COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP522-CR **Cir. Ct. No. 2011CT727**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARILYN M. TORBECK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

¶1 REILLY, J.[1] The State appeals from a judgment of the circuit court dismissing a third operating while intoxicated (OWI) charge against Marilyn M. Torbeck. Torbeck did not have any alcohol in her system at the time she crashed her vehicle, but she had "huffed" the substance 1, 1-Difluoroethane (DFE), which is commonly found in air spray cans. The circuit court dismissed the charge after concluding that DFE is not an "intoxicant" within the meaning of the OWI statute. We agree and affirm the dismissal.

BACKGROUND

¶2 On the afternoon of March 18, 2011, Deputy Darren Putzer of the Winnebago County Sheriff's Office responded to a report of a single vehicle crash at an intersection in Oshkosh. As Putzer approached the scene, he noticed a Saturn Ion in a ditch and a Dodge Grand Caravan parked outside of the intersection. The driver of the Grand Caravan told Putzer that she was almost hit by the Saturn Ion. The driver of the Saturn Ion—Torbeck—was taken to a hospital to treat her injuries.

¶3 At the hospital, Putzer discussed the accident with Torbeck. He reported that she acted confused and did not have much memory of the crash. A preliminary breath test revealed that Torbeck did not have any alcohol in her system. Putzer was about to give Torbeck a citation for inattentive driving when an emergency room doctor told Putzer that someone visiting Torbeck told the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

doctor that Torbeck "may be in an impaired state due to 'huffing' and possibly other prescription medication." Putzer spoke with two of Torbeck's friends who were visiting her and both of them said they believed that Torbeck crashed her car after "huffing."[2] Based on this information, Putzer cited Torbeck for her third OWI offense, in violation of WIS. STAT. § 346.63(1)(a). Torbeck submitted to a blood test which indicated that she had DFE in her system.

¶4 Torbeck filed a motion to suppress on the grounds that Putzer did not have probable cause to believe that Torbeck was operating while under the influence of an intoxicant. The circuit court denied the motion. Torbeck then filed a motion to dismiss on the grounds that DFE is not an intoxicant, controlled substance, controlled substance analog, or drug under WIS. STAT. § 346.63(1)(a). The circuit court agreed with Torbeck and granted the motion. The State appeals.

STANDARD OF REVIEW

¶5 Whether a criminal complaint sets forth probable cause to justify a criminal charge is a legal question that we review de novo. ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. This case requires us to interpret numerous provisions within WIS. STAT. ch. 346. Statutory interpretation is a question of law that we review de novo. *See* ***Zellner v. Cedarburg Sch. Dist.***, 2007 WI 53, ¶16, 300 Wis. 2d 290, 731 N.W.2d 240.

[2] Torbeck does not dispute the State's definition of "huffing" as "[b]reathing [inhalant] fumes in order to get high."

DISCUSSION

¶6 WISCONSIN STAT. § 346.63(1)(a) provides that no person may drive or operate a motor vehicle while:

> [u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

For the State to charge Torbeck with OWI under § 346.63(1)(a), DFE must be either an intoxicant, a controlled substance, a controlled substance analog, or a drug. DFE is not listed as a controlled substance under either Wisconsin or federal law. A "controlled substance analog" is defined as "a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance." WIS. STAT. § 961.01(4m)(a). The State presented no evidence that DFE is "substantially similar" in chemical structure to a controlled substance. For purposes of the OWI law, "drug" is defined as:

> (a) Any substance recognized as a drug in the official U.S. pharmacopoeia and national formulary or official homeopathic pharmacopoeia of the United States or any supplement to either of them;
>
> (b) Any substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease or other conditions in persons or other animals;
>
> (c) Any substance other than a device or food intended to affect the structure or any function of the body of persons or other animals; or
>
> (d) Any substance intended for use as a component of any article specified in pars. (a) to (c) but does not include gases or devices or articles intended for use or consumption in or for mechanical, industrial, manufacturing or scientific applications or purposes.

WIS. STAT. § 450.01(10).[3] A search for DFE on the "U.S. Pharmacopeial Convention" website (http://www.usp.org/) did not yield any results. DFE is thus not a "drug" under Wisconsin law. As DFE is not a controlled substance, controlled substance analog, or drug, the State may only charge Torbeck with OWI if DFE is an "intoxicant."

