STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL NO. 2015AP000586 CR
CIRCUIT COURT CASE NO. 2013CT001592

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOSEPH C. RISSE,

Defendant-Respondent.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN BROWN COUNTY, THE HONORABLE MARC A. HAMMER PRESIDING

DEFENDANT-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

Was the trial court's consideration of documents from various government agencies of the State of Connecticut and the National Highway Traffic Safety Administration (NHTSA) clearly erroneous when those documents were presented at sentencing and were self-authenticating and reliable?

Was the trial court's finding that the State failed to meet its burden of proof that the defendant, Joseph Risse, had a prior countable conviction under Wis. Stat. sec. 343.307 from the State of Connecticut clearly erroneous when presented with competent evidence that the conviction did not exist?

CORRECTIONS/SUPPLEMENT TO STATEMENT OF THE CASE

The Defendant-Respondent, Joseph C. Risse, was initially charged on October 10, 2013 (not on October 13, 2013, as indicated in the Plaintiff-Appellant's brief) in the Wisconsin Circuit Court for Brown County. (Pl. Appellant's App. p. 51-56). The Defense presented four documents disputing the existence of any conviction from the State of Connecticut. (Pl. Appellant's App. p. 17-37).

The Defense first introduced information from the definitive record of convictions in the State of Connecticut, the State of Connecticut Judicial Branch website ("CJB website") located at http://www.jud.ct.gov/crim.htm. (*Id.* at 19-23). The information was presented both through two related screen-captured print outs and interactively as the judge duplicated the search on the website on the court's computer. (*Id.* at 19-23, 61-62.). The CJB website listed no convictions for Risse. (Pl. Appellant's App. p. 32-33, 61-62, *See also* http://www.jud2.ct.gov/crdockets/SearchByDefDisp.aspx, using search terms "Risse" and "J"). The defense additionally introduced a Connecticut Department of Motor Vehicle record indicating a clear record for Risse (Pl. Appellant's App. p.

25-26, 60), a document from the US Department of Transportation National Highway Traffic Safety Administration ("NHTSA") and supporting information from the agency's website (*Id.* at p. 28, 64-66), and a document from the Michigan Department of State Bureau of Branch Office Services Request Report (*Id.* at p. 29-31, 67-69). In its brief, the State references an additional document, a State of Connecticut Record Center Superior Court letter dated September 13, 2013 (*See* Pl. Appellant's br. p. 3, Pl. Appellant's App. p. 63), but there is no indication that this document was either introduced by Risse or relied upon by the trial court at sentencing. (Pl. Appellant's App. p. 17-43).

The State objected to admission of these documents on evidentiary grounds. (*See generally, id.* at p. 19-37). The defense argued that the rules of evidence did not preclude their admission (*id.*) and alternatively the court was not bound by the technical rules of evidentiary admission at the sentencing hearing. (*Id.* at 33).

The court specifically excluded the Michigan document and found that while the CDR had "presumptive validity . . . it can be rebutted." (Pl. Appellant's App. p. 38-39). The court made a finding of fact that the State "failed in its burden" to prove the existence of a prior countable offense and convicted Risse of a civil OWI first offense. (*Id.* at p. 41). It is from this finding of fact and resultant sentence that the State appeals.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT CONSIDERED DOCUMENTS FROM THE STATE OF CONNECTICUT AND THE US DEPARTMENT OF TRANSPORTATION REBUTTING THE WISCONSIN CDR.

A. The rules of evidence do not apply at sentencing and the court can consider a broad spectrum of information in determining an appropriate sentence.

