COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP125 **Cir. Ct. No. 1992TR2722**

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

IN THE MATTER OF THE REFUSAL OF ALAN C. QUAM:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN C. QUAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Fresh off a successful direct attack on a 1992 drunk driving conviction, Alan C. Quam now mounts a challenge to the circuit court's reinstatement of the refusal charge and subsequent finding that his refusal was unreasonable. We affirm because it would thwart public policy to preclude the State of Wisconsin from pursuing the refusal charge and Quam failed to file a written request for a refusal hearing when he had the chance in 1992.

¶2 On May 19, 1992, Quam was charged in Walworth county with OWI, first offense.[2] In addition, he was charged with refusing to submit to a chemical test of his blood. While the Walworth county case was pending, Quam was convicted of OWI, first offense, in Sun Prairie. The Walworth county charge was never amended to OWI, second offense. On June 17, 1992, Quam entered a guilty plea to OWI, first offense, in Walworth county and the penalties for a first offense were imposed. At the plea hearing, the trial court granted the State's motion to dismiss the refusal charge. The electronic docket notes the refusal was found to be "reasonable."

¶3 On June 12, 2007, Quam filed a motion to have the Walworth county conviction vacated.[3] He based his motion on the holding in ***County of***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Our recitation of the underlying facts is at best sketchy because the court record for the 1992 charges against Quam has been destroyed and we must rely upon the screen shots of the electronic docket.

[3] Quam's motion was a direct attack on the judgment of conviction because he was seeking to void or vacate the judgment. *See* ***Schramek v. Bohren***, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988) (A collateral attack is "an 'attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.'" (Citation omitted.)).

Walworth v. Rohner, 108 Wis. 2d 713, 716, 324 N.W.2d 682 (1982), that the "state has exclusive jurisdiction over a second offense for drunk driving." Quam asserted that under ***Rohner***, the 1992 Walworth county case should have been amended to a criminal offense after he was found guilty in Sun Prairie and, because it was not, the court did not have subject matter jurisdiction.

¶4 On November 2, 2007, the trial court granted Quam's motion. At the same time, the court granted the State's motion to reinstate the refusal charge that had been dismissed and ordered Quam to submit a written request for a refusal hearing within ten days of the hearing date. When Quam failed to file a written request for a refusal hearing, the State moved to find him in default by finding that the refusal was unreasonable. After a hearing, the court granted the State's motion and revoked Quam's driving privileges for two years. Quam appeals.

¶5 Quam raises two issues on appeal. First, did the court have the authority to reinstate the 1992 refusal charge absent clear and convincing evidence of a plea agreement requiring Walworth county to dismiss the refusal charge? Second, if the refusal charge was properly reinstated, did the court err in ordering Quam to file a written request for a refusal hearing?

¶6 The parties do not dispute the facts and all that remains for us to answer are questions of law—the extent of the court's authority—to which we apply a de novo standard of review. *See* ***State v. Wilke***, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

¶7 Quam's first issue is based on ***State v. Deilke***, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945. He contends that because the State failed to prove by clear and convincing evidence that it dismissed the refusal charge as part of a plea agreement, there is no evidence that his successful direct attack on his

conviction is a breach of a plea agreement. We agree that the State did not carry its burden of proving a plea agreement in 1992.

¶8 In ***Deilke***, the defendant mounted a successful collateral challenge to the validity of three convictions for OWI that had been entered as part of plea agreements requiring the State to dismiss PAC charges. ***Id.***, ¶¶4-8. The State moved to reinstate the dismissed PAC charges. The circuit court agreed with the State that Deilke had materially breached the plea agreements by his collateral attack and ordered two of the dismissed charges reinstated. ***Id.***, ¶¶7-8. We reversed.[4]

¶9 The supreme court accepted a petition for review and reversed the court of appeals. Pertinent to this case is the supreme court's approval of the circuit court's discretionary call to restore the parties to their position before Deilke's pleas and reinstate the three dismissed PAC charges. ***Id.***, ¶¶25-26.

¶10 The question here is whether there was a plea agreement in 1992. In ***Deilke***, the supreme court held that "[t]he burden is on the party arguing a breach to show, by clear and convincing evidence, that a breach occurred and that the breach is material and substantial." ***Id.***, ¶13. The State is hampered in its attempt to carry its burden because there is no court record available of the 1992 drunk driving case and the screen shots of the electronic docket do not establish that a plea agreement was formally entered into between the parties. Quam concludes that the State failed to carry its burden and was not entitled to a reinstatement of the refusal charge under ***Deilke***.

