COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0619-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDY J. HULL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

MYSE, J. Randy J. Hull appeals a judgment of conviction and sentence finding him guilty of operating a motor vehicle while intoxicated, in violation of § 346.63(1)(a), STATS.[1] Hull contends that the trial court erred by

[1] Hull was sentenced to 75 days in jail, fined $1,800, had his licensed revoked for 30 months, and was ordered to complete an alcohol assessment. The sentence was ordered stayed pending this appeal.

relying upon two prior uncounseled civil forfeiture OWI convictions to subject to him to prosecution and punishment as a third-time OWI offender. Hull contends this violates his due process and equal protection rights under the Wisconsin and United States Constitutions. Because the use of two uncounseled civil forfeiture OWI convictions as a basis for conviction and sentencing as a third-time OWI offender does not violate either the due process clause or the equal protection clause of the Wisconsin or United States Constitutions, the trial court's judgment of conviction and sentence are affirmed.

The facts in this case are undisputed. Randy Hull was convicted of OWI in February 1988, and received a first offense civil forfeiture.[2] In June 1996, Hull was convicted of OWI a second time. The prior 1988 conviction did not trigger second offense penalties because it did not occur within five years of the 1996 conviction and therefore Hull received another first offense civil forfeiture on the 1996 conviction. Hull did not retain counsel for either of these forfeiture convictions. In May 1997, Hull was cited for OWI a third time. This was Hull's third OWI offense within the ten-year statutory period. Hull pled guilty to the OWI charge and the trial court counted his two prior OWI forfeiture convictions to convict and sentence Hull as a third-time offender.

[2] A conviction for OWI as a first offense results in a non-criminal forfeiture. Section 346.65(2)(a), STATS. Second and subsequent OWI offenses are criminal violations and result in progressively higher fines and longer mandatory minimum jail sentences. Section 346.65(2)(b) through (e), STATS. A prior OWI conviction triggers "second offense" penalties if it occurred within five years of the present offense. Section 346.65(2)(b), STATS. Prior OWI offenses within a ten-year period are considered when determining whether the present offense is a third or subsequent offense. Section 346.65(2)(c) through (e), STATS. Under this scheme it is possible for a person to acquire two non-criminal first offense OWI convictions and then be subject to third offense criminal penalties if another OWI conviction is obtained within ten years of the first conviction. *See* ***State v. Foust***, 214 Wis.2d 567, 569, 570 N.W.2d 905, 906 (Ct. App. 1997).

Hull contends that it is an unconstitutional violation of his due process and equal protection rights to predicate a third OWI conviction and sentence on two uncounseled civil forfeitures. This issue involves the application of constitutional standards to undisputed facts, which is a question of law we decide de novo. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).

Hull seemingly makes two due process arguments. First, he appears to contend that the OWI penalty scheme, which subjects him to significant criminal sanctions for a third offense based upon two predicate civil forfeiture first offenses bears no rational or reasonable relationship to the purpose of the statute as a penalty enhancement scheme.

This argument is not compelling. Due process requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment. *See* ***State v. Jackman***, 60 Wis.2d 700, 705, 211 N.W.2d 480, 484 (1973). The clear policy of the OWI penalty scheme is to facilitate the removal of drunk drivers from the highways, particularly repeat offenders. *See* ***State v. Banks***, 105 Wis.2d 32, 49, 313 N.W.2d 67, 75 (1981). Because Hull's two initial convictions were more than five years apart, they were required to be treated as civil forfeitures. The statute creating the ten-year window counts all offenses that occur within the ten-year period without regard to whether the offenses were criminal offenses or civil forfeitures. *See* ***State v. Baker***, 169 Wis.2d 49, 68, 485 N.W.2d 237, 244 (1992) (under the OWI penalty scheme the use of criminal sanctions is predicated on a defendant's status as an adjudicated offender, not upon the nature of the prior OWI offenses) (citation omitted). This is a rational method to identify and penalize repeat drunk drivers. Accordingly, Hull's conviction as a third-time OWI offender based upon *two* prior offenses,

albeit "first offenses," is consistent with his status as a third-time offender, and his sentence properly reflects the legislature's goal of increasing criminal sanctions for repeat drunk drivers.

