

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2801-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN WILLIAM SCRIVNER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Pierce County:
DANE F. MOREY, Judge. *Affirmed.*

CANE, P.J. After pleading guilty or no contest to the charges of third offense operating while intoxicated, third offense operating after revocation with the habitual traffic offender enhancer set forth in § 351.08, STATS., and possession of drug paraphernalia, the trial court ordered that John Scrivner forfeit \$1,796 and serve 180 days in jail on the OWI conviction. When imposing this sentence, the trial court followed the judicial district's sentencing guidelines for OWI offenses. With respect to the OAR conviction, the trial court ordered a fine of \$1,000 and thirty days in jail concurrent with the OWI charge. Relying on § 351.08, the court then added a \$100 fine and thirty consecutive days in jail for the habitual traffic offender enhancement relating to the OAR conviction.

Scrivner makes two arguments on appeal. First, he cannot be sentenced for additional jail time with respect to the habitual traffic offender (HTO) enhancer if he is not given the maximum sentence on the underlying OAR conviction. Therefore, he reasons the additional sentence of thirty days in jail and the \$100 fine should be vacated. Second, the use of the judicial district sentencing guidelines on the OWI conviction violates the separation of powers doctrine. These arguments are rejected and the sentences are affirmed.

The OAR, third offense, provides for a penalty of a fine of not less than \$1,000 nor more than \$2,000, and imprisonment not less than thirty days mandatory and not more than nine months.

The relevant part of § 351.08, STATS., provides:

Any person who is convicted of operating a motor vehicle in this state while the revocation under this chapter is in effect shall, *in addition to any penalty imposed under s. 343.44*, be fined not to exceed \$5,000 and imprisoned not to exceed 180 days. (Emphasis added.)

Scrivner contends that under *State v. Harris*, 119 Wis.2d 612, 350 N.W.2d 633 (1984), imposition of a term of imprisonment less than the maximum authorized by statute on the underlying offense precludes application of a repeater statute in sentencing. When an excess sentence is imposed, the excess portion is void. *State v. Zimmerman*, 185 Wis.2d 549, 559, 518 N.W.2d 303, 306 (Ct. App. 1994).

Scrivner's reliance on *Harris* is misplaced. In *Harris*, the supreme court concluded that under the specific language of § 939.62, STATS. (increased penalty for habitual criminality), the statute was not applicable to a defendant's sentence unless the maximum sentence is imposed for the crime for which the defendant is convicted. *Id.* at 616-17, 350 N.W.2d at 636. On the other hand, here we are dealing with the motor vehicle code and not the repeater statute of § 939.62. Where there is specific language in a statutory chapter, that language shall control rather than general language from another chapter. *State v. Taylor*, 170 Wis.2d 524, 529, 489 N.W.2d 664, 666 (Ct. App. 1992).

Under the plain language of § 351.08, STATS., any person convicted of operating a motor vehicle while revoked, "shall, in addition to any penalty imposed" receive an additional fine and jail term. Unlike § 939.62, STATS., § 351.02, STATS., does not state that the HTO penalty shall be applied when the maximum penalty is imposed. Rather, it states that the additional penalty shall be in addition to *any* penalty imposed. Scrivner's argument is therefore rejected.

Next, Scrivner argues that the trial court misused its sentencing discretion by applying the judicial district's sentencing guidelines when imposing the recommended sentence on the OWI conviction. He contends that the legislature has not granted any express authority for the adoption of these guidelines, but instead the guidelines were created by the judges within the district and violates the separation of powers doctrine. Additionally, he argues that these judicial district guidelines differ from the statutory scheme for sentencing and consequently violate the separation of powers doctrine.

In response to Scrivner's argument, the State refers this court to § 346.65(2m), STATS., where the legislature in ch. 346 (Rules of the Road) specifically required judicial administrative districts to establish sentencing guidelines for violations of §§ 346.63(1)(b) or (5), STATS. Section 346.65(2m) provides:

In imposing a sentence under sub. (2) for a violation of s. 346.63(1)(b) or (5) or a local ordinance in conformity therewith, the court shall review the record and consider the aggravating and mitigating factors in the matter. If the level of the person's blood alcohol level is known, the court shall consider that level as a factor in sentencing. The chief judge of each judicial administrative district shall adopt guidelines, under the chief judge's authority to adopt local rules under SCR 70.34, for the consideration of aggravating and mitigating factors.

This court is unpersuaded that the trial court's application of these guidelines impinges on the legislature's authority when in fact the legislature has encouraged, if not mandated, the use of these guidelines. In the judicial administrative district, the circuit courts have developed a framework to

provide guidance and uniformity of sentencing on these OWI convictions within the district. The trial court's imposed sentence on the OWI conviction falls within both the legislative and judicial districts' parameters and does not constitute a misuse of its sentencing discretion.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.