STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP2782-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

ANDRE M. CHAMBLIS,

Defendant-Respondent-Cross-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT OF CONVICTION AND REMANDING TO THE CIRCUIT COURT WITH INSTRUCTIONS TO ISSUE AN AMENDED JUDGMENT OF CONVICTION AND IMPOSE A NEW SENTENCE, AND DISMISSING A CROSS-APPEAL

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Page

Page

OTHER AUTHORITIES CITED

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

This case is before the court on Chamblis's petition for review of an unpublished per curiam opinion of the court of appeals, *State v. Andre M. Chamblis*, No. 2012AP2782-CR (Wis. Ct. App. Dist. IV May 29, 2014). The court of appeals' decision reversed a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), and sentence for a sixth offense, entered in the circuit court for La Crosse County, the Honorable Elliott Levine, presiding (42). The court of appeals remanded the case to the circuit court with instructions to issue an amended judgment of conviction and impose sentence for a seventh offense. *Chamblis*, slip op. ¶ 31.

The following background facts are taken from the court of appeals' decision:[1]

> In November 2011, Chamblis was arrested on suspicion of operating while intoxicated in La Crosse, Wisconsin [6:1, 5]. The State filed a complaint charging Chamblis with (1) operating while intoxicated (OWI) as a fifth or sixth offense and as a repeater; (2) operating with a PAC as a fifth or sixth offense and as a repeater; and (3) obstructing an officer as a repeater [6:1-2], The complaint alleged that Chamblis had previously been convicted of five OWI-related offenses in Minnesota [6:3].
>
> In January 2012, the State filed an amended information charging Chamblis with OWI as a seventh, eighth, or ninth

[1] The State has added bracketed record citations to the court of appeals' recitation of the facts where appropriate.

offense and as a repeater, and operating with a PAC as a seventh, eighth, or ninth offense and as a repeater [14]. The State alleged that Chamblis had previously been convicted of two OWI-related offenses in Illinois, in addition to the five Minnesota convictions [14:3]. The State attached documentation regarding the purported Illinois convictions to the amended information [33]. The circuit court granted the State's motion to amend the information [58:5].

In August 2012, Chamblis filed a motion challenging the two Illinois convictions alleged in the amended information on multiple grounds [30]. The circuit court held a hearing on the motion on September 12, 2012 [47]. Chamblis first argued that the two purported Illinois convictions should be counted as one conviction because they "stem[med] from the same incident" [30:3; 47:4]. The State did not object to this argument [47:5-6], and the circuit court therefore determined that the two Illinois convictions alleged in the amended information would be counted as one conviction.

Chamblis's other argument pertinent to the issues in this appeal was that the documentation that the State had submitted with the amended information was not sufficient to prove that Chamblis had been convicted of an OWI-related offense in Illinois [47:6-13]. Citing ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996), the circuit court determined that the documentation the State had submitted to prove the purported Illinois conviction was "not competent evidence" [47:27-28]. The court explained, "I will not consider [the purported Illinois conviction] as a prior conviction unless there's other evidence [47:28]. Obviously, judgments of conviction would make a difference or some other information" [47:28]. The court further explained to the prosecutor that "if obviously

more evidence is supplied, … we will review it at that point in time" [47:28]

On September 14, 2012, the circuit court held a final pretrial hearing, at which the parties informed the court that Chamblis intended to enter a plea rather than proceed to trial [48:3]. Chamblis's counsel stated: "Your Honor, this will be a plea…. I believe the State is going to be requesting a PSI [presentence investigation], so [we] don't need a sentencing hearing to go with the plea date" [48:3]. At this hearing, there was no discussion regarding additional evidence of the purported Illinois conviction.

The circuit court held a plea hearing on September 19, 2012 [49; R-Ap. 101-39]. At the plea hearing, the parties informed the court that Chamblis intended to plead guilty to operating with a PAC as a fourth offense "or greater" [49:4; R-Ap. 104]. Chamblis admitted that he had previously been convicted of five OWI-related offenses in Minnesota [49:4; R-Ap. 104]. However, the prosecutor and Chamblis's counsel informed the court that "proof of the prior" Illinois conviction remained an issue [49:3-4; R-Ap. 103-04].

Regarding the purported Illinois conviction, the circuit court asked the prosecutor:

> Was there a particular amount of time ... that you thought you would need [in order] to try to get further information ... is that what you're trying to do is get further information on that prior [Illinois] conviction, or are you just going to make an argument based on the record we have here? [49:6; R-Ap. 106].

The prosecutor responded that he had obtained "additional information from

> Illinois" [49:9; R-Ap. 109] The prosecutor had not at that point turned over the additional evidence to the circuit court or to Chamblis's counsel [49:9-10; R-Ap. 109-10]. Chamblis's counsel argued: "[I]n terms of the State digging into things further ... there should be some stopping point of information coming in, and at this point there shouldn't be any more information turned over to us at this late date" [49:6; R-Ap. 106]. Determining that the additional evidence that the prosecutor stated he wanted to introduce was being offered "too late," the circuit court excluded the additional evidence [49:15; R-Ap. 115]. Chamblis subsequently pled guilty to operating with a prohibited alcohol concentration, as a sixth offense [49:25-27; R-Ap. 125-27].
>
> At a sentencing hearing in November 2012, the circuit court sentenced Chamblis to four years' imprisonment (two years' initial confinement, two years' extended supervision) [50:19-20].

