STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2012AP2782-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

ANDRE M. CHAMBLIS,

Defendant-Respondent-Cross-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, THE HONORABLE ELLIOTT M. LEVINE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

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C O U R T O F A P P E A L S

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BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

ISSUES PRESENTED

1. Did the circuit court properly conclude that the State did not present sufficient evidence to prove the fact of Chamblis's prior Illinois offense relating to operating a motor vehicle while under the influence of an intoxicant (OWI), and with a prohibited alcohol concentration (PAC), so that it could be used to enhance the sentence for his current PAC offense?

The circuit court concluded that the State did not adequately prove the fact of the prior offense, even though the State submitted an Illinois Drivers Abstract demonstrating that Chamblis's operating privilege was revoked for driving while under the influence of an intoxicant, and with a prohibited alcohol concentration.

2. Did the circuit court err in not allowing the State to submit evidence before sentencing to prove the fact of Chamblis's prior Illinois offense, so that it could be counted to enhance the sentence for his current PAC offense?

The circuit court concluded that the prosecutor violated discovery rules by submitting additional evidence of Chamblis's Illinois offense the day before the plea hearing, more than six weeks before sentencing. The court therefore did not count the Illinois offense as a prior offense, and sentenced Chamblis for PAC as a sixth offense, rather than a seventh offense.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

The State appeals a judgment convicting the defendant-respondent, Andre M. Chamblis, of PAC, and sentencing him for a sixth offense (42, A-Ap. 101-102). A vehicle driven by Chamblis was stopped in La Crosse on November 22, 2011, and he was arrested (6:1, 5). The State charged Chamblis with OWI and PAC, and asserted that he had six prior OWI-related offenses (14). The State submitted proof of five prior offenses in Minnesota, and one prior offense in Illinois (33, A-Ap. 106-117; 47:17, A-Ap. 143). The circuit court, the Honorable Elliott M. Levine, concluded that the State did not adequately prove the fact of the Illinois offense (47:25-28, A-Ap. 151-54). It informed the prosecutor that he could submit additional

evidence of the Illinois offense before sentencing (47:28, A-Ap. 154). However, when the prosecutor attempted to submit additional evidence, the court concluded that the State had violated discovery rules by not submitting the additional evidence to defense counsel sooner, and declined to consider the evidence (49:15, 19-21, A-Ap. 171, 175-77). Chamblis pled guilty to PAC, and the court imposed sentence for a sixth offense (49:25-27, A-Ap. 181-83; 42, A-Ap. 101-02).

The State filed a notice of appeal of the judgment convicting Chamblis of OWI and sentencing him for a sixth offense, rather than for a seventh offense (51). Chamblis then filed notice of a cross appeal (65).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE STATE DID NOT PROVE THE FACT OF CHAMBLIS'S ILLINOIS OWI-RELATED OFFENSE.

A. Introduction.

The State asserted that Chamblis had six prior offenses that were countable under Wis. Stat. §§ 343.307 and 346.65, and that his conviction of PAC in this case should have been for a seventh offense (14). The State produced evidence to prove the fact of five Minnesota offenses, and one Illinois offense (33, A-Ap. 106-117; 47:17, A-Ap. 143). Chamblis did not contest the five Minnesota offenses, but he did file a motion requesting that the court not count the Illinois offense (30).

Chamblis made a number of arguments in his motion. First, he asserted that the two Illinois offenses were really one offense (30:2-3). Second, he asserted that his cousin Allen Smith had posed as Chamblis in the Illinois and Minnesota offenses (30:3). Finally, Chamblis asserted that the number of prior offenses is an issue for the jury, not for the court (30:3-6).

