COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2044-CR **Cir. Ct. No. 2006CF485**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARAN G. ESPOSITO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Aran G. Esposito appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, fourth offense. He contends that the circuit court erred in counting two prior "zero tolerance" suspensions that appeared on Esposito's Illinois driving record.[2] We disagree and affirm the judgment of the circuit court.

¶2 Esposito was arrested and charged with OWI on October 8, 2006.[3] The State submitted that the violation was Esposito's fifth drunk driving offense, which is a felony. It counted two zero tolerance offenses and two refusal suspensions on Esposito's Illinois driving record.

¶3 Esposito moved to dismiss the complaint on grounds it was defective. Specifically, Esposito argued that the allegations did not support a felony fifth OWI offense because two prior offenses were violations of a zero tolerance law and could not be counted under WIS. STAT. § 343.307(1). He further asserted that one of the refusal suspensions was still pending and could not be used against him in the instant case. The court held a motion hearing on April 12, 2007. After hearing the arguments, the court held that the two zero tolerance suspensions counted as prior offenses under § 343.307(1)(d). The court held open

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The terms "zero tolerance," "absolute sobriety," and "not a drop" are often interchanged when describing a law that prohibits alcohol consumption by anyone under twenty-one years old. Because the Illinois driving record at issue in this case refers to "zero tolerance" suspensions, we use that term as well.

[3] An additional charge of operating with a prohibited alcohol concentration was dismissed.

the question of whether the contested refusal should be counted and set the matter for a preliminary hearing.

¶4 The State amended the charge against Esposito, alleging the OWI was his fourth offense, a misdemeanor. Esposito pled no contest to the charge and now renews his argument that his OWI arrest in Wisconsin was, in fact, only his second alcohol-related motor vehicle offense. Esposito concedes that he has two zero tolerance suspensions and one refusal suspension on his Illinois record. His dispute is limited to the legal treatment of the zero tolerance suspensions under Wisconsin's counting statute. Application of a statute to undisputed facts presents a question of law for our de novo review. ***State v. White***, 177 Wis. 2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993).

¶5 In Wisconsin OWI cases, prior offenses are counted pursuant to WIS. STAT. § 343.307. The relevant portion of the counting statute is as follows:

> The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under s. 346.65(2):
>
> ….
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated … with an excess or specified range of alcohol concentration … as those or substantially similar terms are used in that jurisdiction's laws.

Sec. 343.307(1).

¶6 Esposito argues that the counting statute, though it casts the net wide, does not reach zero tolerance violations. He offers no case law to support his position nor does he engage in any statutory construction to make his point. He simply suggests that "[i]t is apparent from examination of the [counting

statute] that zero tolerance … violations are not among the enumerated, countable offenses." Esposito fails to demonstrate why zero tolerance offenses should not be counted under WIS. STAT. § 343.307(1)(d), which states that convictions from another jurisdiction for refusing chemical testing or for driving with an excess or specified range of alcohol concentration should be counted. Because the plain language of the statute states such violations should be counted, and because Esposito offers no legal argument for reading it otherwise, we reject his contention that zero tolerance violations are outside the scope of the counting statute.[4]

¶7 Alternatively, Esposito argues that violations of the Illinois zero tolerance law should not be counted because violations of Wisconsin's absolute sobriety law are not counted. In Wisconsin, the law states in relevant part:

> If a person has not attained the legal drinking age, as defined in [WIS. STAT. §] 125.02(8m), the person may not drive or operate a motor vehicle while he or she has an alcohol concentration of more than 0.0 but not more than 0.08. One penalty for violation of this subsection is suspension of a person's operating privilege under [WIS. STAT. §] 343.30(1p)…. If a person arrested for a violation of this subsection refuses to take a test under [WIS. STAT. §] 343.305, the refusal is a separate violation and the person is subject to revocation ….

WIS. STAT. § 346.63(2m). Penalties for refusals by underage motorists are described in § 343.305(10)(em), which provides, "Any such improper refusal or revocation for the refusal does not count as a prior refusal or a prior revocation under this section or … [WIS. STAT. §] 343.307 …." Therefore, Esposito argues,

[4] Arguments unsupported by legal authority will not be considered. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

if his zero tolerance suspensions had occurred in Wisconsin, they would not count as prior offenses in his current OWI case.[5]

¶8 Again, Esposito offers no legal argument to support his proposition. It is unlikely he would find any support in the case law. In ***State v. Mattson***, 140 Wis. 2d 24, 30, 409 N.W.2d 138 (Ct. App. 1987), we compared a Minnesota drunk driving law to a Wisconsin law and determined that the Minnesota law prohibited conduct that was not prohibited in Wisconsin. As a result, we concluded that the Minnesota conviction could not be counted for penalty enhancement purposes. *See* ***id.*** at 25. Though Esposito never cites to ***Mattson***, it appears this is the legal reasoning behind his argument.

¶9 More recent case law demonstrates the weakness in Esposito's position. In ***White***, we held that Wisconsin OWI statutes now simply require that the other state's law prohibit the use of a motor vehicle while intoxicated for violations to be counted as prior offenses under WIS. STAT. § 343.307. *See* ***White***, 177 Wis. 2d at 125-26. Noting that the relevant statute in ***Mattson*** had been amended, the ***White*** court rejected the proposition that another state's law must be "in conformity" with Wisconsin law in order to be counted as a prior offense for penalty enhancement purposes. ***Id.***

¶10 In ***State v. List***, 2004 WI App 230, ¶8, 277 Wis. 2d 836, 691 N.W.2d 366, we explained that "Wisconsin even counts prior offenses committed in states

[5] While he does not expressly state that he refused chemical testing, we read Esposito to suggest that he did. His use of WIS. STAT. § 343.305(10)(em), which discusses refusals, would make that the only reasonable inference. Whether Esposito refused chemical testing in Illinois or whether he submitted to testing and was found to be in violation of the zero tolerance law is irrelevant to our analysis.

with OWI statutes that differ significantly from our own." Here, Esposito's suspensions were a result of his violations of 625 ILL. COMP. STAT. 5/11-501 (2005), which prohibits driving under the influence of alcohol. Specifically, subsec. 501.8 of the statute addresses driver's license suspension for underage alcohol consumption and sets forth an implied consent framework for chemical tests conducted in conjunction with the arrest of a "person who is less than 21 years of age and who drives or is in actual physical control of a motor vehicle upon the public highways … [and] has consumed any amount of an alcoholic beverage."[6]

¶11 The Illinois zero tolerance law prohibits the use of a motor vehicle by a person under the legal drinking age for any traffic violation and with any amount of alcohol in his or her system. Esposito never challenges the proposition that his suspensions arose from use of a motor vehicle while having a blood-alcohol concentration above zero. That is all that is required under WIS. STAT. § 343.307(1)(d); therefore Esposito's zero tolerance suspensions were properly counted as prior OWI offenses under the Wisconsin counting statute. The circuit court correctly applied the law when it convicted Esposito for a fourth OWI offense.

By the Court.—Judgment affirmed.

[6] Unlike a standard OWI suspension in Illinois, which is imposed when a driver is arrested for driving under the influence, a zero tolerance summary suspension may be imposed if a driver under age twenty-one has been arrested for *any* traffic violation, provided there is probable cause to believe the driver consumed some amount of alcohol and refuses testing or submits and the test reveals a blood-alcohol concentration greater than zero. *See* ***Gumma v. White***, 833 N.E.2d 834, 841 (Ill. 2005).

This opinion will not be published. See WIS. STAT. RULE 809. 23(1)(b)4.