Chamblis, slip op. ¶¶ 4-11 (footnotes omitted).

The State appealed the judgment of conviction, asserting that the circuit court erred in not counting the Illinois conviction for sentence enhancement purposes, and in therefore sentencing Chamblis for PAC as a sixth offense rather than a seventh offense (51).

Chamblis moved to dismiss the State's appeal (*see* 54:1), but the court of appeals denied the motion (54). He moved for reconsideration (*see* 55), but the court of appeals also denied that motion (55). Chamblis then filed a cross-appeal, asserting that the trial court erred in denying his motion to suppress evidence gathered after a police officer stopped the vehicle he was driving (65).

The court of appeals agreed with the State that the circuit court erred in not counting the Illinois conviction. *Chamblis*, slip op. ¶ 24. The court concluded that the court erred in excluding the "additional evidence" the prosecutor submitted, and that the "additional documents" "definitively show that Chamblis was convicted of 'operating a motor vehicle while under the influence'" in Illinois on June 19, 2002. *Id.* The court further concluded that the record demonstrates that Chamblis was aware when he entered his plea that whether his Illinois conviction would be counted was still "at issue," and that if it were counted, he would face penalties for a seventh offense, including imprisonment of up to ten years with up to five years of initial confinement, and a mandatory minimum of three years of initial confinement. *Id.* ¶¶ 28-29. The court of appeals therefore remanded the case to the circuit court to issue an amended judgment of conviction and to impose sentence for PAC as a seventh offense. *Id.* ¶ 31.

The court of appeals dismissed Chamblis's cross-appeal, concluding that the stop of his vehicle was supported by reasonable suspicion, and that the circuit court therefore properly denied his motion to suppress evidence. *Id.* ¶ 36.

Chamblis petitioned for review, and this court granted the petition.

SUMMARY OF ARGUMENT

This court granted review on two issues. The first is:

> Where a defendant seeks to plead guilty or no contest to a charge of operating a motor

> vehicle while under the influence of an intoxicant (OWI), or with a prohibited alcohol concentration (PAC), [do] State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and due process principles require that the number of prior offenses that count for sentence enhancement be determined prior to entry of the defendant's plea?

This issue was not specifically addressed by the court of appeals, likely because the circuit court determined the number of prior offenses that counted for sentence enhancement purposes prior to the entry of the defendant's plea.

In this case the State provided evidence of Chamblis's prior convictions, and the circuit court determined the number of prior convictions, before Chamblis pled guilty. However, as the court of appeals recognized, the circuit court's pre-plea determination was wrong because it incorrectly excluded evidence of the Illinois conviction. *Chamblis*, slip op. ¶¶ 23-24. Chamblis admitted to five prior convictions, and as the court of appeals concluded, the State "definitively" proved a sixth prior conviction. *Chamblis*, slip op. ¶ 24. In his petition and brief to this court, Chamblis has not disputed the court of appeals' conclusion.

Chamblis's position is that the circuit court must determine the number of convictions that will count for sentence enhancement before entry of the plea. His position is seemingly that even if the court's determination is wrong, whether because the court erred in not recognizing a prior conviction, or for any other reason, the court is required to impose sentence based on its pre-plea determination. Anything else would be a due process violation.

The State's position is that a court must ensure that a defendant entering a guilty or no contest plea understands the nature of the offense and the range of penalties he or she faces upon conviction. But under Wis. Stat. §§ 346.65 and 343.307(1),[2] the determination of the total convictions for sentence enhancement is made at or before sentencing, and the court is required to impose sentence on the basis of the total number of countable convictions a person has at the time of sentencing.

A defendant who enters a plea without understanding the range of penalties he or she faces can move to withdraw the plea. But a defendant is not entitled to a sentence based on the incorrect number of convictions.

The second issue on which this court granted review is:

> Is a court of appeals' decision ordering remand to the circuit court with instructions to: (1) issue an amended judgment of conviction reflecting a conviction for operating with a PAC, as a seventh offense, and (2) hold a resentencing hearing, and impose a sentence consistent with the penalty ranges for a seventh offense, constitutionally impermissible under Bangert and due process principles where the defendant specifically entered a plea of guilty to PAC as a sixth offense, where the circuit court sentenced the defendant in accordance to proper penalties for PAC as a sixth offense, and where the defendant has already served the confinement portion of such sentence?

[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

The State maintains that this issue is really whether the entering of an amended judgment of conviction and the imposition of sentence for PAC as a seventh offense would violate *Bangert*[3] and due process principles.

The court of appeals concluded that when Chamblis pled guilty he was aware of the penalties he faced if it were determined that he had six prior convictions rather than five, and that an amended judgment of conviction and imposition of a proper sentence for a seventh offense therefore would not violate due process. *Chamblis*, slip op. ¶¶ 28-31.

Chamblis's position is seemingly that even though the circuit court erred in determining the number of prior conviction he had, and therefore improperly imposed sentence for a sixth offense rather than a seventh offense, correcting the court's error and imposing a proper sentence would violate his right to due process. He argues that his due process rights would be violated because he relied on the circuit court's incorrect determination, and because he has served the confinement portion of the sentence that was imposed, even though that term is shorter than the minimum term of confinement that could have been imposed had he been properly sentenced for a seventh offense.

The State's position is that because it proved seven convictions, the circuit court was required under §§ 343.307(1) and 346.65(2) to impose sentence for a seventh offense. Chamblis has no due process right to a sentence based on the

[3] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

circuit court's error in not counting one of his prior convictions.

