood test or a breath test. [This is unsurprising, since prior to *Dalton* and *Birchfield*, the State probably did not realize the importance of the distinction.] If anything in the record proved the refusal was for a breath test, the State would have pointed it out in its brief.

If *Dalton* does apply and blood test refusals cannot count as prior offenses, and the record in this case is silent as to whether Singh's refusal was for a breath test instead, then the State failed to prove the repeater allegation beyond a reasonable doubt. If only breath test refusals can count as prior offenses, and the State failed to enter any evidence into the record that Singh's refusal was for a breath test, then the State did not carry its burden of proving the repeater allegation.

The purpose here is not to now definitively determine whether Singh's refusal was for a blood test or a breath test, but whether the State proved back in 2005 at the time of sentencing that the refusal was for a breath test. The State's brief points to no evidence that it did. Therefore, the State concedes that it failed to prove the repeater if *Dalton* does apply. The only question to resolve in this appeal then is whether *Dalton* precludes the counting of blood tests.

C. THE STATE'S INTERPRETATION OF *DALTON* MAKES NO SENSE.

On page 8 of the Respondent brief, the State writes, "Considering a refusal as defined by the Implied Consent law as a prior for counting purposes, which is supported by § 343.307 (1)(d), (e), and (f), is not the same as explicitly increasing the

confinement portion of a sentence." The State does not explain further what it thinks the distinction is. Considering the refusal directly led to Singh receiving a longer confinement portion of the sentence than he was otherwise subject to. In fact, counting the refusal as a prior offense is exactly what enhanced Singh's OWI to a criminal offense. Singh was originally convicted of a civil OWI and a forfeiture imposed. Consideration of the refusal is what increased Singh's penalties to a term of incarceration and a greater fine.

Consideration of the refusal did not merely increase Singh's confinement, but also enhanced Singh's OWI from a civil offense to a criminal charge. This effect plainly falls under the scope of *Dalton* as discussed in Singh's brief-in-chief. The State does not contest Singh's assertion on the final page of his brief that if *Dalton* applies, the conviction should not merely be reduced to a first offense but dismissed outright. Therefore, the State concedes this latter point.

D. SINGH DOES NOT CHALLENGE THE CONSTITUTIONALITY OF § 343.307.

Contrary to the State's assertion, Singh does not challenge the constitutionality of § 343.307. Instead, Singh interprets the statute in a way that excludes refusals to submit to a blood test in order to preserve its constitutionality. Singh certainly challenges the constitutionality of the State's interpretation of the statute, but that is not the same thing as challenging the constitutionality of the statute itself.

Regardless of this distinction, the *Dalton* case clearly explains the constitutional implications of Implied Consent laws, and consideration of the refusal plainly made all the difference between Singh receiving a civil versus criminal conviction with mandatory minimums.

CONCLUSION

For the various reasons discussed above, Singh asks the court to reverse the trial court order and instruct the court on remand to vacate the judgment of conviction and dismiss the case.[1]

Dated this 7th day of February 2020,

Aman Deep Singh

[1] Singh notes that the State violated numerous rules of appellate procedure during the course of this appeal resulting in delays to the submission of the case. Its first and third motions to enlarge time to file a Respondent brief were both filed late. None of the three motions to enlarge time were timely served on Singh resulting in further delays. When the State did finally submit a Respondent brief, it did not properly conform to the rules either, resulting in yet another delay. The State's failure to follow the rules comes on the heels of its sanction for failure to follow the rules in the prior appeal as well. This appeal should also be summarily reversed as a sanction against the State for its egregious non-compliance with the rules.