**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 11, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP533-CR** **Cir. Ct. No. 2010CF398**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**FREDERICK J. SCOTT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Reversed*.

¶1 HOOVER, P.J.[1] Frederick Scott appeals a judgment of conviction for operating with a prohibited alcohol concentration, fourth offense. Scott argues the court erred by finding he was prohibited from driving with an alcohol

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

concentration in excess of .02. He contends his successful collateral attack reduced his countable convictions to two and, therefore, he is only prohibited from driving with an alcohol concentration of .08 or more. Scott asserts that, because his alcohol concentration was .03, he cannot be guilty of operating with a prohibited alcohol concentration as a matter of law. We agree and reverse.

## BACKGROUND

¶2 In Wisconsin, all motorists are prohibited from driving with an alcohol concentration of .08 or more. *See* WIS. STAT. §§ 346.63(1)(b); 340.01(46m)(a). However, motorists who have three or more convictions, suspensions, or revocations, as counted under WIS. STAT. § 343.307(1), are prohibited from driving with an alcohol concentration in excess of .02. *See* WIS. STAT. §§ 346.63(1)(b); 340.01(46m)(c). If the State charges a defendant with operating with a prohibited alcohol concentration and alleges the defendant is subject to the .02 alcohol level, it must prove at trial, as an element of the offense, that the defendant has three countable offenses under § 343.307(1). *See* WIS JI—CRIMINAL 2660C (2007).

¶3 In this case, Scott drove with a .03 alcohol concentration, and, at the time he drove, he had three prior convictions as counted under WIS. STAT. § 343.307(1). The State charged him with operating with a prohibited alcohol concentration and operating while intoxicated, both as fourth offenses, and operating after revocation.[2]

[2] Scott was originally charged as a fifth offender; however, the State later amended the operating charges to fourth offenses. In his brief, Scott explains that the charges were reduced to fourth offenses because one of the convictions the State used for counting purposes had been vacated.

¶4 After being charged, Scott moved to collaterally attack one of his three countable convictions. He alleged the conviction was invalid because he was deprived of his right to counsel. The court granted Scott's motion and determined the conviction "may not be used for counting purposes, thus making this [a] … third offense for purposes of these proceedings."

¶5 Scott then argued that if he only had two countable convictions, he was only prohibited from operating with an alcohol concentration of .08 or more. He contended that, because his alcohol concentration was .03, he could not be guilty of operating with a prohibited alcohol concentration.

¶6 The circuit court determined that, irrespective of the collateral attack, Scott would still be subject to the .02 alcohol level. It reasoned that the purpose of the collateral attack was to prevent the conviction's use as a penalty enhancer and that collateral attacks are not used to negate an element of the offense.

¶7 Based on the parties' agreement, Scott then waived his right to a jury trial and stipulated that he operated a motor vehicle with an alcohol concentration of .03. The State dismissed the operating while intoxicated and operating after revocation charges. The court found Scott guilty of operating with a prohibited alcohol concentration. Scott appeals.

## DISCUSSION

¶8 "A defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used *to support guilt* or enhance punishment for another offense." ***State v. Baker***, 169 Wis. 2d 49, 59-60, 485 N.W.2d 237 (1992) (emphasis added). "A defendant may not, in a subsequent proceeding, collaterally attack a prior conviction if the prior conviction is used to identify the defendant as a member of a potentially dangerous class of individuals." ***Id.*** If a defendant is successful in his or her collateral attack, the conviction is invalidated. ***State v. Deilke***, 2004 WI 104, ¶17, 274 Wis. 2d 595, 682 N.W.2d 945.

¶9 On appeal, Scott argues his successful collateral attack invalidated his prior conviction. He contends that, once the conviction was invalidated, the court erred by relying on that conviction to support its finding that he was subject to the .02 prohibited alcohol concentration.

¶10 The State responds that the court was allowed to rely on the conviction to find Scott was subject to the .02 alcohol level. It asserts Scott's successful collateral attack does not mean the conviction is invalid for all purposes—rather, the State contends the effect is that the conviction cannot be used for impeachment or sentence enhancement purposes. The State also argues that, when determining an individual's prohibited alcohol concentration, we should look to the number of countable convictions an individual had at the time of driving—even if those convictions are subsequently collaterally attacked.

