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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012AP2782-CR

STATE OF WISCONSIN,
Plaintiff-Appellant-Cross-Respondent,
vs.

ANDRE M. CHAMBLIS, Defendant-Respondent-Cross-Appellant-Petitioner

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Defendant-Respondent-Cross-Appellant-Petitioner's Reply Brief

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Harmonization of Sections 343.307 and 346.25 with Section 971.08 requires this Court to reject the State's argument that even in the context of a plea of guilty or no contest, prior offenses are to be determined at the time of sentencing.

This appeal requires the Court to harmonize various statutes, most directly, Sections 343.307, 346.25, and Section 971.08. In interpreting multiple statutes, this Court interprets them together and harmonizes them to avoid a conflict if at all possible. **State v. O'Brien**, 2014 WI 54, ¶70, 354 Wis.2d 753, 850 N.W.2d 8. This court attempts to harmonize statutes in a way that will give effect to the legislature's intent in enacting both statutes. **Id**. We examine the context in which statutory language is used and we interpret it reasonably to avoid absurd or unreasonable results**. State ex. rel. Kalal v. Circuit Court for Dane Cnty**., 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110. This Court may easily harmonize Sections 343.307, 346.25 and Section 971.08 by 1)affirming that an adjudication of guilt by way of a plea of guilty or no contest implicates due process considerations that are not present in an adjudication of guilt by trial; 2)concluding that a plea of guilty or no contest requires a different analysis under Sections 343.307 and

346.25 as to when a trial court must determine the number of prior offenses; and 3)concluding that in the context of a plea of guilty or no contest, a trial court cannot wait until sentencing to make such determination without violating due process principles and must therefore make the determination prior to entry of a defendant's plea of guilty or no contest.

A. A plea of guilty or no contest based on a variable or contingent range of penalties does not satisfy the constitutional requirement that a defendant be fully aware of the direct consequences of his plea.

At page 11 of its brief, the State acknowledges that a trial court accepting a plea of guilty or no contest is required to inform the defendant of the "range of penalties" he or she will face if convicted. The State asserts however that this requirement "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." See State's brief at p.14. Italics added. Curiously, the State's assertion here is a retreat from the position it took before the Court of Appeals and in its response to the petition for review. By using the term "definitive," the

State now seems to recognize that there is at least some determination that the trial court must make as to the prior number offenses before accepting a defendant's plea of guilty or no contest. In contrast, the State's earlier submissions took the position that the trial court did not have to make any such determination. The State now suggests that a trial court could accept somewhat of a variable or contingent plea which would depend on the actual number of prior convictions "ultimately counted." See State's brief at p.15. For instance, where the offense level may be a 6th or a 7th, a Class H or a Class G felony, the trial court could advise a defendant of both sets of penalties. In this sense, the "range of penalties," would not simply be the range of penalty within the particular offense class, for instance a Class H felony, but a range of penalties that encompasses various offense classes. Of course, this is the precise framework that the trial court rejected on the basis that the defendant would not know and understand the precise charge to which he was pleading guilty or no contest. 49:5-6, 49:7, 49:11, 49:19, 49:20. The trial court was correct. In order for a defendant's plea to be knowing, intelligent and voluntary, the defendant must be fully aware of the direct consequences of entering such a plea. **Brady v. United States**, 397 U.S. 742, 755 (1970). As such, courts are constitutionally required to

notify defendants of the direct consequences of their pleas. See **State v. Bollig**, 2000 WI 6, ¶16, 232 Wis.2d 561, 605 N.W.2d 199, citing **Brady v. United States**, 397 U.S. at 755. A direct consequence represents one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment. **Id**. The problem with the State's theory is that under a variable or contingent plea framework, a court cannot inform the defendant prior to entering his or her plea of guilty or no contest what the direct, immediate, and automatic effect such plea will have on his or her punishment. The punishment would not directly, immediately and automatically flow from the entry of the plea but rather from some intervening event, namely the indirect, subsequent and speculative determination of what his or her prior offenses are determined to be. As a result, the defendant, at the time he or she enters his or her plea of guilty or no contest, would not have a full awareness of what the direct consequences of the entry of that plea will be. Such a situation would fail to satisfy constitutional standards under **Bollig** and **Brady**. There are also practical reasons why this Court should reject a variable or contingent plea approach. It would be complicated and cumbersome in application. Take for instance a defendant who faces a current OWI/PAC charge and has over

his or her lifetime at least 3 but possibly 6 convictions, suspensions, revocations or implied consent violations which could be used for enhancement under Section 343.307. The offense level would therefore be an OWI/PAC 4th, a misdemeanor, a 5th or 6th, a Class H felony, or 7th, a Class G felony depending on the determination of "prior offenses." Under the State's proposal, the trial court would have to advise the defendant of three sets of penalties with each set carrying different maximum and minimum penalties. More problematically, under **State v. Mohr**, 201 Wis.2d 693,700-701, 549 N.W.2d 497 (Ct. App. 1996), the trial court would also have to advise the defendant and the defendant would have to know and understand the *presumptive* or *mandatory* minimum penalty. Would it be 60 days (OWI/PAC 4th), 6 months (OWI/PAC 5th or 6th) or 3 years imprisonment (OWI/PAC 7th)? At the time of the variable or contingent plea, it would be impossible for the court to communicate and for the defendant to know. The contingent and variable nature of the plea would inherently conflict with the presumptive or mandatory nature of the penalty. More problematically, consider what would happen when after the trial court takes the variable or contingent plea to the OWI/PAC 6th , a Class H, or the 7th, a Class G, the State discovers other priors and seeks to

