



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mark Gottlieb, P.E.
Secretary
Department of Transportation
4802 Sheboygan Avenue, Room 120B
Madison, WI 53705

Dear Mr. Gottlieb:

¶ 1. Wisconsin Stat. §§ 343.30(1q) and 343.305 authorize the revocation of a person's operating privilege following a conviction for operating a vehicle under the influence of intoxicants or refusal to submit to a test for intoxication, respectively. The Department of Transportation ("DOT") may revoke the offender's operating privilege if a court fails to do so. Wis. Stat. §§ 343.30(1q)(f) and 343.305(10)(f). You ask which convictions DOT should count in making this determination.

¶ 2. Specifically, you ask whether a conviction that has been collaterally attacked for criminal sentencing purposes should be disregarded by DOT in determining whether to revoke the offender's operating privilege. An offender may challenge, or "collaterally attack," the use of a conviction for purposes of calculating a sentence for a new criminal conviction.

¶ 3. I conclude that DOT must count these convictions. The statutes require DOT to maintain a permanent record of all unvacated convictions and use that record to calculate revocations. A conviction that has been collaterally attacked remains on the record. It is irrelevant that the offender may have a right to have the conviction disregarded for criminal sentencing: the revocation of operating privileges is a civil, not a criminal, consequence.

¶ 4. In providing for license revocation, the Legislature has provided no statutory exception to exclude a conviction based on a collateral attack. The statutes mandate that specific prior convictions, suspensions, or revocations be counted. Wis. Stat. § 343.307(1) ("The court *shall* count the following . . .")(emphasis added). The statute defines "conviction" as including any "unvacated adjudication of guilt. . . ." Wis. Stat. § 340.01(9r). Even a conviction that has been expunged continues to be listed in DOT's records under Wis. Stat. § 343.23(2)(a). Wis. Stat. § 973.015(1m)(a). DOT must permanently maintain a record of those suspensions, revocations, and convictions for use in determining whether to revoke:

[S]o that the complete operator's record is available for the use of the secretary in determining whether operating privileges of such person shall be suspended, revoked, canceled, or withheld, or the person disqualified, in the interest of public safety. The record of suspensions, revocations, and convictions that would be counted under s. 343.307(2) shall be maintained permanently.

Wis. Stat. § 343.23(2)(b).

¶ 5. A conviction that has been collaterally attacked meets the definition of "conviction" under Wis. Stat. § 340.01(9r) because a collateral attack does not overturn or vacate the conviction. Instead, it attempts to avoid the conviction's force of law in a subsequent criminal proceeding. *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354. Thus, as long as the adjudication of guilt is unvacated, the conviction remains on DOT's records and should be counted in determining whether to revoke the offender's operating privilege.

¶ 6. No constitutional principle alters the analysis. As you note, a defendant may challenge the effect of a previous conviction for purposes of criminal sentencing on the grounds that it was obtained in violation of the Sixth Amendment's right to counsel in criminal proceedings. *Custis v. United States*, 511 U.S. 485, 495-96 (1994); *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *State v. Ernst*, 2005 WI 107, ¶ 22, 283 Wis. 2d 300, 699 N.W.2d 92. That principle is inapplicable to the revocation of operating privileges because revocation is a civil, not a criminal, consequence.

¶ 7. The Sixth Amendment does not prohibit the use of an uncounseled conviction for all purposes. In *Lewis v. United States*, 445 U.S. 55 (1980), the U.S. Supreme Court held that a federal prohibition on firearms possession could permissibly be based on a conviction obtained in violation of the Sixth Amendment. The Court reasoned that the Sixth Amendment was not a barrier to considering such a conviction because the statute's consequence was essentially civil:

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with *Burgett*, *Tucker*, and *Loper*. In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. . . . Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," see *Burgett*, 389 U.S., at 115, 88 S. Ct., at 262

Lewis, 445 U.S. at 67.

¶ 8. Wisconsin case law also limits the application of collateral attacks to circumstances in which the prior conviction would be used to support guilt or enhance a criminal penalty, not those in which the consequences are civil. The basic distinction has been repeatedly stated by the Wisconsin Supreme Court:

A defendant may, in a subsequent proceeding, collaterally attack a prior conviction obtained in violation of the defendant's right to counsel if the prior conviction is used to support guilt or enhance punishment for another offense. A defendant may not, in a subsequent proceeding, collaterally attack a prior conviction if the prior conviction is used to identify the defendant as a member of a potentially dangerous class of individuals.

State v. Foust, 214 Wis. 2d 568, 572, 570 N.W.2d 905 (Ct. App. 1997) (quoting *State v. Baker*, 169 Wis. 2d 49, 59-60, 485 N.W.2d 237 (1992)).

¶ 9. The revocation of operating privileges falls into the second category. "When the state revokes a person's license, the state thereby identifies and classifies that person as a potentially dangerous individual who should not drive a motor vehicle and alerts that person to this status." *Baker*, 169 Wis. 2d at 64 (footnote omitted). Unlike the use of a conviction to support guilt or enhance a punishment for a subsequent offense, its use to calculate the revocation of operating privileges results in no criminal penalty and is not punishment for the offense. It simply determines who is licensed to drive, which serves the purpose of protecting public safety on the roadways:

The automobile of today, with engineering emphasis on power and speed, can be a crippling and potentially lethal weapon in the hands of an irresponsible driver. Licensing helps to assure safe drivers and also provide a good record-keeping system for identifying irresponsible drivers.

County of Fond du Lac v. Derksen, 2002 WI App 160, ¶ 8, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted). The constitutional principle underlying a collateral attack, which arises when criminal consequences are at stake, thus does not apply to the revocation of a driver's license.

¶ 10. Courts in other jurisdictions have held consistently that an individual may not collaterally attack the validity of a prior conviction for purposes of the state's revocation of operating privileges. In *Broadwell v. Michigan Department of State*, 539 N.W.2d 585, (Mich. Ct. App. 1995), the Michigan court of appeals held that the state licensing agency could not disregard a conviction that had been collaterally attacked in the course of a criminal proceeding. The court concluded:

[D]river's license revocation is mandatory, and a prior [operating under the influence of liquor] conviction that is determined to be constitutionally infirm on collateral attack can form the basis for the administrative action of revoking a person's driving privileges.

Broadwell, 539 N.W.2d at 587 (citation omitted).

¶ 11. In the context of revocations determined in administrative proceedings, other courts have agreed that the state should disregard collateral attacks on previous convictions. *See, e.g., Ray v. Dep't of Transp.*, 821 A.2d 1275, 1278 (Pa. Commw. Ct. 2003); *Commonwealth v. Duffey*, 639 A.2d 1174, 1177 (Pa. 1994) (“[T]he scope of review of an operating privilege suspension which resulted from a criminal conviction does not include the authority to attack the validity of the underlying criminal conviction.”); *State v. Laughlin*, 634 P.2d 49, 51 (Colo. 1981) (distinguishing criminal habitual traffic offender cases, in which a constitutional challenge to an underlying conviction may be mounted, from a driver's license revocation proceeding, where it may not). These courts have concluded that a collateral attack on a prior conviction is irrelevant for license revocation purposes because revocation is not a criminal sanction. A licensee's recourse is not a collateral attack, but rather a post-conviction remedy to vacate the criminal judgment. *Ray*, 821 A.2d at 1278; *Laughlin*, 634 P.2d at 51.

¶ 12. I conclude that, unless a conviction has been vacated, DOT must count convictions that have been collaterally attacked when it determines whether to revoke an individual's operating privilege.

Sincerely,

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