The circuit court held a hearing on Chamblis's motion (47, A-Ap. 127-56). At the hearing, there was no dispute that the two Illinois offenses, if proved, would count as a single offense (47:4-6, A-Ap. 130-32). The court concluded that the number of prior offenses is an issue for the court, not the jury (47:24-25, A-Ap. 150-51). The court noted that the State did not submit a judgment of conviction to prove the Illinois offense (47:17, A-Ap. 143), and that the State submitted an Illinois Department of Transportation record, rather than a Wisconsin Department of Transportation record (47:18-19, A-Ap. 144-45). The court concluded that the Illinois Department of Transportation record had no date of arrest, and did not indicate "any place that it happened" (47:27, A-Ap. 153). The court concluded that the certified record from Illinois therefore "is not competent evidence under *Spaeth*" (47:28, A-Ap. 154) (citing *State v. Spaeth*, 206 Wis. 2d 135, 556 N.W.2d 728 (1996)). The court therefore concluded that "I will not consider that as a prior conviction unless there's some other evidence" (47:28, A-Ap. 154).

As the State will explain, the circuit court erred in not accepting the Illinois Department of Transportation record as competent evidence of Chamblis's prior Illinois offense.

B. Applicable statutes.

The first issue in this case concerns whether the State presented sufficient competent evidence to prove Chamblis's Illinois offense, so that it is countable to enhance the sentence for his current OWI. Whether a prior offense is countable for sentence enhancement purposes is governed by Wis. Stat. §§ 346.65, 343.307(1), and 340.01(9r). Section 346.65 "Penalty for violating sections 346.62 to 346.64" provides in relevant part that:

> **(2)** (am) Any person violating s. 346.63 (1):
>
> **6.** Except as provided in par. (f), is guilty of a Class G felony 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 7, 8, or 9, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

Section 343.307, "Prior convictions, suspensions or revocations to be counted as offenses" provides in relevant part that:

> **(1)** The court shall count the following to determine the length of a revocation under s. 343.30 (1q) (b) and to determine the penalty under ss. 114.09 (2) and 346.65 (2):
>
> (a) Convictions for violations under s. 346.63 (1), or a local ordinance in conformity with that section.
>
> (b) Convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.63 (1).
>
> (c) Convictions for violations under s. 346.63 (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle.
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.
>
> (e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.
>
> (f) Revocations under s. 343.305 (10).
>
> (g) Convictions under s. 114.09(1)(b)1. or 1m.

Wis. Stat. § 343.307(1).

Wisconsin Stat. § 340.01(9r) supplies the definition of "conviction" for use in the motor vehicle code, including § 343.307(1). *State v. Carter*, 2010 WI 132, ¶ 43, 330 Wis. 2d 1, 784 N.W.2d 213. It provides as follows:

> **340.01 Words and phrases defined.** In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:
>
> . . . .
>
> **(9r)** "Conviction" or "convicted" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of property deposited to secure the person's appearance in court, a plea of guilty or no contest accepted by the court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. It is immaterial that an appeal has been taken. "Conviction" or "convicted" includes:
>
> (a) A forfeiture of deposit under ss. 345.26 and 345.37, which forfeiture has not been vacated;
>
> (b) An adjudication of having violated a law enacted by a federally recognized American Indian tribe or band in this state.
>
> (c) An adjudication of having violated a local ordinance enacted under ch. 349;
>
> (d) A finding by a court assigned to exercise jurisdiction under chs. 48 and 938 of a violation of chs. 341 to 349 and 351 or a local ordinance enacted under ch. 349.

C. The Illinois Department of Transportation record that the State submitted was competent evidence of Chamblis's Illinois offense.

To establish prior convictions for sentence enhancement purposes, the State must present "'competent proof' of prior convictions." *Spaeth*, 206 Wis. 2d 135, 148 (citing *State v. McAllister*, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982)). In general, "competent proof" means either a defendant's admission, or "reliable documentary proof of each conviction." *Id.* (citing *McAllister*, 107 Wis. 2d at 539; *State v. Wideman*, 206 Wis. 2d 91, 104-05, 556 N.W.2d 737 (1996); *State v. Meyer*, 258 Wis. 326, 338, 46 N.W.2d 341 (1951)).

