



Wisconsin Department of Transportation

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Governor

Mark Gottlieb, P.E.
Secretary

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June 24, 2013

John B. Van Hollen
Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

RE: Effect of Collateral Attacks in Criminal Drunk Driving Cases upon Driver Licensing

Dear Attorney General Van Hollen:

I am requesting your formal opinion as to the effect collateral attacks in criminal drunk driving cases should properly have when determining the appropriate driver license revocation to impose following entry of the conviction. Collateral attacks are not a creation of the legislature, and we request your assistance in interpreting the law so that Division of Motor Vehicles (DMV) applies it correctly.

When courts sentence criminal defendants in Operating While Intoxicated related cases in Wisconsin, the number of prior offenses committed by the offender affects the severity of criminal sanctions to which the offender may be sentenced. For example, a second offense drunk driver faces five days to six months imprisonment; a tenth offender faces felony charges and imprisonment for 4 to 12½ years. Because the penalties change based on the number of prior offenses an offender has committed, defendants have an incentive to attempt to legally challenge prior convictions in an attempt to reduce the penalties they face in a pending case. The U.S. Supreme Court has provided criminal defendants an ability to challenge prior convictions for that purpose without requiring the defendants to return to the original court that sentenced them if they were denied their constitutional right to an attorney in the earlier case. A successful collateral attack results in an offense not counting as a prior criminal conviction for sentencing purposes in the repeat drunk driving case.

The Department's attorneys have looked at the issue of whether a collateral attack for criminal sentencing purposes should affect the collateral consequences of the conviction upon the defendant, especially the driver license revocation imposed by the state for repeat drunk driving. The U.S. Supreme Court has analyzed several cases involving felons who carried or sought a license to sell firearms. In those cases, the court has held that collateral attacks and expungement of convictions do not affect the

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revocation of authority to carry or sell guns imposed under federal law. The logic used by the U.S. Supreme Court in those cases and the text of Wisconsin's driver licensing and drunk driving laws suggest that a repeat drunk drivers' successful collateral attack of a prior conviction should not affect the driver license sanction imposed by the court or Department following conviction, even though it does affect the criminal penalty imposed under the law in the case.

Basing driver license revocations upon the official driver record would greatly simplify matters for the DMV. The problem with collateral attacks from a data processing standpoint is that prior convictions remain of record because the defendant is not absolved of the offense. The result is that DMV's calculation of the appropriate driver licensing consequences, which takes into account each valid conviction of record, may not agree with a court calculation that excludes consideration of collaterally attacked convictions. Significant time and effort is required to sort out the resulting discrepancies. If the department and courts should include all convictions of record that have not been directly challenged and vacated when determining the appropriate driver licensing consequences to the driver, much of this time consuming work can be avoided. Convictions that are directly attacked and vacated do not present the same administrative difficulties from an administrative standpoint.

I therefore request your opinion as to whether successfully collaterally attacked convictions should be counted as prior convictions for purposes of determining the collateral consequences to a driver's operating privilege upon conviction for repeatedly driving while intoxicated.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Gottlieb". The signature is stylized and cursive.

Mark Gottlieb, P.E.
Secretary