

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 12, 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. 96-2309

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF DANE,

Plaintiff-Respondent,

v.

GARY M. SAM,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

ROGGENSACK, J. The defendant, Gary M. Sam, appeals the denial of his motion to dismiss charges of operating a motor vehicle while under the influence of an intoxicant (OMVWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC) and also his conviction. On appeal¹, Sam contends that the initiation of a criminal OMVWI/PAC prosecution subsequent to the imposition of an administrative suspension of his

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

driving privileges violates the double jeopardy of the Fifth Amendment of the United States Constitution. Sam's argument is contrary to controlling precedent. Accordingly, the decision of the trial court is affirmed.

BACKGROUND

On March 22, 1996, Sam was stopped and arrested for OMVWI and PAC in violation of §§ 346.63(1)(a) and (b), STATS. Because Sam failed the test for a prohibited alcohol concentration, he was served with a Notice of Intent to Suspend his operating privileges, and his driver's license was administratively suspended pursuant to § 343.305, STATS. Subsequently, Sam was charged in a criminal complaint with violations of §§ 346.63(1)(a) and (b). Sam filed a motion to dismiss on double jeopardy grounds, which the trial court denied. Sam then entered a plea to the OMVWI count; the court adjudged him guilty, and imposed an appropriate sentence. Sam appeals, based on the double jeopardy contention.

DISCUSSION

Scope of Review.

Sam argues that the administrative suspension of his operating privileges is a "punishment"; and therefore, prosecution of the OMVWI constitutes placing him twice in jeopardy of punishment for the same offense, in violation of the Double Jeopardy Clause. His contention requires analysis of the Fifth Amendment of the United States Constitution², in light of Wisconsin's Implied Consent Law, § 343.305, STATS. Because the question involves the application of constitutional principles to undisputed facts, we will review the trial court's decision *de novo*. *State v. Pheil*, 152 Wis.2d 523, 529, 449 N.W.2d 858, 861 (Ct. App. 1989).

² Article I, sec. 8 of the Wisconsin Constitution also provides that "no person for the same offense may be put twice in jeopardy of punishment." However, Wisconsin

Double Jeopardy.

The Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after a conviction; and (3) protection against multiple punishments for the same offense. *State v. Kurzawa*, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994). Sam argues that he was subjected to multiple punishments for the same offense, contrary to the third prong of double jeopardy analysis.

A civil penalty may constitute "punishment" when the penalty serves the goals of punishment, such as retribution or deterrence. *United States v. Halper*, 490 U.S. 435, 448 (1989). However, this court has already determined that § 343.305, STATS., is remedial in nature because it was enacted to keep drunken drivers off the road. *State v. McMaster*, 198 Wis.2d 542, 548, 543 N.W.2d 499, 501, *petition for review granted*, 546 N.W.2d 468 (1996). In other words, the primary purpose of the implied consent law is to protect innocent drivers and pedestrians, rather than to punish drunken drivers. *Id. McMaster* represents the current state of Wisconsin law, and is binding precedent. Therefore, Sam's criminal prosecution for operating a motor vehicle while intoxicated, after the administrative suspension of his operating privileges, did not constitute multiple punishments, and did not violate the Double Jeopardy Clause.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.

(..continued)

interprets its double jeopardy clause in accordance with the rulings of the United States Supreme Court, *State v. Kurzawa*, 180 Wis.2d 502, 522, 509 N.W.2d, 712, 721, *cert. denied* 114 S. Ct. 2712 (1984), and because the defendant does not raise the Wisconsin constitutional issue, this analysis is limited to the federal clause.