In *Spaeth*, the supreme court the State provides "competent proof" of prior violations of Wisconsin's operating after revocation law when it presents the court with "(1) an admission; (2) copies of prior judgments of conviction for OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record." *Id.* at 153.

Spaeth concerned Wisconsin convictions, suspensions, and revocations. In *State v. Devries*, 2011 WI App 78, ¶ 1, 334 Wis. 2d 430, 801 N.W.2d 336, the Wisconsin Court of Appeals addressed whether the State had sufficiently proved Devries's two out-of-state "convictions," one from Arizona and another from California. To prove the Arizona "conviction," the State submitted certified copies of an "Arizona Traffic Ticket and Complaint," two different "Phoenix Municipal Court 'Record of Proceedings,"' and a "decision by an Arizona Department of Transportation administrative law judge suspending Devries's Arizona driver's license/operating privileges for ninety days." *Id.* ¶ 5.

The State did not submit a judgment of conviction demonstrating that Devries was "convicted" of OWI. Instead, the State submitted evidence demonstrating that

> (1) Devries was arrested on August 31, 2005 for drunk driving; (2) Devries was directed to appear in court on the specified date; (3) Devries promised to appear in court on the specified date; (4) Devries had a lawyer for the Arizona matter; and (5) Devries defaulted on her obligation and promise to appear in court. Indeed, one of Devries's trial lawyers conceded that Devries had "violated a condition of her bond" in Arizona.

Id. The court of appeals concluded that these documents were sufficient to prove a prior "conviction" as defined in Wis. Stat. § 343.307. *Devries*, 334 Wis. 2d 430, ¶ 5.

In regards to the California case, the State submitted certified copies of: (1) A '"Notice to Appear' (uppercasing omitted) on a form used by the 'Sheriff's Department County of Riverside' (uppercasing omitted) California"; (2) "A complaint filed on January 26, 2004, in the Superior Court for Riverside County that charged Devries with drunk driving on December 26, 2003"; and (3) "A document titled 'Case Print' (uppercasing omitted) for the Riverside courts referencing Devries's arrest on December 26, 2003." *Id.* ¶ 6.

The State did not submit a judgment of conviction. However the court of appeals concluded that the documents the State submitted proved that:

> (1) Devries was arrested on December 26, 2003, for drunk driving; (2) Devries was "ordered" to appear in court on the date specified in the Notice to Appear; (3) Devries promised to appear in court on the date specified in the Notice to Appear; (4) Devries did not appear on the date specified in the Notice to Appear; (5) Devries had a lawyer for the California matter; (6) Devries pled "not guilty"; and (7) Devries did not appear for trial.

Id. ¶ 7.

The court of appeals concluded that:

> Thus, the documents support the circuit court's conclusion that Devries had a "conviction" as that word is defined by Wis. Stat. § 340.01(9r), because she did not appear in court after she was arrested and released even though she was "ordered" to do so, and she did not appear on the date scheduled for trial. *See* § 340.01(9r) (defining "conviction" as including: a "fail[ure] to comply with the law in a court of original jurisdiction"; and a "violation of a condition of release without the deposit of property.").

Id.

In the current case, the State submitted a certified copy of a document from the Illinois Department of Transportation, which indicated that Andre M. Chamblis, a male born 01-07-83, and who resided in Chicago, was arrested on 12-26-01, and that his operating privilege was revoked effective 07-20-02 (33, A-Ap. 106-117)[1]. The record indicates that on 12-26-01, Chamblis received three tickets in Cook County: (1) ticket number 25153 for "DUI/Alcohol concentration above limit"; (2) ticket number 25152 for "DUI/Alcohol"; and(3) ticket number 25151 for "Driving without a valid license or permit." The record indicates that Chamblis's operating privilege was revoked, effective 07-20-02, in the 1st district in Cook County.

The circuit court concluded that this evidence was not competent evidence to prove a prior conviction because the documents did not show the date of arrest or the place of the illegal driving. The face of the documents demonstrates that the court was incorrect. The State

[1] The Illinois driving record of Andre M. Chamblis is the document with blue and red writing in the appellate record at 33, but with no page numbers.

maintains that, like in *Devries*, the documents submitted by the State were sufficient to prove a prior conviction.

