

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2012

Diane M. Fremgen
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 Nos. 2011AP2307-CR
2012AP243-CR**

**Cir. Ct. Nos. 2011CT35
2011CT329**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**No. 2011AP2307-CR
STATE OF WISCONSIN,**

PLAINTIFF-RESPONDENT,

V.

LISA M. ARENTZ,

DEFENDANT-APPELLANT.

**No. 2012AP243-CR
STATE OF WISCONSIN,**

PLAINTIFF-RESPONDENT,

V.

ERIC R. HENDRICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 REILLY, J.¹ Lisa M. Arentz and Eric R. Hendricks appeal their convictions for third-offense operating a motor vehicle while intoxicated (OWI). Arentz and Hendricks pled no contest to third-offense OWI after the denial of their motions seeking that the State prove all of the elements of their prior OWI violations during their jury trials on their third OWI offenses. We consolidated their cases as they raised identical challenges to the constitutionality of Wisconsin's OWI statutes, and we affirm.

BACKGROUND

¶2 Arentz was charged with third-offense OWI in January 2011. At the time, she had two previous civil forfeiture OWI convictions from April 30, 1990, and December 3, 2003.² Arentz moved the circuit court to require that all the elements of her two previous convictions be proved to a jury beyond a reasonable doubt. The court denied Arentz's motion. Arentz subsequently pled no contest to third-offense OWI and was sentenced in accordance with the penalty enhancers required for a third OWI violation under WIS. STAT. § 346.65(2)(am)3.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Arentz's second conviction was a civil forfeiture because it occurred more than ten years after her first conviction. *See* WIS. STAT. § 346.65(2)(am)2.

¶3 Hendricks was charged with third-offense OWI in April 2011. Hendricks had two previous OWI-related convictions that were civil forfeitures. Hendricks moved the circuit court to require that all the elements of his previous OWI-related convictions be proved before a jury beyond a reasonable doubt. The court denied Hendricks's motion. Hendricks subsequently pled no contest and was sentenced in accordance with the penalty enhancers for a third OWI violation.

STANDARD OF REVIEW

¶4 Arentz's challenge³ to the constitutionality of Wisconsin's OWI statutory sentencing scheme calls for de novo review of the circuit court's conclusions of law. *See State v. Foust*, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997). Our standard of review is limited by the fact that we are an error-correcting court. *See Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). We are bound by prior case law until it is overruled by the Wisconsin Supreme Court. *Id.* at 189-90.

DISCUSSION

¶5 Arentz argues two related issues on appeal: (1) that a civil forfeiture OWI conviction cannot enhance a criminal conviction without all of the elements of the underlying civil forfeiture being proved to a jury beyond a reasonable doubt and (2) that WIS. STAT. § 343.307(1) is unconstitutional as applied to Arentz as it requires a court to count civil forfeiture OWI convictions when the underlying

³ As the parties submitted nearly identical briefs challenging the constitutionality of Wisconsin's OWI sentencing statutes, all references to Arentz's arguments include Hendricks's arguments.

civil forfeiture OWI convictions were obtained without the requirement of proof beyond a reasonable doubt to a unanimous jury. The issues and principles raised by Arentz have already been addressed and decided in prior cases, which have held that a prior civil forfeiture OWI is not an essential element for a later criminal charge of OWI, *see State v. Alexander*, 214 Wis. 2d 628, 644-45, 571 N.W.2d 662 (1997), and the use of a civil forfeiture OWI to enhance a later OWI violation does not violate a defendant's constitutional rights, *see State v. Novak*, 107 Wis. 2d 31, 40, 318 N.W.2d 364 (1982).

¶6 It is settled that a prior OWI conviction, whether it is civil or criminal, is not an essential element for a later OWI prosecution. *See Alexander*, 214 Wis. 2d at 650-52. At best, a prior conviction for OWI is a "status element" that places a defendant in a certain category of alleged offenders. *Id.* at 644. Evidence of the status element is wholly independent of proving to a jury the essential elements. The existence of the "status element" must only be proved beyond a reasonable doubt to the court prior to sentencing. *See State v. Saunders*, 2002 WI 107, ¶3, 255 Wis. 2d 589, 649 N.W.2d 263.

¶7 In *State v. McAllister*, 107 Wis. 2d 532, 533, 319 N.W.2d 865 (1982), the State proved beyond a reasonable doubt to a jury that McAllister was operating a motor vehicle while under the influence of an intoxicant. The State offered no proof to the jury that McAllister had been previously convicted of OWI. *Id.* McAllister moved for a judgment of acquittal or, in the alternative, for an amendment to a civil forfeiture OWI as the State had not proved beyond a reasonable doubt to the jury that he had previously been convicted of violating the OWI statute. *Id.*

¶8 The *McAllister* court held that a prior violation, regardless of it being a civil or criminal violation, is not an element of the crime of OWI “either in the ordinary sense of the meaning ... or in the constitutional sense.” *Id.* at 538. *McAllister* also held that Wisconsin’s method of considering previous convictions does not violate due process. *Id.* at 538-39. The Wisconsin Supreme Court in the same term also held that a defendant’s constitutional rights under the Sixth and Fourteenth Amendments are not violated when a civil forfeiture OWI is used to enhance a later OWI violation into a criminal offense. *See Novak*, 107 Wis. 2d at 33-34.

¶9 Arentz sidesteps established Wisconsin precedent and extrapolates her argument from *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* holds that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490. The *Apprendi* Court expressly excepted prior convictions from its holding, finding that prior convictions are not a fact that must be proved beyond a reasonable doubt to a jury in order to enhance a sentence. *Id.*

¶10 Arentz attempts to evade the “prior conviction” exception in *Apprendi* by arguing, without support, that a civil forfeiture conviction for OWI does not fall within *Apprendi*’s notion of a “prior conviction.” Arentz argues that, as the procedural safeguards of the right to a jury trial and the right to proof of the offense beyond a reasonable doubt are lacking in a civil forfeiture conviction,⁴ the

⁴ The standard of proof for a first-offense OWI is clear, satisfactory, and convincing. *See* WIS. STAT. § 800.08(3).

prior civil forfeiture conviction becomes the “functional equivalent of an element” and must be proved to a jury beyond a reasonable doubt.

¶11 Arentz does not argue that either of her earlier civil forfeiture OWI convictions were obtained unlawfully. Arentz challenges the statutory system that allows a court, upon a verdict of guilty on an OWI offense, to count prior OWI convictions toward sentencing, regardless of whether those convictions were criminal or civil. Arentz’s “functional equivalence of an element” theory would mean every OWI trial would require a trial within a trial as to any earlier civil forfeiture OWI conviction. Arentz’s premise fails as Wisconsin’s penalty enhancement scheme in WIS. STAT. § 343.307(1) is constitutional and satisfies all due process requirements. See *McAllister*, 107 Wis. 2d at 538-39; *State v. Banks*, 105 Wis. 2d 32, 50-51, 313 N.W.2d 67 (1981).

CONCLUSION

¶12 A prior conviction for a civil forfeiture OWI is a valid constitutional basis for sentencing a defendant for subsequent OWI violations. See *Novak*, 107 Wis. 2d at 43. A prior OWI conviction is not an essential element of a later-charged OWI and need not be proven to a jury beyond a reasonable doubt.

By the Court.—Judgments affirmed.

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