If Chamblis could show a violation of Wis. Stat § 971.08, and that he entered his guilty plea without understanding that he could be sentenced for a seventh offense, and what penalties he could face, he would be entitled to withdraw his guilty plea.

In this case, however, the court of appeals concluded that the record demonstrates that Chamblis was aware that he could be convicted of and sentenced for a seventh offense. *Chamblis*, slip op. ¶ 28. Even if Chamblis could show that the court was incorrect, he would only be entitled to move to withdraw his plea. He is not entitled to benefit from the circuit court's error and to be sentenced for a sixth offense when the State "definitively" proved that this is his seventh conviction.

Finally, the State's position is that it is not fundamentally unfair that Chamblis, who does not dispute that he has seven countable OWI-related convictions, be sentenced for a seventh offense.

ARGUMENT

I. A CIRCUIT COURT MUST INFORM A DEFENDANT PLEADING GUILTY TO OWI OR PAC OF THE NATURE OF THE CHARGE AND THE RANGE OF PENALTIES, BUT THE COURT MUST IMPOSE SENTENCE IN ACCORDANCE WITH THE NUMBER OF CONVICTIONS COUNTED AT THE TIME OF SENTENCING.

A. Under *Bangert* and Wis. Stat. § 971.08, a court must inform a defendant of the nature of the charge and the range of penalties before accepting a guilty or no contest plea.

A circuit court is required to inform a defendant of the nature of the charge and the range of penalties before accepting the defendant's plea of guilty or no contest. In *Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), this court set forth that a court accepting a plea must conduct a colloquy with a defendant sufficient:

> (1) To determine the extent of the defendant's education and general comprehension;
>
> (2) To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries;

> (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
>
> (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circum-stances which would not be apparent to a layman such as the accused;
>
> (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him; and
>
> (6) To personally ascertain whether a factual basis exists to support the plea.

Id. at 261-62 (citations omitted).

Wisconsin Stat. § 971.08 "Pleas of guilty and no contest; withdrawal thereof" similarly requires that when a trial court accepts a plea, "it shall":

> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

> (d) Inquire of the district attorney whether he or she has complied with s. 971.095 (2).

Before accepting a plea, a court is required to inform the defendant of the elements of the crime. But it is well established that the number of prior convictions is not an element of OWI or PAC, except when the number of convictions means that a person cannot legally operate a motor vehicle with a blood alcohol concentration in excess of 0.02, rather than the generally applicable 0.08 standard.

An OWI charge has only two elements: (1) the person operated a motor vehicle; and (2) while the person was under the influence of an intoxicant. Wis. JI-Criminal 2663 (2006). In *State v. McAllister,* 107 Wis. 2d 532, 319 N.W.2d 865 (1982), this court unanimously held that "the fact of a prior violation, civil or criminal, is not an element of the crime of OMVWI either in the ordinary sense of the meaning of the word element, *i.e.*, the incidents of conduct giving rise to the prosecution, or in the constitutional sense." *Id.* at 538. This court concluded that the graduated penalty structure under § 346.65(2) (1981-82) "is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense; *i.e.*, the prohibited conduct, but rather goes only to the question of punishment." *Id.* at 535. This court further determined that because the number of prior convictions is not an element of OWI, the question of the existence of the prior convictions need not be submitted to the jury. *Id.* at 532-33, 538-39.

A PAC charge for a person with fewer than three countable prior convictions similarly has two

elements: (1) the defendant operated a motor vehicle; and (2) with a prohibited alcohol concentration. Wis. JI-Criminal 2660 (2006).

The number of prior convictions is an element of a PAC charge only for a person with three or more prior OWI-related convictions. That charge has three elements: (1) the defendant operated a motor vehicle; (2) with a prohibited alcohol concentration of 0.02; (3) with three or more prior offenses. Wis. Stat. §§ 346.63(1)(b), 340.01(46m)(c); Wis. JI-Criminal 2660C (2002); 1999 Wisconsin Act 109.

A court accepting a plea to a PAC 0.02 charge must inform the defendant of the two basic elements of PAC, and also that a third element is that the defendant has three or more prior OWI-related convictions.

Here, Chamblis pled guilty to PAC 0.02. The court was therefore required to inform him that to prove him guilty the State would have to prove that he operated a motor vehicle; with a prohibited alcohol concentration above 0.02; and that he had three or more prior OWI-related convictions. Chamblis does not assert that the court failed to inform him of any of these elements.

A court accepting a plea is also required to inform the defendant of the range of penalties he or she will face if convicted. The State maintains that the requirement that a court ensure that a defendant understand the range of penalties does not mean that the court is required to make a definitive determination of the number of prior convictions a person will have at sentencing, before accepting a guilty or no contest plea. For

instance, in this case, at the plea hearing, Chamblis's defense counsel informed the court that Chamblis wanted to plead guilty to a PAC charge, that he admitted to the elements of the crime and to five prior convictions from Minnesota, but that the parties disagreed about whether the sixth prior conviction, from Illinois, could properly be counted (49:4-5; R-Ap. 104-05).

The State maintains that in this type of case, a court could properly verify that the defendant understands the situation, inform the defendant of the potential penalties depending on whether the prior conviction is ultimately counted, and if the court is satisfied that the defendant understands, accept the defendant's plea.

As a practical matter, when a court accepts a defendant's guilty or no contest plea to OWI or PAC and then proceeds to sentencing, the court will have informed the defendant of how many priors the State has proved and what range of penalties the defendant faces.