The documents establish that Chamblis was arrested on 12-26-01, for "DUI/Alcohol concentration above limit" (PAC) and DUI /Alcohol (OWI), in Cook County, Illinois, and that his operating privilege was revoked effective 07-20-02 (33, A-Ap. 106-117). Under *Devries* and *Carter*, the State need only prove that it was determined that Chamblis violated the law in Illinois, and that as a result, he was "convicted." This is exactly what the documents submitted by the State showed.

The circuit court concluded that the documents submitted by the State were not competent evidence, and that "it creates a very unjust situation, with basically an assertion that there's some conviction in the State of Illinois, somewhere in the State of Illinois, but we don't know where it is. That's fundamentally unjust. There has to be more identification that that" (47:28, A-Ap. 154).

However, as explained above, the documents showed the date of arrest, the date of revocation, and the location of the court that entered the revocation. The document therefore constitutes sufficient evidence to prove the fact of the prior conviction.

For these reasons, the State submitted sufficient competent evidence to prove the fact of Chamblis's prior Illinois offense, and the circuit court erred by concluding that the State had not proved the prior offense.

As the State will next explain, even if the court were correct in concluding that the evidence the State submitted to prove the prior offense was not competent evidence, the court erred in not accepting the additional evidence the State attempted to submit, before sentencing, to prove that Chamblis had six prior offenses and should be sentenced for a seventh offense.

II. THE CIRCUIT COURT ERRED IN NOT ACCEPTING ADDITIONAL EVIDENCE THAT THE STATE SUBMITTED BEFORE SENTENCING THAT PROVED CHAMBLIS'S PRIOR ILLINOIS OFFENSE.

A. Introduction.

After the circuit court concluded that the evidence the State submitted to prove Chamblis's Illinois prior offense was insufficient, the court stated that it would not consider the offense as a prior conviction "unless there's other evidence" (47:28, A-Ap. 154). The court stated that "if obviously more evidence is supplied, Mr. Xiong, we will review it at that point in time" (47:28, A-Ap. 154).

At the plea hearing, held one week after the motion hearing, the parties discussed Chamblis pleading guilty to OWI, and the prosecutor told the court that he wanted to make an offer of proof and then submit additional information that he obtained to further prove the fact of the Illinois prior offense (49:6, A-Ap. 162).

However, the court informed the prosecutor that it wanted to know what level of felony Chamblis was going to plead to. The court stated:

> At some point, you have to as the cliché, cut and fish bait, you know, either cut bait or fish. That's the whole thing. What are we doing? Are we going to hassle over this one? I know it makes a difference between a G and an H, but they're both felonies and they both have substantial prison time over them. Do we want to continue on with this process or not, and I guess I'm asking the State to seriously think because right now I'm going to take the evidence as it is presented and I think the State probably knows what my position is, because I believe I made it very clear. I mean, of the case law that I read into the record last time we had a hearing what the court thinks.

> Unless there was something new that came up like a judgment of conviction, like a sentencing transcript, like some type of evidence indicating that Mr. Chamblis is the individual that, that has convictions in Illinois on that day, I'm going to stick probably with my original ruling.

(49:8-9, A-Ap. 164-65).

The prosecutor pointed out that the number of prior convictions is an issue at sentencing, and that the State had additional information from Illinois regarding the Illinois offense (49:10-11, A-Ap. 166-67). The prosecutor explained that he had a "clarified driver's transcript," that, like the original document the State submitted, showed an arrest date of December 26, 2001, and convictions the equivalent of OWI and PAC, entered in the Cook County First District Court (49:10, A-Ap. 166).

The court noted that the additional documents the State was submitting showed a date of arrest and a jurisdiction (49:11, A-Ap. 167). However, Chamblis's defense counsel argued that the additional documents were "too little, too late" (49:12, A-Ap. 168).

