COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1684-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEAN F. BERTRAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

NETTESHEIM, J. Dean F. Bertrand appeals from a judgment of conviction for operating after revocation (OAR) contrary to §§ 343.44(1) and (2)(e)1, and 351.08, STATS. On appeal, Bertrand challenges the authority of the State to prosecute this action as a criminal proceeding. Instead, Bertrand contends that only civil penalties were appropriate under § 343.44(2)(e)2. Because the revocations upon which this OAR proceeding were premised, in part,

on an offense not related to a failure to pay fines or forfeitures, we conclude that Bertrand was properly convicted of a criminal traffic offense.

FACTS

The State filed a criminal complaint against Bertrand alleging the offense of operating after revocation on July 17, 1996. The complaint additionally recited that Bertrand's license had previously been revoked on December 12, 1991, for a period of five years based on Bertrand's status as a habitual traffic offender (HTO) pursuant to § 351.08, STATS.[1]

Bertrand filed a motion to dismiss, claiming that the complaint failed to state a criminal offense. Bertrand maintained that the offenses underlying his revoked status resulted from his failure to pay fines and forfeitures and, therefore, he should only be subject to civil penalties. The trial court denied Bertrand's motion concluding that Bertrand's revoked status at the time of the current offense was in part due to an offense which was not related to a failure to pay fines or forfeitures. Bertrand waived his right to a jury trial and stipulated to each of the elements of OAR. The trial court found Bertrand guilty of the alleged offense and imposed criminal penalties under § 343.44(2)(e)1, STATS. Bertrand appeals.

DISCUSSION

The appellate issue is whether the trial court properly imposed criminal penalties under § 343.44(2)(e)1, STATS., or whether civil penalties should have been imposed under § 343.44(2)(e)2. The application of a statute to a set of undisputed facts is a question of law which we consider de novo. *See* ***NCR Corp.***

[1] This section has been amended. *See* 1995 Wis. Act 281, § 11. These changes do not affect our analysis.

v. Department of Revenue, 112 Wis.2d 406, 409, 332 N.W.2d 865, 867 (Ct. App. 1983).

Section 343.44(2)(e), STATS., provides:

> 1. Except as provided in subd. 2., for a 5th or subsequent 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 $2,500 and may be imprisoned for not more than one year in the county jail.
>
> 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 $2,500. This subdivision applies regardless of the person's failure to reinstate his or her operating privilege.

Thus, under this statute, criminal penalties may not be imposed when the revocation or suspension underlying the violation was imposed solely because the offender failed to pay a fine or forfeiture. *See* § 343.44(2)(e)2. Bertrand argues that the revocations and suspensions underlying his violation are due solely to his failure to pay fines and forfeitures and, therefore, he is only subject to civil penalties.

It is undisputed that at the time of Bertrand's current offense, his license was revoked due to his HTO status.[2] In applying § 343.44(2)(e), STATS., the trial court looked to the offenses underlying Bertrand's HTO status.

Under § 351.02(1), STATS., "habitual traffic offender" means "any person … whose record, as maintained by the department shows that the person

[2] It also appears from the record that at least two other suspensions were in effect at the time of this offense. However, because those suspensions were imposed as a result of failure to pay fines, they cannot be used to support a criminal charge against Bertrand.

has accumulated the number of convictions for the separate and distinct offenses … under par. (a) or (b) committed within a 5-year period ….” Under subsection (a), four or more convictions of any of the offenses listed, including reckless driving, *see* § 351.02(1)(a)2, and operating a motor vehicle with a suspended or revoked license, *see* § 351.02(1)(a)4, will result in an HTO revocation.

Here, the order of revocation issued to Bertrand by the Wisconsin Department of Transportation lists the offenses which formed the basis for his HTO status. The first listing is for a reckless driving offense which occurred in 1987. Bertrand’s license was not suspended or revoked as a result of this violation. However, because Bertrand failed to pay the forfeiture imposed as a result of the offense, his license was later suspended. Bertrand continued to drive and thereafter accumulated two additional convictions for operating after suspension and three additional convictions for operating after revocation. These revocations and suspensions also form the basis for Bertrand’s HTO status.

Bertrand argues that the trial court erred in concluding that his HTO status allowed consideration of all of his past violations. Bertrand relies on ***State v. Taylor***, 170 Wis.2d 524, 489 N.W.2d 664 (Ct. App. 1992), in support. Bertrand’s reliance is misplaced.

