COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1738-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

VICKIE L. SHIPLER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 DEININGER, J. The State appeals a judgment convicting Vickie Shipler of operating a motor vehicle while under the influence of an intoxicant (OMVWI), third offense, with a minor in the vehicle, contrary to WIS. STAT.

§§ 346.63(1)(a), 346.65(2)(c) and (f) (1999-2000).[1] The trial court sentenced Shipler to 120 days of home detention to be served on electronic monitoring, pursuant to WIS. STAT. § 973.03(4)(a). The State claims the trial court erred in not sentencing Shipler to a minimum term of imprisonment in the county jail, as required by § 346.65(2)(c). We conclude the trial court did not err, and accordingly, we affirm the judgment and the sentence imposed.

BACKGROUND

¶2 The underlying facts are not in dispute. Shipler was charged with and convicted by a jury of third-offense OMVWI with a minor in the vehicle. At sentencing, Shipler requested home detention in lieu of confinement in the county jail. The State opposed this request, arguing that the court must sentence her to at least the specified minimum jail sentence, pursuant to WIS. STAT. § 346.65(2)(c).[2] The trial court ordered Shipler to serve 120 days of home detention on electronic monitoring, and it imposed a fine and driver's license revocation. The State appeals.

ANALYSIS

¶3 This appeal requires us to interpret WIS. STAT. §§ 346.65(2) and 973.03(4). Statutory interpretation is a question of law, subject to our de novo review. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). The goal of statutory interpretation is to ascertain the intent of the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The specified minimum jail sentence for the charged crime is sixty days: thirty days under WIS. STAT. § 346.65(2)(c), doubled because there was a minor passenger under sixteen years of age in the car, pursuant to § 346.65(2)(f).

legislature; to discern this intent we look first to the plain language of the statute. ***Anderson v. City of Milwaukee***, 208 Wis. 2d 18, 25 ¶12, 559 N.W.2d 563 (1997). If the statute's language is clear, we look no further and simply apply the statute to the facts and circumstances before us. ***Jungbluth v. Hometown, Inc.***, 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996).

¶4 If, however, the statute is ambiguous, we must look beyond its language and examine such things as its scope, history, context, subject matter, and purpose. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 282, 548 N.W.2d 57 (1996). On occasion, a statute appearing to be clear on its face "can be rendered ambiguous by its interaction with and its relation to other statutes." ***State v. White***, 97 Wis. 2d 193, 198, 295 N.W.2d 346 (1980). We must reasonably construe statutes to avoid conflicts, and we must attempt to harmonize apparently contradictory statutes. ***State v. Szulczewski***, 216 Wis. 2d 495, 503 ¶21, 574 N.W.2d 660 (1998).

¶5 Considered separately, neither statute presents any apparent ambiguity. WISCONSIN STAT. § 346.65(2)(c) provides that an individual convicted of third-offense OMVWI "shall be … imprisoned for not less than 30 days nor more than one year in the county jail." WISCONSIN STAT. § 973.03(4)(a) provides, in relevant part: "In lieu of a sentence of imprisonment to the county jail, a court may impose a sentence of detention at the defendant's place of residence or other place designated by the court." Taken together, however, a conflict arises: given that a third-offense OMVWI offender "shall be imprisoned" under the former statute, may the court nonetheless order monitored home detention "in lieu of imprisonment" under the latter? We conclude that it may.

¶6 The legislature clearly intended, via WIS. STAT. § 973.03(4)(a), to give trial courts discretion to employ monitored home detention in lieu of sentences to the county jail. As Shipler notes, WIS. STAT. § 346.65(2)(c) existed in substantially its current form before the legislature enacted § 973.03(4).[3] Nothing in § 973.03(4) excludes persons sentenced pursuant to § 346.65(2)(c) from its operation. The legislature is presumed to act with knowledge of existing statutes. *See* ***State v. Neumann***, 179 Wis. 2d 687, 707, 508 N.W.2d 54 (Ct. App. 1993). If the legislature did not want § 973.03(4) to apply to § 346.65(2)(c), it could easily have inserted an exclusionary cross-reference in § 973.03(4), or added one in § 346.65(2). *See, e.g.*, WIS. STAT. § 343.44(2p) (prohibiting courts from using the sentencing option under § 973.03(4) for certain operating after revocation or suspension offenses). It did not do so. We therefore conclude that a court may order monitored home detention in lieu of a specified minimum jail sentence under § 346.65(2)(c), just as it may do so for offenses which authorize jail sentences but specify no minimum number of days.[4]

¶7 The State presents four arguments in support of its position that a sentencing court *must* impose the specified minimum amount of imprisonment in a county jail, regardless of the authority granted under WIS. STAT. § 973.03(4) to

[3] WISCONSIN STAT. § 973.03(4) was created by 1987 Act 27, § 2205m, effective August 1, 1987. At the time, WIS. STAT. § 346.65(2)(c) (1985-86) provided, as it does now: "[a third-offense OMVWI offender] shall be … imprisoned for not less than 30 days nor more than one year in the county jail."