Hull's second due process argument appears to challenge the use of *two* prior uncounseled convictions as expanding the holding in ***State v. Novak***, 107 Wis.2d 31, 42-43, 318 N.W.2d 364, 370 (1982), that a defendant's *first* conviction under a civil forfeiture action for OWI at which he was not represented by counsel is valid for all purposes including providing a basis for incarcerating defendant as a *second* offender pursuant to § 346.65, STATS. Hull fails to fully develop this argument to explain how "expanding" ***Novak*** creates a due process violation and we therefore decline to address this contention. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989). We do not, however, interpret the ***Novak*** holding as narrowly as Hull would suggest. The ***Novak*** court concluded that uncounseled civil forfeiture OWI convictions are valid for *all* purposes including providing a basis for incarcerating a defendant. We note, also, that ***Novak*** was decided prior to 1993 WIS. ACT 317, which created the ten-year "look back" period for counting OWI offenses and which creates the possibility for a person to acquire two non-criminal OWI convictions but then be subject to third offense criminal penalties if another OWI conviction is obtained within ten years of the first conviction. Section 346.65(2)(c) through (e), STATS. Therefore, Hull's due process challenges fail.

Finally, Hull contends that the use of the two prior uncounseled OWI forfeiture convictions as a predicate to reach a third OWI conviction violates the equal protection clause of the Wisconsin and United States Constitutions. Hull contends that the penalty scheme creates disparate treatment in terms of the procedural rights available to similarly situated third-time offenders. Specifically,

Hull claims that as a third-time offender, his inability to collaterally attack his uncounseled prior civil forfeiture convictions is different from the third-time offender with a second offense criminal conviction who can collaterally attack his second conviction.

Hull's equal protection argument is based upon the false premise that a third-time OWI offender with a second offense criminal conviction is similarly situated to a third-time OWI offender with two civil forfeiture convictions simply because they are both third-time offenders. Hull is not similarly situated to the offender with a prior criminal conviction. His second forfeiture conviction is based upon the length of time that has expired between his first and second convictions. Convictions resulting in civil forfeitures do not require the same procedural safeguards as criminal convictions. *See* ***Village of Bayside v. Bruner***, 33 Wis.2d 533, 535-36, 148 N.W.2d 5, 7 (1967). Under ***Novak***, an OWI offender accused of a forfeiture is not constitutionally entitled to counsel. ***Id.*** at 41, 318 N.W.2d at 369. Therefore, Hull's inability to challenge a prior civil conviction based upon a right to counsel argument is different from the offender with a prior criminal conviction. While all third-offense OWI offenders can collaterally attack a prior conviction used as a penalty enhancer, the arguments as to the validity of their prior offenses will be different since one class has been convicted criminally while the other has not. Because these offenders are not similarly situated, Hull's equal protection argument fails.

While Hull may not be accorded the "benefit" of collaterally attacking a second criminal conviction, he certainly received the "benefit" at the time of his second forfeiture conviction of not serving a more serious criminal punishment and its associated stigma. Furthermore, to now claim a denial of equal protection because had the second offense been criminal in nature, Hull might be

able to collaterally attack it, presumes facts not present here. Specifically, it assumes that Hull might have entered a guilty plea or pled no contest without representation. Such circumstances are purely speculative and do not form the basis for an equal protection claim. Accordingly, Hull's equal protection challenge fails.

Because Hull has failed to establish that the OWI penalty statute violates his due process or equal protection rights under the Wisconsin or United States Constitutions, the trial court's judgment of conviction and sentence are affirmed.

By the Court.—Judgment affirmed.

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