have the defendant sentenced for a 10th offense or greater, a Class F, at sentencing. Under the State's variable or contingent plea theory, only the plea to the OWI/PAC 6th or 7th would arguably meet **Bangert** and due process principles. A conviction and sentence for OWI/PAC 10th or greater would plainly not. Rather than solving the problem, the State's theory leads us back to it. Finally, a variable or contingent plea framework would invariably lead to extensive plea withdrawal litigation based not only on **Bangert** but on **Nelson**/**Bentley**[1] and ineffective assistance of counsel grounds. For all of the above reasons, this Court should reject a contingent or variable plea framework.

B. Plain language of sections 343.307(1) and 346.65 does not require that the trial court determine the number of prior offenses at sentencing.

On page 16 of the State's brief, the State asserts, "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 has been found

[1] **Nelson v. State,** 54 Wis.2d 489, 195 N.W.2d 629 (1972), **State v. Bentley**, 201 Wis.2d 303, 548 N.W.2d 50 (1996)

guilty at trial." The State then discusses Section 343.307(1) and Section 346.65. Despite the assertion that the "plain language" of the statutes "requires" that the court determine the number of convictions at the time of sentencing, there is no language in either statute that expressly makes such a requirement. The State's argument under the respective statutes is more of an interpretive argument as opposed to a "plain language" argument. Moreover, the language used in the statutes actually favors Chamblis not the State. Section 343.307(1) provides in relevant part that "(t)he court shall count the following to determine…the *penalty* under...346.65(2)." Italics added. Of course, we know from case law construing **Bangert**, due process principles, and Section 971.08, that the trial court must advise the defendant of the potential penalty including the maximum sentence, **State v. Bartelt**, 112 Wis.2d 467,475, 334 N.W.2d 91 (1983), and any presumptive minimum, **State v. Mohr,** supra, *before* accepting the defendant's plea. It is clear that the "determination" of the penalty under Section 346.65 must be made *prior* to the time the defendant enters his or her plea. After all, a trial court cannot advise a defendant of the penalty when the penalty has not yet been determined.

The State next argues that under Section 346.65(2)(am), the trial court is required to sentence a defendant based on the "total number of convictions under §343.307(1)" and since a defendant is not convicted of the present offense until he pleads guilty, the "only logical reading of the statute is that the court is required to determine the total number of convictions after the person has been convicted in the current case." See State's brief at p.18. Not so. To the contrary, the only logical interpretation is that Section 346.65 contemplates the "current" offense as well as "other convictions" specifically those counted under Section 343.307. By its express title, Section 343.307 deals only with "*Prior* convictions…to be counted as offenses." Italics added. Contrary to the State's assertion at p.18 of its brief, the "current" offense is not a "prior" offense and cannot be considered one of the "prior offenses" under Section 343.307. The "current" offense cannot be considered a prior offense under Section 343.307(1) because such characterization requires that a sentence must have been imposed on the "prior" offense not just that the defendant had been adjudicated guilty. See **State v. Skibinski**, 2001 WI App 109, ¶10, 244 Wis.2d 229, 629 N.W.2d 12. Italics added. Section 346.65 similarly references "*other convictions* counted under s.343.307(1)," with "other

convictions" meaning those prior offenses counted under Section 343.307(1). The State's statutory interpretation argued is flawed and this Court should reject it.

As discussed in Chamblis's brief-in-chief, Chamblis recognizes of course that certain decisions, namely **McCallister**, **Wiedman** and **Matke**, allow for the proposition that a trial court is to determine the number of prior convictions at sentencing. Chamblis has already distinguished this line of cases by emphasizing that they all involved trials not pleas of guilty or no contest. As already discussed, a plea of guilty and the attendant relinquishment of one's constitutional rights implicate due process considerations that do not exist in the context of a trial. The statutes and the case law need to be applied and harmonized in proper context.

C. If not harmonized with other statutes, a bright line rule that the number of prior convictions is to be determined at sentencing does lead to absurd results.

While not applicable to Chamblis's exact situation, the arguments made in Chamblis's brief-in-chief regarding Section 970.03, "Preliminary examination," Section 971.29, "Amending the charge," Section 971.05,

"Arraignment," Section 970.02, "Duty of a judge at the initial appearance," plainly show that absurd results would occur if this Court were to adopt the position of the State, that irrespective of whether the case involved a plea or trial, prior offenses are to be determined at sentencing. Moreover, the State has wholly failed to explain its position in the context of these statutes.