The court seemingly agreed with defense counsel, and it declined to consider the additional documents (49:12-15, A-Ap. 168-71). The court seemed to conclude that by not obtaining and submitting the additional information to defense counsel sooner, the State violated discovery rules (49:15, A-Ap. 171). The court concluded that it would not accept additional information relating to the number of prior offense, for sentencing purposes (49:15, A-Ap. 171).

The prosecutor objected to the court's decision on two grounds. First, the prosecutor noted that the documents it originally submitted were sufficient to prove the act of Chamblis's prior Illinois offense (49:17, 22-23, A-Ap. 173, 178-79). Second, the prosecutor noted that the time for determining the number of prior offenses is at sentencing, and that the court therefore should consider

evidence submitted to prove the number of priors if the evidence is submitted prior to sentencing (49:18, 23, A-Ap. 174, 179).

The trial court concluded that the evidence of prior offenses had to be submitted to the court before the defendant entered a guilty plea, so that the defendant would know the maximum penalty he would face (49:19, A-Ap. 175). The court noted that the prosecutor had submitted the additional documents to the court and defense counsel before Chamblis entered his guilty plea, but the court concluded that the prosecutor had violated discovery rules by not submitting the documents sooner (49:19-21, A-Ap. 175-77).

The court accepted Chamblis's guilty plea to PAC as a sixth offense, based on his five prior Minnesota offenses (49:25-27, A-Ap. 181-83). The court did not count Chamblis's Illinois offense, for the equivalent of OWI and PAC, on December 26, 2001. At the sentencing hearing, the prosecutor renewed the State's objection to not counting Chamblis's Illinois offense for sentence enhancement purposes (50:7, A-Ap. 202). However, the court imposed sentence for PAC as a sixth offense (50:17, A-Ap. 212).

As the State will explain, the court erred in not accepting the information that the State attempted to present, and in not sentencing Chamblis for a seventh offense.

B. The number of prior offenses that count for sentence enhancement purposes is determined at sentencing.

The State maintains that the circuit court erred in not considering the evidence that the State submitted to prove the Illinois prior offense. The court in this case expressed its concern with the difficulties involved in a defendant pleading guilty to OWI or PAC without

knowing how many prior offenses will be counted, and therefore knowing the precise range of penalties he or she faces. However, that is how the OWI penalty statute operates.

"The enhanced penalty provisions of Wis. Stat. § 346.65(2) do not address the manner by which the State is to establish prior offenses at sentencing." *Wideman*, 206 Wis.2d at 98. However, it is well established that the time for counting prior offenses for sentence enhancement purposes is at sentencing. The supreme court made clear in *Wideman* that the number of prior offenses is not an element of OWI, and the number of prior offenses need not be proved to a jury.

> The court has held that for an accused to be given an enhanced penalty as a repeat OWI offender, the State need not prove the existence of a prior offense as an element of the offense of operating a motor vehicle while intoxicated. [*State v. McAllister*, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982)] Thus, proof of a prior offense need not be submitted to the jury.
>
> Nonetheless, *McAllister* made clear that for the circuit court to impose an enhanced penalty under Wis. Stat. § 346.65(2) the State must establish the prior offense. *McAllister*, 107 Wis. 2d at 539, 319 N.W.2d 865. A prior offense is an element of Wis. Stat. § 346.65(2)(c), the OWI penalty enhancement statute, rather than of Wis. Stat. § 346.63(1), the substantive crime charged.
>
> In *McAllister*, the court stated that prior OWI offenses "may be proven by certified copies of conviction or other competent proof offered by the state before sentencing." *McAllister*, 107 Wis. 2d at 539, 319 N.W.2d 865. Further, said the court, "[t]here is no presumption of innocence accruing to the defendant regarding the previous conviction," but the accused must have an opportunity to challenge the existence of the prior offense. *Id.*

Wideman, 206 Wis. 2d at 104-05 (footnote omitted).

