STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2015AP000586-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

JOSEPH C. RISSE,
Defendant-Respondent.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN BROWN COUNTY CIRCUIT COURT CASE NO. 13CT1592, THE HONORABLE MARC A. HAMMER PRESIDING

PLAINTIFF-APPELLANT'S BRIEF

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[1] The State uses the term "OWI-related" to refer collectively to the offenses that may be counted as a prior offense pursuant to Wis. Stat. § 343.307 to enhance an OWI offense. (2013-14).

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BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

Whether the circuit court erred when it failed to comply with acceptable legal standards and admitted Risse's uncertified, unauthenticated, and inadmissible records to rebut the State's proof of Risse's prior Operating While Intoxicated-related conviction?

Whether the circuit court erred when it found that Risse's proffered records rebutted the State's evidence of a Wisconsin Certified Driving Record reflecting a 2008 Implied Consent

conviction in Connecticut and found Risse guilty of Operating While Intoxicated as a first offense?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument because the issues presented are fully briefed. The State of Wisconsin does not request publication because the issues are addressed by existing case law.

STATEMENT OF CASE

On October 13, 2013, the State filed a criminal complaint charging the Defendant-Respondent, Joseph C. Risse, with Operating While Intoxicated ("OWI") as a second offense, Operating with a Prohibited Alcohol Concentration ("PAC") as a second offense, and Endangering Safety by Use of a Dangerous Weapon – Possession of a Firearm While Intoxicated for an offense that occurred on August 28, 2013. App., p. 50-53. In the criminal complaint, the State initially alleged that Risse had been convicted of OWI in 2006, App., p. 53; however, the State later filed an amended complaint alleging that he had been convicted of OWI in the State of Connecticut on April 10, 2008, with an offense date of March 11, 2008, and was suspended as a result thereof, App., p. 54-56. The

matter proceeded to a court trial on December 10, 2014, at which time the court heard testimony from multiple witnesses and granted a continuance to continue the trial on another date. App., p. 70-74. However, at the balance of the court trial on February 4, 2015, Risse ultimately entered a plea to the OWI pursuant to a plea agreement that left the number of prior convictions for the Court, the Honorable Marc A. Hammer, to determine. App., p. 6-9. The PAC charge was dismissed, and the Endangering Safety charge was dismissed but read in. App., p. 14. (2/4/15 TR. P. 3)

At the February 4, 2015, hearing, the State entered Risse's Wisconsin Certified Driving Record ("CDR"), which reflected an April 10, 2008, conviction in Connecticut for an Implied Consent violation as proof of his prior conviction. App., p. 16, 57-59. The offense date of the Implied Consent conviction was March 11, 2008, and the Non UTC and Court Report ID was 08002132. App., p. 59. Risse submitted the following documents and argued that they demonstrated that Risse had no prior convictions, App., p. 19-33:

1. A State of Connecticut Department of Motor Vehicles Response dated June 20, 2014, App., p. 19-23;

2. A State of Connecticut Judicial Branch Criminal/Motor Vehicle Convictions Name Summary online printout dated July 31, 2014; App., p. 19-23;

3. A State of Connecticut Judicial Branch Criminal/Motor Vehicle Convictions– Search By Docket Number online printout dated July 30, 2014; App., p. 19-23;

4. A State of Connecticut Record Center Superior Court letter dated September 13, 2013, App., p. 2;.

5. A National Highway Traffic Safety Administration (NHTSA) letter dated October 28, 2014, and NHTSA mission statement online printout dated December 9, 2014, App., p. 28, and

6. A Michigan Department of State Bureau of Branch Office Services Request Report dated January 7, 2015, App., p. 29.

During oral arguments, the State articulated[2] the reasons why Risse's documents failed to rebut the conviction in the CDR. App., p. 33-37. However, after excluding the Michigan Report, Judge Hammer found that the remaining documents "create[d] a question" as to whether the 2008 Implied Consent conviction should be counted as a prior offense. App., 39. He ultimately concluded that he could not find "beyond a reasonable doubt that this is an OWI second," App., 41, and sentenced Risse based on an OWI first offense conviction, App., p. 48-49. It is from this determination that the State appeals.