But, as the State will explain, a court is required to impose sentence based on the number of convictions it counts at the time of sentencing. In a case in which the court does not impose sentence immediately after accepting the plea, the court cannot definitively tell the defendant how many convictions will be counted because, the court cannot know how many convictions the defendant will have at the time of sentencing.

B. Under Wis. Stat. §§ 343.307(1) and 346.65, a court is required to count a defendant's prior convictions and impose sentence according to the total number of convictions a person has at the time of sentencing.

By their plain language, the statutes governing the penalties for OWI and PAC violations require that the court determine the number of convictions at the time of sentencing, after the person has pled guilty or no contest or been found guilty at trial. The OWI and PAC statute, Wis. Stat. § 346.63(1), does not set forth the penalties for OWI and PAC violations. The penalties for violations of the OWI or PAC laws are found in Wis. Stat. § 346.65(2).

In *McAllister,* 107 Wis. 2d at 535, this court concluded that the graduated penalty structure under § 346.65(2) (1981-82) "is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense; *i.e.*, the prohibited conduct, but rather goes only to the question of punishment."

Wisconsin Stat. § 346.65(2)(am) provides that for violations of § 346.63(1), a court is required to impose sentence depending on the number of convictions under Wis. Stat. §§ 940.09(1) and 940.25, and convictions that are counted under § 343.307(1).[4]

[4] Wisconsin Stat. § 343.307 "Prior convictions, suspensions or revocations to be counted as offenses," provides in relevant part:

Subsection 6 of § 346.65(2)(am) applies to a defendant with seven total convictions, like Chamblis. It provides that:

> 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

---

(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 for violations under s. 114.09 (1) (b) 1. or 1m.

> 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. The court shall impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years.

The statute does not say that a court determines the number of convictions under § 343.307(1) and then adds one for the current conviction. It says that the court determines the number of convictions counted under § 343.307(1) and imposes sentence according to that number.

Wisconsin Stat. § 343.307(1) provides that the court is required to count a person's convictions. The interplay of § 343.307(1) and § 346.65(2)(am)6., necessarily means that all of the person's convictions, including the present conviction, are counted under § 343.307(1).

Before entry of a guilty or no contest plea, a person has not been convicted. At that time, the total number of convictions under § 343.307(1) can only be the number of convictions a person has before the conviction that will occur after the defendant pleads guilty. That obviously is not the number of convictions that the court is required to count under § 346.65(2)(am).

The only logical reading of the statutes is that the court is required to determine the total number of convictions after the person has been convicted in the current case. This reading is entirely consistent with the interpretation of the statutes by this court and the court of appeals.

Wisconsin courts have recognized that sentencing is based on the number of convictions a person has at the time of sentencing. In *State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981), this court determined that a circuit court is required to impose sentence according to the number of convictions a person has at the time of sentencing. It stated that the penalty provisions for OWI violations "require criminal penalties based upon more than one drunken driving conviction or license revocation within a five-year period at the time of sentencing." *Id.* at 47.

In *McAllister,* 107 Wis. 2d 532, this court stated that prior OWI offenses "may be proven by certified copies of conviction or other competent proof offered by the state before sentencing." *Id.* at 539. This court added that "The defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge prior to sentencing. However, the convictions may be proven by certified copies of conviction or other competent proof offered by the state before sentencing." *Id.*

In *State v. Wideman*, 206 Wis. 2d 91, 556 N.W.2d 737 (1996), this court made explicit that the State must prove the number of priors at sentencing, not before the defendant enters a plea. This 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.

In *State v. Matke*, 2005 WI App 4, ¶ 9, 278 Wis. 2d 403, 692 N.W.2d 265, the court appeals reached the same conclusion, stating: "There 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."

Chamblis asserts that these cases do not establish that the court must determine the number of prior convictions at the time of sentencing (Chamblis's Br. at 19-20). He argues that neither *McAllister* nor *Wideman* held that the time for counting convictions is at sentencing. He argues that "The phrases '[p]rior to sentencing' and 'before sentencing' are entirely consistent with the challenge and determination being made prior [to] the entry of a plea of guilty or no contest. After all, the entry of a guilty or no contest plea plainly occurs 'prior to' or 'before sentencing'" (Chamblis's Br. at 20).

Of course, that the entry of a plea comes before sentencing does not mean that an act that must be done before sentencing must also be done before entry of the plea. By that logic, the court would be required to determine the number of convictions a person has before the person is charged because that also occurs before sentencing.

Chamblis points out, correctly, that *McAllister*, *Wideman*, and *Matke* were all cases in which a defendant was convicted after a trial, rather than a guilty plea. But he points to no authority holding that although the number of convictions is determined after a person is found guilty at trial, it must be determined before a person pleads guilty. He does not explain why a person who exercises the constitutional right to a jury trial could receive an enhanced sentence if the State presents evidence of a prior conviction after trial, but if the same person pleads guilty, he could not receive an enhanced sentence.

Chamblis's position is that the number of convictions that are counted at sentencing must be determined before entry of a plea. But a defendant may plead guilty to OWI or PAC, and then challenge the number of prior convictions, and the range of sentences, before sentencing. *See e.g.*, *State v. Carter*, 2010 WI 132, ¶ 8, 330 Wis. 2d 1, 794 N.W.2d 213 ("Carter entered a guilty plea to the OWI charge and filed a motion challenging, under Wis. Stat. § 343.307(1), the State's counting for sentence enhancement purposes his two prior Illinois suspensions.")