The supreme court in *Wideman* then made explicit that the State must prove the number of priors at sentencing, not before the defendant enters a plea. The court stated:

> The State and defense counsel should, prior to sentencing, investigate the accused's prior driving record. The State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof. Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses. The State and defense counsel should, whenever appropriate, stipulate to the prior offenses. If the State and defense counsel follow these suggestions there should be no need for either party to request a continuance of a sentencing proceeding to obtain proof of prior offenses.
>
> In addition to suggesting the above practices for the State and defense counsel, we recommend that before imposing sentence the circuit court make findings based on the record about the exact dates and nature of prior offenses.

Id. at 108.

The workings of the statutes governing the counting of prior offenses to enhance the sentence for subsequent OWI-related offenses mean that a defendant who enters a guilty or no contest plea to OWI or PAC, and who is not sentenced immediately, will not know for certain how many prior convictions the court will count at sentencing, and what range of sentences he or she faces. Under Wisconsin's system, the court is to count the number or prior convictions at sentencing. "[T]he number of a defendant's prior OMVWI convictions to be counted for penalty enhancement purposes is *not* an element of the offense of OMVWI." *State v. Matke*, 2005 WI App 4, ¶ 6, 278 Wis. 2d 403, 692 N.W.2d 265 (quoting *McAllister*, 107 Wis. 2d at 535). "Thus, in order to obtain a conviction for the crime of second-offense OMVWI, the

State need only prove beyond a reasonable doubt that the defendant (1) operated a motor vehicle (2) while under the influence of an intoxicant." *Id.* (citing *McAllister*, 107 Wis. 2d at 535). "The number of prior convictions for penalty enhancement purposes need only 'be proven by certified copies of conviction or other competent proof offered by the state before sentencing.'" *Id.* (quoting *McAllister*, 107 Wis. 2d at 539). The law makes clear that the order of the convictions is irrelevant. Specifically a "prior" offense need not be one involving operation of a motor vehicle before the operation in the case in which the sentence is to be enhanced. What matters is how many convictions a person has when sentenced in the current case. *Id.* ¶ 9.

In this case, Chamblis entered a guilty plea to PAC. The Illinois offense had no bearing on the PAC charge to which Chamblis pled guilty, PAC with a blood alcohol concentration exceeding 0.02. The crime has three elements: (1) that a person operated a motor vehicle; (2) with a prohibited alcohol concentration; and (3) at the time the person operated the motor vehicle, he or she had at least three prior OWI-related offenses as counted under Wis. Stat. § 343.307(1). Wis. JI—Criminal 2660C (2007). The third element, the number of prior offenses, is an element to be found by a jury only if the defendant elects not to stipulate to it.

In pleading guilty to PAC, Chamblis admitted to operating a motor vehicle with a prohibited alcohol concentration, and that he had at least three prior countable OWI-related offenses. He also admitted that he had five prior offenses from Minnesota. Whether he also had a sixth prior offense—the Illinois offense at issue in this appeal—had nothing to do with his guilt of PAC for driving with a blood alcohol concentration above 0.02. Whether the Illinois offense was a countable prior offense was only an issue at sentencing. If it counted as a prior offense, Chamblis would properly be sentenced for a seventh offense. If not, he would properly be sentenced for a sixth offense.

The circuit court seemed troubled by the idea that if it allowed the State to present evidence of the Illinois offense after Chamblis pled guilty, but before sentencing, Chamblis would not know at the time of his plea what level felony he would be sentenced for, and what the range of penalties would be.

