

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

October 24, 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, 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. 96-1807-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**VENUS M. MANNS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded.*

DYKMAN, P.J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Venus M. Manns appeals from a judgment convicting her of operating a motor vehicle after revocation (OAR), § 343.44, STATS., second offense, and imposing criminal penalties under § 343.44(2)(b)1. Manns argues that the revocation or suspension that was the basis for her OAR conviction was imposed solely due to failure to pay a forfeiture, and therefore the trial court could not impose criminal penalties pursuant to § 343.44(2)(b)2. Because we conclude that the only suspension in effect at the time of the most recent OAR violation was imposed for failure to pay a forfeiture, even though Manns failed

to reinstate her operating privileges after a two-month revocation for excessive demerit points, the trial court should have sentenced Manns under § 343.44(2)(b)2. We reverse the judgment and remand the matter with directions to resentence Manns under § 343.44(2)(b)2.

## BACKGROUND

The facts are not in dispute. On June 14, 1990, and again on June 4, 1991, Manns' license was suspended for five years for failure to pay a forfeiture. On February 21, 1991, she received a six-month revocation for operating while suspended, and on April 19, 1991, she received a two-month revocation for excessive demerit points. Manns did not reinstate her license from either of these revocations. Finally, on August 31, 1991, Manns was cited for operating after revocation pursuant to § 343.44(1), STATS.,<sup>1</sup> for the second time in five years.

The State filed a complaint against Manns seeking sanctions under § 343.44(2)(b)1, STATS. Manns moved to dismiss the case, arguing that these penalties were not available. The trial court denied Manns' motion, found her guilty of OAR, second offense, and sentenced her to five days in jail, fined her \$420 plus costs, and revoked her license for six months. Manns appeals.

## DISCUSSION

Manns argues that sanctions were not available under § 343.44(2)(b)1, STATS., because the revocation or suspension that was the basis of her OAR violation was imposed solely due to a failure to pay a fine or a

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<sup>1</sup> Section 343.44(1), STATS., provides:

No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state during such suspension or revocation or thereafter before filing proof of financial responsibility or before that person has obtained a new license in this state ....

forfeiture. This issue presents a question of statutory interpretation, which we review independently from the trial court's determination. *State v. Muniz*, 181 Wis.2d 928, 931, 512 N.W.2d 252, 253 (Ct. App. 1994).

Manns was sentenced under § 343.44(2)(b), STATS., which provides:

1. Except as provided in subd. 2, for a 2nd conviction under this section or a local ordinance in conformity with this section within a 5-year period, a person may be fined not more than \$1,000 and shall be imprisoned for not more than 6 months.
2. If the revocation or suspension that is the basis of a violation was imposed solely due to a failure to pay a fine or a forfeiture, or was imposed solely due to a failure to pay a fine or forfeiture and one or more subsequent convictions for violating sub. (1), the person may be required to forfeit not more than \$1,000. This subdivision applies regardless of the person's failure to reinstate his or her operating privilege.

In both *State v. Muniz*, 181 Wis.2d 928, 512 N.W.2d 252 (Ct. App. 1994), and *State v. Biljan*, 177 Wis.2d 14, 501 N.W.2d 820 (Ct. App. 1993), we construed § 343.44, STATS., to determine whether the State could seek a criminal conviction under § 343.44(2) against a defendant who had violated § 343.44(1) on more than one occasion. In *Muniz*, we concluded that the only suspension in effect was a five-year suspension for Muniz's failure to pay a forfeiture, and thus a § 343.44(2)(b)1 sanction was not available. 181 Wis.2d at 933, 512 N.W.2d at 254. In *Biljan*, we concluded that the revocation was not based solely upon Biljan's failure to pay a forfeiture, and therefore a § 343.44(2)(c)1 sanction was available.<sup>2</sup> 177 Wis.2d at 20, 501 N.W.2d at 823.

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<sup>2</sup> Section 343.44(2)(c), STATS., provides the penalty for OAR, third offense, while § 343.44(2)(b) provides the penalty for OAR, second offense. Otherwise, the sections are identical.

Manns argues that this is a *Muniz* case, and therefore § 343.44(2)(b)1 sanctions are not available. The State argues that *Muniz* is distinguishable, and therefore *Muniz* is not controlling authority. In the alternative, the State argues that *Muniz* was incorrectly decided and that we should rely on *Biljan* instead. We agree with Manns that *Muniz* is controlling and reverse.

The facts in *Muniz* are substantially identical to the facts of this case:

Muniz was convicted of OAR, first offense, in May 1989. Effective January 29, 1991, Muniz's operating privileges were revoked under § 343.32(2)(c), STATS., for two months because he had accumulated twelve demerit points in a twelve-month period. During that two-month period, Muniz's operating privileges were suspended for five years because he failed to pay a forfeiture. Muniz failed to reinstate his license on March 30, 1991, the date his demerit suspension expired. On June 9, 1991, Muniz was cited for OAR, second offense, the violation underlying this appeal.

*Muniz*, 181 Wis.2d at 930, 512 N.W.2d at 252-53.