[2] The State also incorporated by reference the arguments contained in its State's Brief Opposing Defendant's Motion to Dismiss, filed on September 29, 2014. App., 75-78

STATEMENT OF FACTS

On August 28, 2013, at approximately 1:44 a.m., officers from the Green Bay Police Department responded to the Manorcare parking lot to check the welfare of a man who appeared to be sleeping in a parked truck that was running for approximately one hour. App., p. 52. Officers arrived on scene and located a male who appeared to be asleep in the front driver's seat of the truck. *Id*. Officers identified the male as the defendant, Joseph C. Risse, d.o.b. 12/13/1982. *Id*. After officers woke Risse, Officer Dunn spoke with Risse and noticed that Risse's eyes were very red and bloodshot, his speech was slurred, and that he had a strong odor of intoxicants coming from his mouth. *Id*. Risse failed the field sobriety tests and was arrested based upon Officer Dunn's belief that Risse was under the influence of intoxicants. *Id*. Officer Dunn read Risse the "Informing the Accused" and asked Risse to submit to an evidentiary blood test. App., p. 53. Risse refused to consent to the blood test, so Officer Dunn obtained a search warrant and the blood draw was completed. *Id*. The Wisconsin State Laboratory of Hygiene, Medical Toxicology Section analyzed the blood and

reported that Risse's blood alcohol concentration was .146%. App., p. *Id*.

ARGUMENT

I. A WISCONSIN CERTIFIED DRIVING RECORD IS ADMISSIBLE AND SUFFICIENT TO PROVE OUT-OF-STATE PRIOR OWI-RELATED CONVICTIONS BEYOND A REASONABLE DOUBT.

To prove prior convictions for purposes of enhancing an OWI offense, the State may prove any of the following beyond a reasonable doubt and by competent proof, *State v. Van Riper*, 267 Wis. 2d 759, 672 N.W.2d 156, ¶¶ 13, 21 (Ct. App. 2003):

1. Prior OWI convictions, Wis. Stat. § 343.307(1)(a) (2013-14);

2. Prior tribal convictions conforming with Wisconsin OWI laws, Wis. Stat. §343.307(1)(b) (2013-14);

3. Prior OWI Causing Injury, Injury by Intoxicated Use of a Vehicle, or Homicide by Intoxicated Use of a Motor Vehicle convictions, Wis. Stat. §343.307(1)(c) (2013-14);

4. Prior refusal of chemical testing convictions ("refusals") from any other jurisdiction, Wis. Stat. § 343.307(1)(d) (2013-14);

5. Prior operating privilege suspensions or revocations due to chemical testing refusals from any other jurisdiction, Wis. Stat. § 343.307(1)(e) (2013-14);

6. Prior court-ordered revocations on refusals pursuant to Wis. Stat. § 343.305(10), Wis. Stat. § 343.307(1)(f) (2013-14); and

7. Prior reckless flying convictions, Wis. Stat. § 343.307(1)(g) (2013-14).

Significantly, each provision is a separate and distinct basis for counting[3] prior offenses for the purposes of enhancing an OWI conviction. *See State v. Carter*, 2010 WI 132, ¶¶ 21-22, 27-28, 330 Wis. 2d 1, ¶¶ 21-22, 27-28, 794 N.W.2d 213, ¶¶ 21-22, 27-28. Furthermore, a certified driving record is admissible to prove the prior convictions beyond a reasonable doubt. *Van Riper*, 267 Wis. 2d at ¶ 2, 672 N.W.2d. at ¶ 2. The Wisconsin CDR is also sufficient to prove an out-of-state prior OWI-related conviction beyond a reasonable doubt. *Id*. at ¶¶ 19-20. Once the State has established the prior conviction with the CDR, the defendant bears the burden of proving that the record is incorrect. *See State v. Devries*, 2011 WI App 78, ¶ 9, 334 Wis. 2d 430, ¶ 9, 801 N.W.2d 336, ¶ 9.

II. THE CIRCUIT COURT ERRED WHEN IT CONSIDERED RISSE'S UNCERTIFIED, UNAUTHENTICATED, INADMISSIBLE RECORDS TO REBUT THE STATE'S PROOF OF RISSE'S PRIOR OWI-RELATED CONVICTION BECAUSE THE

[3] This is true unless the suspension, revocation, or conviction resulted from the same incident or occurrence, in which, it is counted as one. Wis. Stat. 343.65(2)(am).

DECISION DID NOT COMPLY WITH ACCEPTABLE LEGAL STANDARDS.

Appellate courts will "not overturn a circuit court's findings of fact unless they are 'clearly erroneous.'" *Id*. at ¶ 2. Additionally, while appellate courts generally uphold a circuit judge's evidentiary ruling as a discretionary decision, the appellate courts may reverse an evidentiary ruling when it was not made pursuant to accepted legal standards and the facts of the case. *See Van Riper*, 2003 WI App at ¶ 8, 267 Wis. 2d at ¶ 8, 672 N.W.2d at ¶ 8 (*quoting State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citations omitted)) ("a trial court's evidentiary ruling will not be upset on appeal if the court had a 'reasonable basis' and it was made 'in accordance with accepted legal standards and in accordance with the facts of record'"). Consequently, an evidentiary ruling that does not comply with accepted legal standards or the facts may be reversed. *See id.* Finally, appellate courts conduct a *de novo*, not deferential, review of "purely documentary" evidence. *Devries*, 2011 WI App at ¶ 2, 334 Wis. 2d at ¶ 2, 801 N.W.2d at ¶ 2.