¶7 "Intoxicant" is not defined within the OWI statute. The State urges that we adopt a plain meaning definition by relying on Merriam-Webster's dictionary, which defines "intoxicant" as "something that intoxicates," and "intoxicate" as "to excite or stupefy by alcohol or drug especially to the point where physical and mental control is markedly diminished." MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/intoxicant & http://www.merriam-webster.com/dictionary/intoxicate (last visited July 12, 2012). According to the State, DFE "is a substance that causes euphoria and diminished motor control" and thus should be considered an intoxicant. Torbeck responds that even using the State's dictionary definition, DFE is not an "intoxicant." As "intoxicate" means to "excite or stupefy by alcohol or drug," and as DFE is neither alcohol nor a drug, DFE cannot be an intoxicant.

¶8 We agree with Torbeck that the legislature has not codified DFE as an "intoxicant" within the OWI statute and thus affirm the dismissal of the OWI

[3] The introductory paragraph of WIS. STAT. § 340.01 provides that, "In [WIS. STAT. §] 23.33 and [WIS. STAT.] chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning[.]" Section 340.01(15mm) states that the definition of "drug" is found in WIS. STAT. § 450.01(10). We therefore rely on § 450.01(10) to define drug under the OWI law.

charge. Our decision is guided by the fact that the legislature has already created a punishment for Torbeck's conduct: reckless driving. WISCONSIN STAT. ch. 346 is entitled "Rules of the Road." Subchapter X is entitled "Reckless and Drunken Driving." The reckless driving statute provides that "[n]o person may endanger the safety of any person or property by the negligent operation of a vehicle." WIS. STAT. § 346.62(2). Before crashing into a ditch, Torbeck nearly hit the driver of another vehicle. Her conduct seemingly constitutes reckless driving.

¶9 Additionally, the penalty schemes for reckless driving and OWI are similar. Both first offense reckless driving and first offense OWI result in fines (of differing amounts) but no jail time. *Compare* WIS. STAT. § 346.65(1)(a) ($25-$200 for reckless driving) *with* § 346.65(2)(am)1 ($150-$300 for OWI). A second reckless driving conviction within a four-year period increases the fine and provides for up to a year in jail (with no minimum jail requirement). Sec. 346.65(1)(b). Similarly, second offense OWI provides for a stiffer fine and jail time between five days and six months. Sec. 346.65(2)(am)2.[4] Given that reckless driving and OWI are grouped under the same statutory subchapter, and given the similarities between the penalty structures, we hold that the legislature intended that Torbeck's conduct would fall under reckless driving and not OWI.

¶10 Our conclusion is further bolstered by two canons of statutory construction. The first is the rule of lenity, which provides that ambiguous criminal statutes are construed in favor of the defendant. ***State v. Kittilstad***, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999). As Justice Scalia has stated, the rule

[4] One significant difference is that OWI penalties, unlike reckless driving penalties, continue to escalate beyond the second conviction.

of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." ***United States v. Santos***, 553 U.S. 507, 514 (2008) (plurality opinion), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, 18 U.S.C.A § 1956(c)(9), Pub. L. No. 111-21, § 2(f)(1), 123 Stat. 1617. This "venerable" rule "also places the weight of inertia upon the party that can best induce [the legislature] to speak more clearly and keeps courts from making criminal law in [the legislature's] stead." ***Id.***

¶11 The second canon we rely upon is *expressio unius est exclusio alterius*, which provides that "to express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY 620 (8th ed. 2004). We apply this canon when examining WIS. STAT. § 346.935, entitled "Intoxicants in motor vehicles." That statute provides that "[n]o person may drink alcohol beverages *or inhale nitrous oxide* while he or she is in any motor vehicle when the vehicle is upon a highway." Sec. 346.935(1) (emphasis added). The statute also bans opened bottles or receptacles containing alcohol or nitrous oxide within a vehicle. Sec. 346.935(2)-(3). We read this statute as the legislature targeting the problem of inhaling dangerous chemicals while driving a vehicle.[5] The fact that DFE is not mentioned is significant, for in statutory interpretation there is a general inference that omissions are intentional. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:25 (7th ed. 2007).

[5] The record does not indicate whether Torbeck huffed DFE before driving her vehicle or while in her vehicle.

CONCLUSION

¶12 We affirm the judgment dismissing Torbeck's third OWI charge.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.