

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3225-CR

Cir. Ct. No. 97-CT-13

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DERWIN W. PETTIT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County:
EDWARD E. LEINEWEBER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Derwin W. Pettit appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), fifth offense. Pettit was originally charged with OWI, third offense, and operating a motor

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

vehicle with a prohibited blood alcohol concentration (PAC), third offense. However, while this case was pending, he accumulated two more OWI convictions in other counties. In this case, he was then convicted of OWI, fifth offense. Pettit argues that the intervening convictions should not have changed the grade of the present offenses and that he should have been sentenced for an OWI, third offense. We disagree and affirm the judgment of conviction.

FACTS

¶2 On April 9, 1997 Pettit was charged with OWI, third offense, PAC, third offense and operating a motor vehicle after revocation. While this case was pending, he was twice more convicted of OWI, in Grant County on July 22, 2000 and on June 30, 2001. On July 17, 2002 Pettit pled no contest to the charge but the parties briefed the issue of whether the offense was a third or fifth offense. After a hearing, the circuit court concluded that “all applicable law was on the books as of the acts of driving on March, 1997. The defendant’s additional acts resulting in two more convictions constituted essentially part of an ongoing offense which was not completed until the subsequent acts of driving result in the two additional convictions; therefore, the court holds that this is a fifth offense.” Pettit was then convicted of and sentenced as an OWI, fifth offense. Pettit appeals.

DISCUSSION

¶3 Pettit argues that because he was originally charged with OWI, third offense, he must be convicted of OWI, third offense, and the intervening two convictions are immaterial. Case law and the plain language of the OWI statutes belie this contention.

¶4 WISCONSIN STAT. § 346.63 (2001-02)² prohibits (1) driving or operating a motor vehicle (2) while under the influence of an intoxicant. *State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982). It is the conduct of operating a motor vehicle while under the influence of an intoxicant which is prohibited by § 346.63(1). *Id.* Nothing more need be proven to sustain a judgment of conviction against a motorist. *Id.*

¶5 WISCONSIN STAT. § 346.65 provides the penalties for violating WIS. STAT. § 346.63(1). Section 346.65(2) states, in relevant part:

(2) Any person violating s. 346.63 (1):

(a) Shall forfeit not less than \$150 nor more than \$300, except as provided in pars. (b) to (f).

(b) Except as provided in par. (f), shall be fined not less than \$350 nor more than \$1,100 and imprisoned for not less than 5 days nor more than 6 months *if the number of convictions* under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1) within a 10-year period, equals 2, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(c) Except as provided in pars. (f) and (g), shall be fined not less than \$600 nor more than \$2,000 and imprisoned for not less than 30 days nor more than one year in the county jail *if the number of convictions* under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1), equals 3, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(d) Except as provided in pars. (f) and (g), shall be fined not less than \$600 nor more than \$2,000 and imprisoned for

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

not less than 60 days nor more than one year in the county jail *if the number of convictions* under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1), equals 4, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(e) Except as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than \$600 and imprisoned for not less than 6 months *if the number of convictions* under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307 (1), equals 5 or more, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

(Emphasis added.) Repeated violations of § 346.63 are subject to increasingly harsher penalties under § 346.65(2). *McAllister*, 107 Wis. 2d at 535. This graduated penalty structure is nothing more than a penalty enhancer similar, but not identical to, a repeater statute which does not in any way alter the nature of the substantive offense. *Id.*

¶6 However, in contrast to the general repeater provisions of WIS. STAT. § 939.62, the specific language of § 346.65(2) does not require the prior conviction occur before the commission of the new offense. *State v. Banks*, 105 Wis. 2d 32, 46, 313 N.W.2d 67 (1981). Rather, they simply require criminal penalties based upon more than one drunken driving conviction within a five-year period at the time of sentencing, regardless of the order in which the convictions were entered. *Id.* at 47. “The absence of any language in sec. 346.65(2) ... requiring a prior conviction before the commission of a [subsequent] offense supports our conclusion that the criminal penalties of this statute apply where there have been” five or more convictions for OWI during a five-year period “regardless of the order in which the offenses were committed and the convictions were

entered.” *Id.* at 47-48. Pettit was properly sentenced under the penalty provisions for OWI, fifth offense. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.