The circuit court's decision to admit, over the State's objections, Risse's proffered records to rebut the CDR was clearly erroneous because it was not made according to accepted legal

standards. *See Van Riper*, 2003 WI App at ¶ 8, 267 Wis. 2d at ¶ 8, 672 N.W.2d at ¶ 8. The records are not self-authenticating and no foundation was laid for the records to authenticate the records. App. p. 18-33, 60-69. " '[A] record is authenticated by a certification which properly and sufficiently identifies the record to which it is attached….'" *Van Riper*, 2003 WI App at ¶ 17, 267 Wis. 2d at ¶ 17, 672 N.W.2d at ¶ 17, (quoting reference omitted) (finding that "a defendant's driving record is self-authenticating by virtue of a certificate attached to the record bearing the State of Wisconsin DOT seal and a signature of the Administrator of the Division of Motor Vehicles (DMV) attesting to the record's authenticity"). None of the documents contained any certificates to identify or authenticate the records or the information contained therein. App. p. 60-69. Furthermore, the defense failed to present any witnesses to testify to authenticate the documents. App., 18-33. Given that the records were not self-authenticating, extrinsic evidence was required as a condition precedent to admissibility.[4] Wis. Stats. §§ 909.01 and 909.02 (2013-14). As such, the records were inadmissible.

[4] "General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." § 909.01.

Additionally, the Connecticut Judicial Branch online printouts App., 61-62, and the NHTSA letter and mission statement App., 64-66, are also inadmissible hearsay. Wis. Stat. § 908.02 (2013-14). They do not fall under the public records hearsay exception because they do not meet any of the three statutory criteria, (a) through (c), but, more significantly, the documents indicate a lack of trustworthiness[5]. Wis. Stat. § 908.03(8) (2013-14).

Risse argued that *State v. Bonds*, 2006 WI 83, 292 Wis. 2d 344, 717 N.W.2d 133, permitted the circuit court to consider the Connecticut online judicial records to determine the existence of Risse's prior conviction, App., p. 22-23; however, *Bonds* clearly

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"Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following:…"
"(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3) or complying with any statute or rule adopted by the supreme court, or, with respect to records maintained by the department of transportation under s. 110.20 or chs. 194, 218, 341 to 343, 345, or 348, certified electronically in any manner determined by the department of transportation to conform with the requirements of s. 909.01." § 909.02.

[5] "PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, ***unless the sources of information or other circumstances indicate lack of trustworthiness***." § 908.03(8) (emphasis added).

held that a Wisconsin Consolidated Court Automation Programs ("CCAP") record is "insufficient to establish prima facie proof" of a prior conviction. *Bonds*, 2006 WI at ¶ 47, 292 Wis. 2d at ¶ 47, 717 N.W.2d at ¶ 47.

The Wisconsin Supreme Court explicitly reasoned that the disclaimer[6] on a CCAP report "by its own terms" demonstrates that the report "is of questionable accuracy." *Id*. at ¶ 46. Moreover, the disclaimer demonstrates that the online record is not the official court record and that the clerks of court maintain the official court records. *Id*. The Wisconsin Supreme Court distinguished CCAP records from uncertified judgments of conviction because "CCAP reports do not purport to be identical to the court records" and the disclaimer "specifically warns that CCAP provides no warranty of accuracy" for the information. *Id*. at ¶ 49.

Consequently, it was erroneous to consider the State of Connecticut Criminal/Motor Vehicle Convictions – Search by Docket Number online printout in determining the existence of Risse's prior conviction because, like CCAP, the Connecticut online

[6] "Policy on Disclosure of Public Information Over the Internet"… "Because information in the CCAP database changes constantly, WCCA is not responsible for subsequent entries that update, modify, correct or delete data. WCCA is not responsible for notifying prior requesters of updates, modifications, corrections or deletions." *Bonds*, 2006 WI at ¶ 46, 292 Wis. 2d at ¶ 46, 717 N.W.2d at ¶ 46.

court records have a disclaimer. The Connecticut online court record's disclaimer "by its own terms" demonstrates that the report is of "questionable accuracy," *see id.* at ¶ 4,:

> This criminal history information may change daily due to erasures, corrections, pardons, and other modifications to individual criminal history record Information. The Judicial Branch cannot guarantee the accuracy of the information except with respect to this date.

App., p. 62. Even though the Connecticut Judicial Branch name search record did not contain the disclaimer, App. p. 61, it is clearly from the same website to which the disclaimer applies.