A defendant also may plead guilty to OWI or PAC, and then collaterally attack a prior conviction, so that it may not be used for sentence

enhancement. *See e.g.*, *State v. Krause*, 2006 WI App 43, 289 Wis. 2d 573, 712 N.W.2d 67.

In addition, when a court grants a motion to not count a prior conviction before the defendant enters a guilty or no contest plea, the State may appeal, challenging the court's decision not to count the conviction. For instance, in *State v. Machgan*, 2007 WI App 263, 306 Wis. 2d 752, 743 N.W.2d 832 (overruled on other grounds by *Carter*, 330 Wis. 2d 1), the defendant moved to dismiss an OWI fourth, asserting that one prior conviction should not be counted. *Id.* ¶ 2. The court agreed, and the defendant pled guilty to OWI. At sentencing, the State asked the court to count the conviction. The court denied the request. The State appealed, and the court of appeals affirmed. *Id.* ¶¶ 5, 16. However, the court did not even hint that the procedure followed in the circuit court, including the State's appeal after the guilty plea, was improper.

In each of these circumstances the number of convictions alleged before entry of the plea is not necessarily the same as the number of convictions determined to be countable at sentencing.

Instead, the cases all have reached the conclusion that is required by the plain language of the statutes—the time for determining the number of convictions for sentence enhancement is at sentencing.

C. Counting the number of convictions at the time of sentencing does not lead to absurd results.

Chamblis argues that an interpretation of the OWI penalty statutes as providing that the number of convictions that are counted for sentence enhancement is determined at sentencing is wrong and leads to absurd results (Chamblis's Br. at 25-32). He points out that statutory interpretation "begins with the language of the statute," but he does not address the language of either statute that governs the counting of convictions for OWI and PAC sentencing, Wis. Stat. §§ 343.307(1) and 346.65(2)(am). Instead, his argument that the State's interpretation of those statutes is somehow wrong is based on a number of statutes that do not concern the counting of convictions for sentence enhancement in OWI or PAC cases (Chamblis's Br. at 27-31).

Chamblis asserts that "The State's interpretation" would lead to "'absurd' or 'unreasonable' results in terms of its application with other relevant statutes irrespective of whether the case is resolved by way of trial or plea" (Chamblis's Br. at 27). He points to Wis. Stat. § 970.03 "Preliminary examination," Wis. Stat. § 971.05 "Arraignment," Wis. Stat. § 971.29 "Amending the charge," and Wis. Stat. § 970.02 "Duty of a judge at the initial appearance" (Chamblis's Br. at 27-31).

However, this court has determined that at least in OWI cases in which the defendant is found guilty at trial, the number of convictions that count for sentencing is determined at sentencing.

Banks, 105 Wis. 2d at 47; *McAllister,* 107 Wis. 2d at 539; *Wideman*, 206 Wis. 2d at 108. Chamblis is seemingly arguing that this court's interpretation of the law in all of those cases was absurd and unreasonable.

Moreover, Chamblis does not assert that in this case the requirement that the circuit court enter an amended judgment of conviction and impose sentence for a seventh offense will result in any of the problems he asserts could occur. For instance, he does not dispute that he had a preliminary hearing (46), and that he received an amended information detailing all of his prior convictions (14).

Chamblis also does not dispute that any problem that resulted from counting convictions after entry of a guilty plea could be easily remedied by a motion to withdraw the plea.

Finally, even if determining the number of convictions for sentence enhancement at sentencing would cause procedural difficulty, there is no reason to disregard the language and meaning of the statutes. In *Banks*, this court rejected the notion that an interpretation of § 346.65(2)(a) as requiring a court to count convictions at sentencing even if the act of driving occurred before the act of driving in the prior conviction was unreasonable because it would cause administrative difficulties. This court stated:

> We do not agree with the appellate court's reasoning that the administrative difficulties which may arise from the application of the criminal penalties of sec. 346.65(2)(a), Stats., to a repeat offender regardless of the sequence of his violations are insurmountable. In any event, the potential difficulties referred to certainly do not and should not provide a justification for interpreting this statute in a manner other than that specifically intended by the legislature, especially where a construction of that nature only serves to defeat the very intent of the legislation.

Banks, 105 Wis. 2d at 48.

The same is true here. Any "problem" caused by counting convictions at time of sentencing is overcome by the need to ensure that repeat drunk drivers are sentenced according to the number of convictions they have.

D. Requiring that the number of convictions that count for sentence enhancement be determined before entry of a plea would lead to absurd and unreasonable results.

Requiring a determination of the number of prior convictions prior to the entry of the defendant's plea would seemingly be an invitation for defendants to "game the system." Wisconsin has a graduated penalty system for OWI-related offenses. A person is sentenced according to the number of convictions the person has at sentencing. The OWI and PAC penalty statute, Wis. Stat. § 346.65(2)(am), does not grant a circuit

court discretion to sentence a person other than in accordance with the number of convictions the person has. The statute provides the penalties that the court "shall" impose depending on the number of the person's convictions.

If the number of convictions must be determined before entry of a guilty plea a defendant could escape being sentenced based on the correct number of convictions by strategic timing of pleas and sentencing. For instance, if a person with one prior conviction pleads guilty to OWI in Dane County, but the court puts off sentencing, and the person then drives drunk in Rock County, pleads guilty to OWI and is sentenced, the Rock County court will impose sentence for a second offense. Until the person is sentenced for a second conviction, he or she has two countable convictions. *See Banks*, 105 Wis. 2d at 47; Wis. Stat. §343.307(1).