However, this is exactly what the graduated penalty structure for OWI-related offenses contemplates. For instance, in this case, even if the State had not presented evidence of the Illinois offense, or agreed not to appeal the circuit court's ruling not counting that offense, Chamblis would not necessarily have been sentenced for a sixth offense. Chamblis entered a guilty plea to PAC. He was sentenced more than six weeks later. If he had been convicted of and sentenced for an additional countable OWI-related offense between the date he entered his guilty plea and the date he was sentenced, Chamblis would properly have been sentenced for a seventh offense in this case. It makes no This is the case even if act of driving that resulted in the additional OWI conviction had occurred after Chamblis pled guilty in the present case. Matke,

As Wisconsin courts have made clear, the timing of offenses does not matter. The supreme court determined in 1981 that Wisconsin's OWI penalty enhancement statute, "§ 346.65(2) did not specify that convictions for prior offenses must precede the commission of the present offense." *Matke*, 278 Wis. 2d 403, ¶ 5 (citing *State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981)). The court of appeals concluded in *Matke* that "[t]here can be little question that, under ***Banks*** and ***McAllister***, the proper time to determine the number of a defendant's prior convictions for sentence enhancement purposes is at sentencing, regardless of whether some convictions may have occurred after a defendant committed the present offense." *Id* ¶ 9 (citing *McAllister*, 107 Wis. 2d 532; *Banks*, 105 Wis. 2d 32).

What matters is how many countable prior offenses a person has when he is sentenced. *Id.* Therefore, even if Chamblis had five countable prior offenses when he pled guilty in this case on September 19, 2012, if he then drove drunk on September 20, 2012, and was convicted of and sentenced for OWI or PAC before he was sentenced in this case on November 5, 2012, he would properly be sentenced in this case for PAC as a seventh offense.

In this case, the prosecutor attempted to prove the fact of Chamblis's prior Illinois offense well before sentencing. The prosecutor informed the court on September 19, 2012 about the additional evidence it had received and wanted to submit in an offer of proof. The court did not consider the evidence. The court imposed sentence on November 5, 2012, more than six weeks later.

The State properly presented the additional evidence well before sentencing, and the circuit court erred by not considering it.

C. The additional evidence that the State attempted to submit to the court was competent evidence that proved Chamblis's Illinois prior offense.

The additional evidence submitted by the prosecutor was a more easily read version of the documents the prosecutor originally submitted (34, A-Ap. 117-21), and addition documentation form Illinois (35, A-Ap. 122-26). The documents, like the first documents the prosecutor submitted, indicate that Chamblis was arrested on 12-26-01, and that he received three tickets (34:1-2, A-Ap. 117-18). Ticket 25153 was for DUI/Alcohol concentration above the legal limit (PAC) (34:1, A-Ap. 117). Ticket number 25152 was for DUI/Alcohol (OWI) (34:1, A-Ap. 117). Ticket number 25151 was for driving without a valid license or permit (34:2, A-Ap. 118). The document states that Chamblis was convicted of the PAC

offense in the first district court in Cook County, on 10-22-02, and of the OWI offense in the first district court in Cook County, on 06-19-02[2] (34:1-2, A-Ap. 117-18).

Like the evidence that the court of appeals concluded was sufficient to prove a prior offense in *Devries*, the evidence here was sufficient to prove Chamblis's Illinois prior offense.

In concluding that the prosecutor in this case committed a discovery violation by not submitting additional evidence of Chamblis's prior convictions to the defense before the plea hearing, the circuit court seemingly overlooked that the time to count prior offenses is at sentencing, and that the prosecutor is required only to provide proof beyond a reasonable doubt of the number of prior offenses, to the court, before sentencing. *Matke*, 278 Wis. 2d 403, ¶ 6 (quoting *McAllister*, 107 Wis. 2d 532).

In this case, the prosecutor provided sufficient proof of Chamblis's Illinois prior offense before he entered his plea, and then presented even more evidence proving the prior offense, more than six weeks before the court imposed sentence. Chamblis's defense counsel had notice of the alleged offense before sentencing, and had ample time to challenge the fact of the prior offense. The State therefore did not commit a discovery violation. Instead, the prosecutor did exactly what the supreme court has instructed prosecutors to do to prove prior offenses:

> The State and defense counsel should, prior to sentencing, investigate the accused's prior driving record. The State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof. Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations of prior

[2] The document submitted by the prosecutor also shows that Chamblis was convicted of driving without a license or permit, on 06-19-02. That would not appear to an OWI-related offense countable under Wis. Stat. § 343.307(1) (34:2, A-Ap. 118).