The NHTSA records were similarly inadmissible because they also contain a disclaimer questioning their accuracy: "Although States use the NDR as part of their driver licensing process, it is the responsibility of the States to maintain the accuracy of the data submitted to the NDR," App., p. 64, and "[s]ince the NDR contains only identification information, you would need to contact the department of motor vehicles for the states listed below to obtain the specific details relating to these records." App., p. 65. Moreover, the NHTSA records do not even purport to pertain definitively to the subject of the name search: "We have searched the NDR database and found one record that ***may*** pertain to you." App., p. 64, (emphasis added). Each disclaimer "indicates a lack of

trustworthiness" rendering the records inadmissible pursuant to Wis. Stat. § 908.03(8).

Thus, the circuit court erred when it considered unauthenticated records and hearsay records because considering inadmissible records is not in accord with accepted legal standards. *See Van Riper*, 2003 WI App at ¶ 8, 267 Wis. 2d at ¶ 8, 672 N.W.2d at ¶ 8.

III. THE CIRCUIT COURT ERRED WHEN IT FOUND THAT RISSE'S PROFFERED RECORDS REBUTTED THE STATE'S PROOF OF RISSE'S PRIOR OWI-RELATED CONVICTION BECAUSE THE DECISION WAS NOT MADE IN ACCORDANCE WITH THE FACTS AND WAS, THEREFORE, CLEARLY ERRONEOUS.

The circuit court erred when it found that Risse's proffered records rebutted the State's proof of the prior 2008 Implied Consent conviction because the decision lacks a "reasonable basis" and was not made "in accordance with the facts of record." *See id.* Pursuant to Wis. Stat. § 343.305 (2013-14), the implied consent statute, failing to comply with a chemical test of one's blood constitutes a refusal. *State v. Reitter*, 227 Wis. 2d 213, ¶ 36, 595 N.W.2d 646, ¶ 36 (1999). Risse's 2008 Connecticut Implied Consent conviction in

his CDR is, therefore, a refusal that is countable as a prior conviction for the purpose of enhancing Risse's present OWI pursuant to 343.307(1)(d).

Despite the admissibility issues, even if the Court were to consider the Connecticut DMV Response, App., p. 60, and the Connecticut Record Center Superior Court letter, App., p. 63, the documents nonetheless fail to rebut the State's proof demonstrating a prior countable offense because they do not demonstrate that the Connecticut conviction was erroneously reported to Wisconsin and because they refer to a separate and distinct offense.

The Connecticut DMV Request states that "[n]o information is found on record for the above case" in the court or DMV records and refers to docket number M09M-MV08-0432892. App., p. 60. The Connecticut Superior Court letter also refers to docket number M09M-MV08-432892-S and reflects a disposition date of March 27, 2009. App., p. 63. The letter further states that the file was destroyed pursuant to local practice. *Id*. These records simply indicate that the Connecticut agencies no longer maintain the record of the occurrence. The inability to locate a physical file does not demonstrate that there was a reporting error. These records

demonstrate only that Connecticut destroyed its records of the offense described; they do not demonstrate that the Wisconsin CDR is incorrect. Accordingly, Risse failed to rebut the State's proof of the 2008 Implied Consent conviction. *See Devries*, 2011 WI App at ¶ 9, 334 Wis. 2d at ¶ 9, 801 N.W.2d at ¶ 9.

Moreover, the contents of the records clearly reflect that they pertain to a different offense, not the 2008 Implied Consent offense/conviction. The CDR reflects a March 11, 2008, violation, an April 10, 2008, conviction, and a Non UTC/Court Report ID of 08002132. App., 59. In comparison, the Superior Court letter refers to a disposition date of March 27, 2009, with a different docket number. The fact that the Connecticut documents refer to a case with a disposition date almost a year after the 2008 Implied Consent conviction demonstrates that the records have no bearing on the validity or accuracy of the Implied Consent conviction in the Wisconsin CDR. Consequently, the circuit court's ruling did not accord with the facts – documents that on their face refer to a different offense cannot reasonably be relied upon to rebut the CDR's 2008 Implied Consent conviction or demonstrate that the CDR is incorrect. Consequently, the circuit court's finding to the

contrary was clearly erroneous as it lacked a "reasonable basis" and was not made "in accordance with the facts of record." *See Van Riper*, 2003 WI App at ¶ 8, 267 Wis. 2d at ¶ 8, 672 N.W.2d at ¶ 8.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court reverse the circuit court's finding convicting Risse of a first offense OWI and remand for entry of an amended judgment reflecting a second offense conviction.

Respectfully submitted this 30th day of July, 2015.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,162 words, including footnotes.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on July 30, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 30th day of July, 2015.

Signed:

/s/ Sarah E. Belair
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