When the Dane County court imposes sentence the person has three total convictions, and under Wis. Stat. §§ 343.307(1) and 346.65(2)(am)3., it is required to impose sentence for a third offense. But under Chamblis's view of the law, the court could only impose sentence for a second offense. Imposing the proper sentence would violate the person's right to due process.

This court rejected an argument in *Banks* that would have allowed for a similar result, stating:

> Under the construction of the statute advocated by the defendant, it would serve the interests of habitual drunken drivers to delay the trial of an offense through the filing of timely substitution of judge motions, through controlled adjournments, etc. Such a

> result would clearly frustrate the obvious legislative intent.

Banks, 105 Wis. 2d at 49.

In addition, if the State were required to prove the prior convictions and the court is required to determine the number of total convictions before a plea is entered, the State will never have an opportunity to appeal the court's determination as of right. A court's determination of the number of convictions is not a final order appealable as of right. The State therefore would have no right to appeal until after the plea and sentencing, when a final judgment of conviction is entered. But, if Chamblis's argument is correct, that would be too late to appeal, as the determination of the number of convictions that will be counted at sentencing was made before entry of the plea, and correcting any error would mean a due process violation.

In Chamblis's motions to dismiss, his brief to the court of appeals and his petition for review Chamblis made the argument that the State had no avenue to appeal as of right, and that the State's only means of seeking review of a circuit court's incorrect determination of the number of prior convictions was a petition for leave to appeal a non-final order under Wis. Stat. §§ 808.03(2) and 809.50 (*see* 54; 55; Chamblis's Court of Appeals Br. at 2-13; Petition at 6-11).

The court of appeals disagreed, concluding that the State properly appealed from the judgment of conviction under Wis. Stat. § 974.05(1)(a) *Chamblis*, slip op. ¶¶13-15. Chamblis argued in his petition for review that the court of appeals was incorrect, but this court did not grant review on that issue.

Chamblis's position is essentially that once the court determines the number of prior convictions the defendant has, and the defendant enters a plea of guilty or no contest, the determination of priors has been made, it is final, and any deviation from sentencing according to that number would violate *Bangert* and "due process principles." In other words, even if the court's determination of priors was wrong, neither the circuit court nor a reviewing court has authority to correct the error and impose sentence as required by § 346.65(2)(am) and § 343.307(1).

If Chamblis's position were correct, the State's only avenue of appeal would be a petition for leave to appeal a non-final order under Wis. Stat. § 808.03(2)(c). If the court of appeals were to deny the petition for leave, the State would be entirely prohibited from appealing the circuit court's incorrect determination. If the court of appeals were to grant the petition, it would decide the number of prior convictions that could be used to enhance the conviction if the defendant were to be convicted. If the defendant chose not to plead guilty, and was found not guilty at trial, or if the State dismissed the case, the court of appeals would have granted leave to appeal, delayed resolution of the case, and decided an issue that has no bearing on the case.

For all of these reasons, this court should recognize that the OWI and PAC statutes provide for the counting of the total number of convictions at sentencing, and imposition of sentence based on that number.

II. THE COURT OF APPEALS' DECISION REMANDING THE CASE TO THE CIRCUIT COURT WITH INSTRUCTIONS TO ENTER AN AMENDED JUDGMENT OF CONVICTION FOR PAC AS A SEVENTH OFFENSE AND IMPOSE SENTENCE FOR A SEVENTH OFFENSE, DID NOT VIOLATE CHAMBLIS'S RIGHT TO DUE PROCESS AND WAS NOT UNFAIR.

A. Introduction.

Chamblis asserts that the court of appeals' decision remanding the case to the circuit court violated his right to due process because it instructed the circuit court to issue an amended judgment of conviction and impose sentence for PAC as a seventh offense, rather than as a sixth offense.

Chamblis does not argue that the court of appeals was incorrect in concluding that the circuit court incorrectly counted his convictions and incorrectly imposed sentence for a sixth offense rather than a seventh offense. His argument is seemingly that even though he had seven convictions when he was sentenced in this case, and even though the circuit court erred in counting only six convictions and imposing sentence for a sixth offense, correcting the circuit court's error would violate due process.

He also argues that on the facts of his case, it would be fundamentally unfair to amend the judgment of conviction and impose sentence for a seventh offense.

As the State will explain, the means of seeking remedy for a defendant who could show that he or she was denied due process by the entering of a judgment of conviction and imposition of sentence for a more serious degree of OWI or PAC charge after a guilty plea, would be a motion to withdraw the plea. In this case, however, the court of appeals rejected Chamblis's argument that he was not aware that he could be subjected to penalties for a seventh offense.

As the State will further explain, it is not fundamentally unfair to remand this case to the circuit court to impose sentence for a seventh offense when Chamblis does not dispute that this was his seventh conviction. He is not entitled to benefit from the circuit court's error.

B. The court of appeals correctly recognized that Chamblis had notice that the State was attempting to prove that this would be his seventh conviction, and of the range of penalties for a seventh offense.