> offenses are incorrect or defense counsel cannot verify the existence of the prior offenses. The State and defense counsel should, whenever appropriate, stipulate to the prior offenses. If the State and defense counsel follow these suggestions there should be no need for either party to request a continuance of a sentencing proceeding to obtain proof of prior offenses.

Wideman, 206 Wis. 2d at 108.

The circuit court in this case also seemingly concluded that because the State did not provide a judgment of conviction for the Illinois offense, the defense did not have an opportunity to collaterally attack the Illinois offense so that it may not be used for sentence enhancement (47:28, A-Ap. 154).

However, in order to collaterally attack a prior conviction, a defendant must establish that he or she had the right to counsel for the prior offense, and that the right to counsel was violated. In many cases, involving things like refusals, first offense OWI or PAC violations in Wisconsin, administrative suspensions, findings of a bond forfeiture, etc., there is no right to counsel, and no possibility of a collateral attack. Regardless, the prior offense still counts for sentence enhancement.

Moreover, the point of a collateral attack on a prior conviction is to preclude the court from counting the prior offense to enhance the sentence for the current OWI-related offense. In this case, the State submitted the additional evidence more than six weeks before sentencing. Chamblis certainly had an opportunity to attempt to collaterally attack the Illinois offense before sentencing.

In not considering the evidence the State submitted, and in not imposing sentence for PAC as a seventh offense, the court erred. In determining how many prior convictions are to be counted for sentence enhancement purposes under Wis. Stat. §§ 346.65(2) and 343.307, the

court's task is to count the prior convictions that the State proves. Section 343.307(1) specifically provides that "(1) The court shall count the following to determine the length of a revocation under s. 343.30 (1q) (b) and to determine the penalty under ss. 114.09 (2) and 346.65 (2)." Wis. Stat. § 343.307(1).

The "shall count" language is similar to language recently explained by the Wisconsin Supreme Court, in *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 40, __ Wis. 2d __, 832 N.W.2d 121:

> Likewise, Wis. Stat. § 343.305(10)(a) states that "if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court shall proceed under this subsection," and "[i]f no hearing was requested, the revocation period shall begin 30 days after the date of the refusal." *Id.* Different revocation periods are set forth that take into account the person's previous suspensions, revocations, or convictions. Wis. Stat. § 343.305(10)(b).

Brefka, 2013 WI 54, ¶ 21. The supreme court concluded that the word "shall" in the statute is mandatory, rather than directory. *Id.* ¶ 26.

The same is logically true in regards to § 343.307(1). When the legislature stated that "The court shall count the following to determine . . . the penalty under . . . 346.65(2)," Wis. Stat. § 343.307(1), it logically did not mean that courts can count the priors. It meant that courts are required to count the priors.

In this case, the State submitted sufficient proof of the fact of a prior offense in Illinois. The court was required to count the prior offense, and unless Chamblis was able to successfully challenge the offense, to sentence

him for a seventh offense, rather than a sixth offense.[3] By not counting the offense, the court erred. This court should therefore remand the case to the circuit court with instructions to count the Illinois prior offense, and unless Chamblis is able to successfully challenge the prior, to impose sentence for OWI as a seventh offense.

CONCLUSION

For the foregoing reasons, this court should remand the case to the circuit court with instructions to sentence Chamblis for operating with a prohibited alcohol concentration as a seventh offense.

Dated this 2nd day of August, 2013.

Respectfully submitted,

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[3] Chamblis asserted that his cousin had committed the Illinois offense that appears on Chamblis's Illinois driving record, as well as the Minnesota offenses on Chamblis's Minnesota driving record (30:3). If Chamblis's wants the Illinois conviction not to count, he should challenge it in Illinois. If he does not do so successfully, the Illinois prior offense should count to enhance the sentence for his current PAC conviction.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,924 words.

Dated this 2nd day of August, 2013.

_____
Michael C. Sanders
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of August, 2013.

_____
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