[4] ***State v. Deilke***, 2003 WI App 151, 266 Wis. 2d 274, 667 N.W.2d 867.

¶11 The State argues that from the evidence submitted to the circuit court, there are two plausible scenarios. It agrees with Quam that one scenario is that there was no plea agreement and the State dismissed the refusal charge out of beneficence. It also proposes an equally plausible scenario that there was a plea agreement requiring the State to dismiss the refusal charge. However, the burden to establish a plea agreement by clear and convincing evidence is not met by presenting evidence of two equally reasonable scenarios.

> "Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established," that is "evidence 'so clear, direct and weighty and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'"

In re Garrett, 357 B.R. 128, 132-133 (Bankr. C.D. Ill. 2006) (citations omitted).

¶12 Applying this definition to the evidence in this case, we must conclude that the finder of fact could not unhesitatingly come to a clear conviction that there was a plea agreement in 1992. However, this conclusion does not lead to Quam's desired result, a reversal of the circuit court's order reinstating the refusal charge.

¶13 While ***Deilke*** deals with plea agreements, it is instructive on what is the State's remedy when a party is successful in a direct challenge to a judgment and a drunk driving conviction is vacated. ***Deilke*** teaches that

> a part of [a drunk driver's] punishment [is] the effect of the statutory scheme regarding drunken driving penalties under WIS. STAT. § 346.65, which envisions progressive punishment as a central component of convictions. *See* ***State v. Banks***, 105 Wis. 2d 32, 49, 313 N.W.2d 67 (1981) (noting that removing drunk drivers from the highways is the "underlying premise of the criminal penalties" in § 346.65, and that "the purpose of general repeater statutes

> is to increase the punishment of persons who fail to learn to respect the law after suffering the initial penalties and embarrassment of conviction").

Deilke, 274 Wis. 2d 595, ¶20. ***Deilke*** goes on to establish that to promote the public policy of getting drunk drivers off the road, it was necessary to reinstate the PAC charges so they could be used as penalty enhancers in subsequent drunk driving proceedings. ***Id.*** That is the reason why the supreme court approved the circuit court's discretionary call to put the State and Deilke in the same position they were in immediately before the plea agreements were entered into.

¶14 Part of the statutory penalty scheme is the requirement that refusals be counted as convictions when applying the progressive punishment structure of the drunk driving law. WIS. STAT. § 343.307(1)(f). If Quam's refusal charge was not reinstated, the State would be denied the right to use the penalty-enhancing value of that 1992 refusal in other proceedings. Quam offers no reason why the State should be deprived of that valuable right, a right that promotes the public policy of getting drunk drivers off the road.

¶15 It is a reasonable inference from the electronic docket that absent a formal plea agreement, Quam's plea to OWI in 1992 induced the State to dismiss the refusal charge. It is also reasonable to conclude the State decided that it would not need the refusal charge to apply to the progressive penalty structure because the conviction for OWI would serve the same purpose. Now that Quam's 1992 conviction has been vacated and it cannot be used in the progressive penalty structure, the State is hampered in promoting the public policy of the State through no fault of its own.

¶16 We conclude that in the spirit of ***Deilke***, the parties should be restored to their position immediately before Quam entered a plea to OWI on

June 17, 1992. Quam cites to no authority to support the proposition that he is to be restored to his pre-plea position, but the State must be left in a worse position than it was in 1992. Quam's successful direct attack on his conviction cannot serve as an impediment to the promotion of public policy.

¶17 The next question we consider is whether the circuit court properly found that Quam's refusal was unreasonable after he failed to request a refusal hearing in writing within ten days of the reinstatement of the refusal charge. This question need not detain us long because the parties have been restored to their respective positions immediately before Quam's plea on June 17, 1992. The record establishes that at that time the refusal charge was pending, and as the circuit court held, Quam had not filed a written request of a refusal hearing within the required statutory time. WIS. STAT. § 343.305(10)(a). The circuit court erred in giving Quam the proverbial second kick at the cat when, on November 2, 2007, it granted him another ten-day period to file a written request for a refusal hearing. The court rectified that error when it properly found the refusal unreasonable after reinstatement of refusal charge.

By the Court.—Order affirmed.

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