Other than the suspension for failure to pay a forfeiture, the only suspension in *Muniz* was the two-month suspension for excessive demerit points. The demerit point suspension, however, expired before Muniz was cited for OAR, second offense. We concluded that "under the specific provisions of § 343.44(2)(b)2 Muniz's failure to reinstate his operating privileges after his demerit points suspension expired does not render his OAR, second offense, criminal and § 343.44(2)(b)2 inapplicable." *Id.* at 933, 512 N.W.2d at 254.<sup>3</sup>

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<sup>3</sup> We stated that the last sentence of § 343.44(2)(b)2, STATS., "demonstrates the legislature's intent to decriminalize the offense of operating after the revocation period has expired but before reinstatement of operating privileges, as long as no intervening suspensions that were imposed for other than a failure to pay a fine or forfeiture are still in

Like *Muniz*, the only revocations on Manns' driving record other than the suspensions for failing to pay a forfeiture had expired prior to Manns' citation for OAR, second offense.<sup>4</sup> Because this case is factually indistinguishable from *Muniz*, we conclude that the trial court erred in imposing penalties under § 343.44(2)(b)1, STATS.

The State argues that *Muniz* is distinguishable from this case because *Muniz* involved a demerit point suspension, while this case involves a demerit point revocation.<sup>5</sup> We do not see the relevance of this distinction. The legislature made no attempt to distinguish revocations from suspensions in the language of § 343.44, STATS. Section 343.44(1) provides: "No person whose operating privilege has been duly *revoked or suspended* ... shall operate a motor vehicle upon any highway in this state during such *suspension or revocation* ...." (Emphasis added.) And § 343.44(2)(b)2 provides: "If the *revocation or suspension* that is the basis of a violation was imposed solely due to the failure to pay a fine or a forfeiture ... the person may be required to forfeit not more than \$1,000." (Emphasis added.)

The last sentence of § 343.44(2)(b)2, STATS., provides: "This subdivision applies regardless of the person's failure to reinstate his or her operating privilege." Because the rest of § 343.44 refers to both suspensions and revocations, we see no reason why the legislature would intend the last sentence of § 343.44(2)(b)2 to refer only to a person's failure to reinstate his or her operating privilege following a suspension, but not a revocation, without stating so. Therefore, we reject the State's argument.

The State also argues that *Muniz* is irreconcilable with *Biljan*, and therefore we should not give precedential value to *Muniz*. According to § 752.41(2), STATS., however, "Officially published opinions of the court of

(. . . continued)  
effect." *State v. Muniz*, 181 Wis.2d 928, 932-33, 512 N.W.2d 252, 253 (Ct. App. 1994).

<sup>4</sup> The February 21, 1991 revocation for operating while suspended expired on August 22, 1991, and the April 19, 1991 demerit point revocation expired on June 20, 1991. Manns was cited for operating after revocation, second offense, on August 31, 1991.

<sup>5</sup> It is unclear whether *Muniz*'s operating privileges were revoked for excessive demerit points or whether they were suspended. We will assume, *arguendo*, that *Muniz* received a demerit point suspension.

appeals shall have statewide precedential effect." Nonetheless, *Biljan* is distinguishable from *Muniz*.

In *Muniz*, the defendant's operating privileges were suspended for two months for excessive demerit points, and this suspension expired prior to the defendant being cited for OAR, second offense. In *Biljan*, on the other hand, the defendant's operating privileges were suspended under § 344.14, STATS., for failing to post a security deposit under § 344.13, STATS., and Biljan's suspension for failure to post a security deposit remained in effect under § 344.18(1), STATS.,<sup>6</sup> at the time of his May 1992 citation for OAR, third offense. *Biljan*, 177 Wis.2d at 18, 501 N.W.2d at 822. The court concluded:

Biljan's failure to pay a forfeiture was not the sole basis for his suspension. The safety responsibility suspension was in effect at the time Biljan was cited for OAR, third offense, the violation with which we are concerned. We therefore conclude that there is a sufficient causal relationship between the suspension for failure to post a security deposit, which is independent of Biljan's failure to pay a fine or forfeiture, and the current violation. The existence of a basis other than failure to pay a fine or forfeiture renders sec. 343.44(2)(c)2, Stats., inapplicable.

*Id.* at 20, 501 N.W.2d at 823.

Like *Muniz*, Biljan could have reinstated his license under § 344.18(1), STATS., by paying the \$50 reinstatement fee. The court concluded, however, that the failure to pay the reinstatement fee was not the basis for Biljan's suspension:

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<sup>6</sup> Section 344.18(1), STATS., provides, "Any operating privilege revoked as provided in s. 344.14 shall remain revoked and shall not be renewed or reinstated until the fee required under s. 343.21(1)(j) has been paid, the applicable provisions of s. 343.38 have been complied with and one of the following requirements has been met: ..." (Emphasis added.)

[W]hile it is true Biljan's safety responsibility suspension continues in effect under sec. 344.18(1), Stats., because he has failed to pay the \$50 reinstatement fee, his failure to reinstate his operating privileges is not the basis of that suspension or revocation. The basis of Biljan's safety responsibility suspension is his failure to post a security deposit as required under sec. 344.14.

*Id.* at 22, 501 N.W.2d at 823-24.

When Biljan was cited for OAR, third offense, his operating privileges remained suspended under § 344.18(1), STATS., because of his failure to post a security deposit, and therefore his suspension for failure to pay a fine or a forfeiture was not the sole basis of his OAR, third offense conviction, making § 343.44(2)(c)2, STATS., inapplicable. Muniz's suspension for excessive demerit points, on the other hand, expired after two months and continued solely because of his failure to reinstate his operating privilege. Because § 343.44(2)(b)2 applies "regardless of the person's failure to reinstate his or her operating privilege," Muniz could not be charged under § 343.44(2)(b)1. The cases are distinguishable.

*By the Court.*—Judgment reversed and cause remanded.

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