Chamblis does not contend that Court's interpretation of the law in **Banks**, **McAllister** and **Wiedman** was absurd and unreasonable. See State's brief at p.24. Those cases plainly did not present the procedural fact patterns contemplated by Chamblis which would result in an absurd or unreasonable result.

The State proposes that "any problem that resulted from counting convictions after entry of a guilty plea could easily be remedied by a motion to withdraw the plea." See State's brief at p.24. Inherent in this State's position is the premise that the plea was not in fact knowing, intelligent and voluntary. If the plea was not knowing, intelligent and voluntary for purposes of allowing Chamblis to withdraw it, it was not knowing, intelligent and voluntary so as to sustain a judgment of conviction

and sentence for a PAC 7th. In this regard, the State's argument undermines its own position. Moreover, Chamblis had a plea agreement with the State. See Chamblis's brief at p.5, note 2. Withdrawal of the plea as a means of safeguarding his rights would potentially result in the loss of those benefits secured by the plea agreement, namely the dismissal of a habitual criminality enhancer, an obstructing charge, and a battery to prisoner in another case. The State's proposal would therefore subject Chamblis to even greater exposure than the basic OWI 7th penalty. As such, the State's proposal does not "easily" "remedy" the problems.

Finally, the State asserts that "procedural" or "administrative" difficulties should not provide a basis for disregarding the language and meaning of the statutes. Chamblis has addressed the "language" and "meaning" earlier in this brief and would simply emphasize that the issues raised in this appeal are not "procedural" or "administrative" but rather constitutional.

D. Determining the number of prior offenses before entry of a plea would not lead to absurd and unreasonable results.

The State, on p.26 of its brief, contemplates a situation where a defendant pleads guilty to an OWI 2nd in Dane County only to before sentencing be

convicted and sentenced on a subsequent OWI in Rock County. The State argues that under Chamblis's view, the Dane County court could only impose sentence for a second offense, and that this situation would allow a defendant to "game the system." Not true. The State's plain remedy here would be to simply dismiss the OWI 2nd and recharge it as an OWI 3rd based on the Rock County conviction. If anything, the State's interpretation promotes "gaming the system" by allowing a prosecutor to charge the offense as a lower level OWI/PAC with a lower penalty, secure the plea of guilty, and then at sentencing up the ante by seeking a greater penalty based on "other convictions."

The State next argues that Chamblis's position would mean that the State would have no "opportunity to appeal the court's determination as of right." See State's brief at p.27. This is correct. But Chamblis maintains, as discussed in the petition for review at pp.6-11, the State does not have such a right of appeal anyway. If the State could properly appeal under Section 974.05, from a "judgment of conviction," then the State could appeal from virtually every criminal case as a matter of right. Such interpretation would eviscerate Section 974.05 which circumscribes the State's ability to appeal as a matter of right. The State's proper avenue for appeal is under Section

808.03(2). If this Court renders a decision clarifying the significance of determining the number of prior convictions prior to the entry of a plea, the legal authority for the State's appeal under Sec. 808.03(2) would be established and the matter ripe for review. Based on this Court's decision, the Court of Appeals would ostensibly know and understand that it should accept and decide the matter.

II. Fundamental fairness

At several points in its brief, the State takes the position that Chamblis never disputed "that this was his seventh conviction," see State's brief at p.29, 30, 33, 35 and 38., and that therefore it would not be fundamentally unfair to sentence him for a seventh offense. To the contrary, the record is clear that Chamblis did dispute the purported 7th offense out of Illinois. Chamblis asserted that it was actually his cousin who committed the offense. 30:3, 47:11.

The State argues that since Chamblis had "notice" of the "range of penalties" for a seventh offense it would not violate his due process rights to sentence him for such an offense. See State's brief at p.30. First, as argued in the brief-in-chief, pp.36-37, the record fails to reflect such

knowledge and understanding on the part of Chamblis. More importantly, notwithstanding Chamblis's alleged knowledge and understanding of the penalties for a PAC 7th, Chamblis never entered a plea of guilty to such a charge. Even if the record allowed for the conclusion that Chamblis knew and understood the penalties for PAC 7th, it does not allow for the conclusion that he agreed to face such penalties. At the time Chamblis entered his plea, the trial court specifically stated that it was rejecting the PAC 7th charge. 49:15. As a result, Chamblis had no reason to believe he faced the penalties associated with such charge. To the contrary, the only range of penalties that Chamblis agreed to face were those specifically explained to him by the trial court, those associated with the PAC 6th. For this reason, it would be fundamentally unfair to re-sentence Chamblis according to penalties for PAC 7th.

CONCLUSION

For all the reasons stated in this brief as well as the brief-in-chief, Chamblis requests that this Court reverse the decision of the Court of Appeals.

Dated this _____day of January 2015.

Respectfully submitted,
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CERTIFICATION OF COMPLIANCE WITH 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 s. 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 upon all opposing parties.

Dated this _____ day of January 2015

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2,996 words.

Dated this _____day of January 2015.

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