[4] In this case, the court ordered home detention for 120 days, where the minimum specified jail sentence was sixty days. See footnote 2. It is thus not necessary for us to address whether a court may order home detention for a shorter time period than that set forth in the statute. The only durational requirement specified for detention under WIS. STAT. § 973.03(4) is that it may not exceed "the maximum possible period of imprisonment." We observe, however, that when the legislature specifies a minimum as well as a maximum sentence of incarceration, it arguably intends that a non-monetary penalty of a certain minimum duration will be imposed for the offense.

impose monitored home detention in lieu of jail. First, according to the State, the plain language of WIS. STAT. § 346.65(2)(c) mandates that a court impose a minimum jail sentence. But, as we have noted, § 973.03(4) just as plainly authorizes a court to impose monitored home detention "in lieu of a sentence of imprisonment to the county jail." We have reconciled the apparent conflict between the plain language of the two statutes by adding an implicit "unless otherwise prohibited by statute" proviso to the home detention option in § 973.03(4), noting that the legislature has in fact prohibited the option for some offenses, but not for OMVWI penalties under § 346.65(2)(c). *See* WIS. STAT. § 343.44(2p).

¶8 Second, the State cites ***State v. Duffy***, 54 Wis. 2d 61, 64-65, 194 N.W.2d 624 (1972), in support of its position. The State contends that the ***Duffy*** court "concluded that where a penal statute provides that a person convicted 'shall be imprisoned,' the legislature is deemed to have removed the trial court's discretion to sentence the defendant to any other form of punishment." We agree with Shipler, however, that the ***Duffy*** analysis does not apply here. ***Duffy*** involved a court's discretionary authority to "withhold sentence" and place a defendant on probation for an offense for which the legislature had specified a minimum sentence of imprisonment. Probation is not a "sentence," and neither is incarceration ordered as a condition of probation. ***State v. Fearing***, 2000 WI App 229, ¶6, 239 Wis. 2d 105, 619 N.W.2d 115. In this case, we address the conflict between a statute which specifies a minimum sentence of imprisonment, and another which expressly authorizes a court to "impose a sentence of [monitored home] detention" "in lieu of a sentence of imprisonment to the county jail." WIS. STAT. § 973.03(4).

¶9 The State also cites ***State v. Eastman***, 220 Wis. 2d 330, 582 N.W.2d 749 (Ct. App. 1998) for the proposition that a specified minimum sentence of imprisonment trumps the authority of a court under WIS. STAT. § 973.03(4) to order a sentence of home detention in lieu of it. However, for the reason the State itself notes, ***Eastman*** also does not apply on the present facts because it expressly dealt with only court-ordered jail time as a condition of probation, not the "sentencing" of a defendant to jail. We specifically noted in ***Eastman*** that "[w]e do not address whether the trial court could have satisfied the [minimum specified imprisonment] requirement … by sentencing Eastman to one year of home detention in lieu of a one-year sentence of imprisonment to the county jail. That question is not before us." ***Id.*** at 336 n.4. Accordingly, ***Eastman*** does not assist us in deciding this case.

¶10 Third, the State points to the language of WIS. STAT. § 973.03(4)(d), which provides that a sentence to monitored home detention "is not a sentence of imprisonment." The State posits that home detention cannot therefore become a substitute for a specified minimum term of imprisonment. We find the argument somewhat circular and reject it. The authority granted to sentencing courts under § 973.03(4)(a) is to impose monitored home detention as an alternative punishment "*in lieu of* imprisonment" (emphasis added). The clarification in paragraph (d) of the subsection, that home detention does not constitute imprisonment, thus takes nothing away from the authority granted in paragraph (a) to impose a sentence of home detention any time a jail sentence might have been imposed.

¶11 Finally, the State urges us to reject any suggestion that sentencing courts must possess the authority to order home monitoring in lieu of a specified minimum term of imprisonment because sheriffs have the authority to do so under

WIS. STAT. § 302.425.[5] Shipler does not advance this argument, and our decision rests on no such premise. *See* ***Eastman***, 220 Wis. 2d at 338-39. As we have explained, we conclude that the statutes at issue in this appeal may be harmonized by simply reading WIS. STAT. § 973.03(4)(a) as permitting a court to impose the alternative punishment of monitored home detention "in lieu of" any sentence to the county jail, regardless of whether a minimum jail term is specified, except where the legislature has expressly prohibited it.

CONCLUSION

¶12 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

[5] WISCONSIN STAT. § 302.425(2) provides that "a county sheriff or a superintendent of a house of correction may place in the home detention program any person confined in jail who has been arrested for, charged with, convicted of or sentenced for a crime."