¶11 We reject the State's arguments. First, a successful collateral attack invalidates a prior conviction. ***Id.***, ¶17 ("We conclude that the result of [the defendant's] successful collateral attack on the convictions was to invalidate the

convictions."). The State cites no relevant legal authority in support of its assertion that a successful collateral attack only invalidates a conviction for certain purposes. Instead, the State cites, without explanation, a single quotation from ***Lewis v. United States***, 445 U.S. 55, 66-67 (1980): "The Court … has never suggested that an uncounseled conviction is invalid for all purposes."

¶12 However, in context, this quotation does not suggest that a successful collateral attack only invalidates a conviction for certain purposes. Rather, ***Lewis*** involved a defendant who argued he should be permitted to collaterally attack an uncounseled conviction. ***Id.*** at 58. The Court determined that, despite his lack of counsel, the defendant could not collaterally attack the conviction because it was being used to identify him as a member of a potentially dangerous class of individuals and it was not being used to "support guilt or enhance punishment." ***Id.*** at 65, 66-67. Here, conversely, Scott was successful in his collateral attack. No one argued he should not be permitted to even bring a collateral attack because the prior conviction was being used to identify him as a member of a potentially dangerous class of individuals.

¶13 Second, even if we agreed with the State and determined a successful collateral attack only means the conviction cannot be used "to support guilt or enhance punishment," we conclude that the conviction here was used "to support guilt." We disagree with the State that "support guilt" only means impeachment. In ***Loper v. Beto***, 405 U.S. 473 (1972), which the State cites for this proposition, the Court concluded a defendant could collaterally attack an uncounseled conviction that was used to impeach his credibility because that conviction was essentially being used "to support guilt." ***Id.*** at 482 (plurality) (citation omitted). The Court reasoned, "The absence of counsel impairs the

reliability of such convictions just as much when used to impeach *as when used as direct proof of guilt*." ***Id.*** (citation omitted) (emphasis added).

¶14 We conclude ***Loper*** does not limit the "support guilt" language to attacks on credibility. Rather, ***Loper*** extended the ability to collaterally attack an uncounseled conviction to one being used for impeachment because it found no difference between a conviction used for impeachment and one used for "direct proof of guilt." ***Id.*** Here, Scott's uncounseled conviction was used to directly prove an element of the offense; therefore, it was used "to support guilt."

¶15 Finally, the State points out that in ***State v. Sowatzke***, 2010 WI App 81, ¶¶11, 13, 326 Wis. 2d 227, 784 N.W.2d 700, we held an individual's prohibited alcohol level is determined by counting the number of convictions, suspensions, or revocations the individual had at the time he or she drove the vehicle. It argues that applying the ***Sowatzke*** rule in this case means that, notwithstanding the collateral attack, Scott had three convictions when he drove and is therefore subject to the .02 alcohol level.

¶16 ***Sowatzke***, however, is not a collateral attack case, and the State's argument ignores the effect a successful collateral attack has on a prior conviction. In ***Sowatzke***, the defendant had two countable convictions when he operated a motor vehicle with an alcohol concentration of .048. ***Id.***, ¶13. By the time he was charged, he had three countable convictions, and the State charged him with operating with a prohibited alcohol concentration in excess of .02. ***Id.***, ¶4. We held that, despite the three convictions, the defendant could not be held to the .02 standard because he did not yet have three countable convictions at the time he drove his vehicle. ***Id.***, ¶¶11, 13.

¶17 Here, even though Scott had three countable convictions when he operated the motor vehicle, his successful collateral attack invalided one of the countable convictions. *See* ***Dielke***, 274 Wis. 2d 595, ¶17. As a result, the court erred by relying on this invalidated conviction to support its finding that Scott was subject to the .02 alcohol level. Without three countable convictions, Scott is only prohibited from operating a motor vehicle with an alcohol concentration of .08 or more. His alcohol concentration was .03. As a matter of law, Scott cannot be guilty of operating with a prohibited alcohol concentration.

*By the Court.*—Judgment reversed.

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