In the court of appeals, Chamblis argued that entry of an amended judgment of conviction and sentencing for a seventh offense would violate his right to due process. The court rejected his argument, concluding that Chamblis "fails to demonstrate that he was not aware of the 'specific penalty' he faced if convicted of operating with a PAC as a seventh offense, or that he could be convicted of that offense, if the State succeeded in proving the purported Illinois conviction." *Chamblis*, slip op. ¶ 28. The court of appeals

concluded that the record demonstrated that Chamblis was aware that depending on the outcome of his challenge to his Illinois conviction he could be convicted of PAC as a sixth offense or as a seventh offense, and that he was aware of the maximum penalty for a seventh offense. The court pointed to Chamblis's counsel explaining at the plea hearing that Chamblis admitted to five prior convictions from Minnesota, and that the sixth prior, from Illinois was "at issue." The court noted that:

> Chamblis's counsel then stated on the record that the penalty for operating with a PAC as seventh offense includes: (1) a maximum fine of $25,000; (2) a ten-year maximum term of imprisonment; (3) a five-year maximum term of initial confinement; and (4) a three-year minimum term of initial confinement [49:4-5; R-Ap. 104-05]. In addition, the record contains a "Plea Questionnaire/Waiver of Rights" form, signed by Chamblis, which states: "I understand that the judge … may impose the maximum penalty. The maximum penalty I face upon conviction is: $25,000 fine and 10 years imprisonment" [37]. Based on this document and Chamblis's counsel's statements at the plea hearing, we conclude that, under the particular facts of this case, Chamblis was aware both of the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, and that he faced this possible punishment if the State succeeded in proving the purported Illinois conviction.

Chamblis, slip op. ¶ 29.

Chamblis now argues that the record does not support the court of appeals' conclusion that he was aware of the penalty for PAC as a seventh offense and aware that he faced that penalty if the State proved the Illinois conviction. He asserts

that instead, the court's colloquy "reflects that Chamblis did not know and understand the 'variable' plea offer and the related variable penalties" (Chamblis's Br. at 37).

The State maintains that the court of appeals decision was correct. The court of appeals recognized that the remedy for a violation of Wis. Stat. § 971.08 that results in a defendant's plea not being knowing, intelligent and voluntary is a plea withdrawal. To withdraw a plea, a defendant is required to "establish a prima facie case that the circuit court violated § 971.08 and allege that he did not know or understand the information that the court should have provided at the plea hearing." *State v. Trochinski*, 2002 WI 56, ¶ 17, 253 Wis. 2d 38, 644 N.W.2d 891 (citing *Bangert*, 131 Wis. 2d at 274) (additional citations omitted).

If the defendant makes a prima facie showing, "[t]he burden then shifts 'to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered.'" *Id.* (citing *Bangert*, 131 Wis. 2d at 274) (additional citations omitted).

In this case, Chamblis would have to show that the court did not comply with § 971.08 when it accepted his guilty plea, and allege that he did not understand information that the court was required to give him.

The court of appeals seemingly determined that even if Chamblis could make a prima facie showing, the record demonstrates that he entered his guilty plea knowingly, voluntarily, and intelligently. As the court of appeals recognized, the record demonstrates that Chamblis's counsel

informed him of the range of penalties he would face if convicted of a sixth offense or a seventh offense (49:4-5; R-Ap. 104-05). The record also demonstrates that Chamblis was informed that whether he would be sentenced for a sixth offense or a seventh offense was at issue.

Even if the record did not demonstrate that Chamblis understood the situation at the plea hearing, he would not be entitled to conviction and sentence for a sixth offense. It is undisputed that Chamblis had six prior convictions when he pled guilty in this case. He had seven total convictions when he was sentenced, so he should have been sentenced for a seventh offense, not a sixth offense. The court of appeals' decision remanding the case to the circuit court merely instructed the circuit court to correct its error, amend the judgment of conviction to reflect that Chamblis had six prior convictions and was therefore properly convicted of PAC as a seventh offense, and impose sentence for a seventh offense.

In its reply brief in the court of appeals, the State pointed out that if Chamblis wants to argue that an amended judgment of conviction and resentencing will violate his right to due process, his remedy lies in a motion to withdraw his guilty plea. It stated: "If this court remands this case and the circuit court imposes sentence for seventh offense, Chamblis may seek to withdraw his guilty plea on the ground that the court failed to inform him of the potential penalties he faced pleading guilty" (State's Court of Appeals Reply Br. at 4 n.2).

Chamblis argues from this comment that the State "seems to concede that Chamblis's guilty

plea was not knowing, intelligent and voluntary as to a PAC 7th charge" (Chamblis's Br. at 35 n.6).

However, the State did not concede that Chamblis was not informed of the penalties for a seventh offense, or that he would be entitled to withdraw his guilty plea. The State merely pointed out that if Chamblis believed that he was not informed of the maximum penalties he faced by pleading guilty, he could seek to withdraw his plea. But his guilty plea does not entitle him to be sentenced for a sixth offense when he has seven convictions.

C. The trial court has jurisdiction to amend the judgment of conviction and impose sentence for a seventh offense.

Chamblis next argues that the circuit court lacks jurisdiction under Wis. Stat. § 972.13 to amend the judgment of conviction and impose sentence for a seventh offense (Chamblis's Br. at 38). He argues that under § 972.13, a judgment of conviction may not be entered for PAC as a seventh offense because he pled guilty to PAC as a sixth offense, but not to PAC as a seventh offense (Chamblis's Br. at 38).