The issue in ***Taylor*** was whether the defendant could be criminally prosecuted as an HTO offender, based solely on failure to pay fines and forfeitures. *See* ***id.*** at 527, 489 N.W.2d at 665-66. In determining that Taylor’s HTO status could not be viewed as a separate offense upon which to base criminal penalties, the court stated that “being classified as an habitual traffic offender is not a separate offense, but is a status based upon one’s driving record that can result in exposure to enhanced penalties.” *See* ***id***. at 530, 489 N.W.2d at 667.

Relying on ***Taylor***, Bertrand argues that "the trial court should not have interpreted [his] HTO status as a separate offense which, by implication, revives past offenses." We disagree. While it is true that an HTO status may not be viewed as a separate offense, the court must, as it did in ***Taylor***, look to the offenses underlying the HTO status and revocation to determine whether an individual is subject to civil or criminal penalties under § 343.44(2)(e), STATS.

This court's holding in ***State v. Kniess***, 178 Wis.2d 451, 504 N.W.2d 122 (Ct. App. 1993), supports our conclusion. Like Bertrand, the defendant in ***Kniess*** challenged the trial court's imposition of criminal penalties. The court reviewed Kniess's record and concluded that "the habitual traffic offender suspension that was in effect when Kniess was arrested for OAS … was imposed for reasons other than Kniess's failure to pay a fine or forfeiture. Thus, [the civil penalty provision] does not apply and criminal sanctions … were available against Kniess." ***Id***. at 456, 504 N.W.2d at 124.

Bertrand attempts to distinguish ***Kniess*** because the defendant in that case received an HTO classification based on offenses which were all unrelated to a failure to pay fines and forfeitures. Bertrand argues that in his case only one of the offenses underlying his HTO classification was unrelated to a failure to pay a fine or forfeiture. This distinction is without merit. In ***Kniess*** we cited to the following language from ***State v. Biljan***, 177 Wis.2d 14, 20, 501 N.W.2d 820, 823 (Ct. App. 1993), which clarified the rule set forth in ***Taylor***:

> [I]f a revocation or suspension in effect at the time the defendant is cited for OAR or OAS was imposed *for other than, or in conjunction with*, the defendant's failure to pay a fine or forfeiture, *the defendant's failure to pay a fine or forfeiture is not the sole basis for the revocation or suspension*; therefore, [the civil penalty provisions do] not apply.

Kniess, 178 Wis.2d at 455, 504 N.W.2d at 124 (emphasis added) (footnote omitted). Thus, a revocation imposed for any reason other than a failure to pay a fine or forfeiture or a revocation based on a failure to pay a fine in conjunction with other offenses will preclude the application of civil penalties.

The trial court in ***Biljan*** imposed criminal penalties when the defendant's violation was based only in part upon a suspension resulting from an offense unrelated to the failure to pay a fine or forfeiture. *See* ***Biljan***, 177 Wis.2d at 18, 501 N.W.2d at 822. Like Bertrand, the defendant's revocation in ***Biljan*** was based in part upon a failure to pay a fine or forfeiture and in part upon a separate offense unrelated to a failure to pay a fine or forfeiture. Thus, the criminal penalty provision, § 343.44(2)(e)1, STATS., applies when a current HTO revocation is based in part upon an offense which is not related to a failure to pay a fine or forfeiture. The criminal penalty provision was properly applied in this case.

Bertrand next contends that the trial court may not look to his reckless driving conviction because it falls outside the statutorily prescribed five-year time limit set forth under § 343.44(2)(e)1, STATS. As we have noted, this subsection provides for criminal penalties when a defendant's fifth or subsequent conviction occurs within the five-year period preceding the violation of the instant case. However, we properly read this provision in conjunction with the very next subsection which "decriminalizes" an OAR violation if the violation is based solely on a failure to pay a fine or forfeiture. That, of course, requires us to apply the law of ***Taylor, Kniess*** and ***Biljan.*** And, as our preceding discussion reveals, that exercise requires that we look to the nature of the underlying offense which contributed to the defendant's suspended or revoked status. Here, Bertrand's reckless driving conviction contributed to his revoked status. And, since Bertrand

has the requisite number of convictions within the five-year period, he was properly prosecuted in a criminal action.

By the Court.—Judgment affirmed.

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