However, as explained above, the crime of PAC for a person with three or more prior convictions has three elements: (1) the person operated a motor vehicle; (2) with a prohibited alcohol concentration above 0.02; and (3) the person had three or more prior convictions. Wis. Stat. §§ 346.63(1)(b), 340.01(46m)(c); Wis. JI-Criminal 2660C (2002).

In pleading guilty, Chamblis admitted each of these elements. The exact number of convictions that would be counted at sentencing, so long as that number is three or more, is not an element of the charge.

The circuit court therefore did not lack jurisdiction to enter judgment of conviction for PAC 0.02, and because the State proved that this was Chamblis's seventh offense under Wis. Stat. § 343.307(1), the court had jurisdiction to impose sentence for a seventh offense.

D. Imposition of sentence for PAC as a seventh offense would not be fundamentally unfair.

Chamblis argues that it would be fundamentally unfair for the circuit court to impose sentence for a seventh offense PAC (Chamblis's Br. at 40-43). Again, he does not argue that he does not have seven convictions. He does not dispute that the circuit court erred in convicting him of PAC as a sixth offense and imposing sentence for a sixth offense, rather than convicting him of PAC as a seventh offense and imposing sentence for a seventh offense.

Instead, Chamblis argues that it would be fundamentally unfair for the circuit court to correct its error and sentence him for a seventh offense because he has already served his term of initial confinement (Chamblis's Br. at 42-43).

Chamblis asserts that "Due process may be denied when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized

and it would be fundamentally unfair to defeat them" (Chamblis's Br. at 40) (citing *United States v Lundien*, 769 F.2d 981, 987 (4th Cir. 1985)).

But Chamblis could hardly have had an expectation that his conviction and sentence were final. He knew that the State had attempted to prove his prior Illinois conviction, which would result in his current PAC being a seventh offense. He knew that the State appealed shortly after he was sentenced, challenging the judgment of conviction and sentence. And he knew that he had a prior conviction in Illinois. Chamblis had no reason to believe that his sentence was somehow final.

Chamblis argues that it would be fundamentally unfair to sentence him for a seventh offense because "more than two years have passed" since he was sentenced, he has served the two-year term of initial confinement that was imposed, and he "has already received whatever rehabilitative benefits the Wisconsin state prison system has provided to him" (Chamblis's Br. at 42).

Again, the State appealed shortly after Chamblis was sentenced. And while Chamblis has served the two-year period of initial confinement that was imposed, the court was required to impose sentence for a seventh offense, and to impose at least the mandatory minimum of three years of initial confinement. As for rehabilitative benefits, Chamblis does not explain why he would not benefit from additional time and additional rehabilitation.

Chamblis argues that his conviction and sentence is "final." He relies on *State v. One 1997*

Ford F-150, 2003 WI App 128, ¶ 19, 265 Wis. 2d 264, 665 N.W.2d 411, and asserts that "The fact that criminal litigants have the right to appeal from a judgment of conviction does not make the judgment any less final" (Chamblis's Br. at 43).

But *One 1997 Ford F-150* concerns when a criminal charge is considered adjudicated for purposes of the forfeiture statute. *One 1997 Ford F-150*, 265 Wis. 2d 264, ¶ 2. Chamblis points to no authority holding that a criminal conviction that is being appealed is final. If that were so, it would make no difference how much of his sentence he has served—the sentence would be final.

Chamblis's final argument is that he received a longer sentence than the minimum for PAC as a sixth offense, so "[t]he State has already received a 'pound of flesh'" from him (Chamblis's Br. at 43).

However, the "objective of removing drunken drivers from the highways is the underlying premise of the criminal penalties of sec. 346.65(2)(a), Stats." *Banks*, 105 Wis. 2d at 49. The legislature has determined that when a person is convicted of OWI or PAC as a seventh offense, that person is to be removed from Wisconsin highways for a minimum of three years. The legislature has given circuit courts no discretion—it requires courts to count convictions and to impose sentence in accordance with the number of convictions. The legislature hardly intended that a person like Chamblis, with seven convictions, escape the punishment the legislature found to be the minimum appropriate for a seventh offense because the circuit court declined to count one conviction that the State proved, and that Chamblis does not contest.

For all of these reasons it is not fundamentally unfair for Chamblis, who does not dispute that he has seven convictions, to be sentenced for a seventh offense.

CONCLUSION

Chamblis pled guilty to PAC and was sentenced for a sixth offense, even though it was his seventh conviction. The court of appeals recognized that Chamblis was not sentenced for the correct offense, so it vacated the judgment of conviction and remanded to the circuit court to enter an amended judgment of conviction and impose sentence for a seventh offense.

Sentence for a seventh offense is required by the OWI and PAC penalty statutes, and entry of an amended judgment of conviction and imposition of sentence for a seventh offense are entirely consistent with statutes and with public policy.

Chamblis does not have a due process right to be sentenced for a sixth offense when he has seven convictions. And even if he could show that his due process rights were violated because he did not understand that he could be sentenced for a seventh offense, his recourse would be a motion for plea withdrawal. He is not entitled to be sentenced for s sixth offense when he has seven convictions.

Chamblis has not shown that his due process rights were violated or that it would be fundamentally unfair to be sentenced for a seventh offense. Accordingly, the court of appeals' decision remanding the case to the circuit court to

amend the judgment of conviction and impose sentence for PAC as a seventh offense should be affirmed.

Dated this 13th day of January, 2015.

Respectfully submitted,

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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 9,243 words.

Dated this 13th day of January, 2015.

_____

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 13th day of January, 2015.

_____
Michael C. Sanders
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