The trial court properly considered documents submitted by Risse to rebut the State's assertion that he had a prior countable OWI-related offense because the court can consider virtually any information at sentencing that it finds will help it reach the appropriate penalty. The Wisconsin Supreme Court has held that "[n]ot only is all relevant information to be brought to the attention of the sentencing judge, but considerable latitude is to be permitted trial judges in obtaining and considering all information that might aid in forming an intelligent and informed judgment as to the proper penalty to be imposed." *Neely v. State*, 47 Wis. 2d 330, 334-35, 177 N.W.2d 79, 82 (1970) (overruled on other grounds in part[1] by *Stockwell v. State*, 59 Wis. 2d 21, 207 N.W.2d 883 (1973)). This is true to such an extent that the rules of evidence are statutorily inapplicable at sentencing. Wis. Stat. § 911.01(4)(c). As noted by the defense during the sentencing hearing, despite any technical evidentiary considerations, sentencing is a gathering of information to "get to the truth" of the matter and craft the appropriate penalty. (Pl. Appellant's App. p. 33).

It is undisputed that the documents considered by the court were introduced by Risse at sentencing and likewise clear that the documents were information that could inform the trial court's decision on the appropriate penalty. The sole question

[1] *Neely* involved the admission of juvenile delinquency proceedings that predated a decision from the Supreme Court of the United States determining that juvenile's right to counsel at a delinquency proceeding is as crucial as an adult's in a criminal case. *Stockwell* overturned *Neely* to that extent. *See Stockwell,* 59 Wis. 2d at 32-33, 207 N.W.2d at 889.

disputed by the parties at sentencing was whether an OWI-related conviction had occurred in the year 2008 in the State of Connecticut subjecting the defendant the increased penalty calculation under Wis. Stat. sec. 346.65(2). The State had alleged in its amended complaint that Risse had an OWI offense; and at sentencing that he instead had an Implied Consent violation from 2008 in Connecticut.

To support this claim, the State provided Risse's Wisconsin CDR. There is no question that the court can consider this document at sentencing. *See, e.g. State v. Spaeth,* 206 Wis. 2d 135, 556 N.W.2d 728 (1996) (regarding proof related to prior OAR convictions); *State v. Van Riper,* 2003 WI App 237, ¶ 16, 267 Wis. 2d 759, 767, 672 N.W.2d 156, 160 (the State may utilize CDR to demonstrate prior OWI convictions). Notably, neither court required that the evidence submitted be restricted to a certified copy of the CDR. In *Spaeth*, the Supreme Court noted that evidence of prior convictions could be proven by copies of judgments of conviction, admissions by the defendant at sentencing or mere teletypes of the defendant's record. 206 Wis. 2d at 153, 556 N.W.2d at 735. The *Van Riper* court seemed to take an even more broad view, allowing for proof by offenses by "appropriate official records or other competent proof." 2003 WI App 237 at ¶ 11, 267 Wis. 2d at 766, 672 N.W.2d at 159 (citing *State v. Wideman,* 206 Wis. 2d 91, 108, 556 N.W.2d 737, 745 (1996)).

Courts are careful to note, however, that the defendant is free to dispute the State's claims. *See, e.g., Wideman*, 206 Wis. 2d at 108, 556 N.W.2d at 745 ("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."); *State v. McAllister,* 107 Wis. 2d 532, 539, 319 N.W.2d 865, 869 (1982) ("The defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge prior to sentencing.") In order to effectively challenge the State's assertion, a defendant should certainly be permitted submit documents similar to those permissible for the State.

The documents submitted by Risse and considered by the court are similar in nature to documents routinely considered by courts at sentencing. The CJB website information is an official compilation of criminal and motor vehicle conviction, similar to Wisconsin's CDR. The two remaining items, the Connecticut Department of Motor Vehicle record document and the NHTSA paperwork are clearly, on their face, official government records and are likewise appropriate for consideration at sentencing. (*See* Pl. Appellant's App. p. 60, 64-66.) They are collectively and individually "appropriate official records or other competent proof" of Risse's record or—more accurately—lack thereof. *See Van Riper,* 2003 WI App 237 at ¶ 11, 267 Wis. 2d at 766, 672 N.W.2d at 159. Allowing the State, but not a defendant, to proffer such evidence would certainly offend traditional notions of justice and fair play. Accordingly, they were properly considered by the trial court at sentencing.

B. Even if the rules of evidence were applied, the documents were self-authenticating and therefore admissible.

Risse's documents are admissible under the rules of evidence because they were self-authenticating. A circuit court's "findings of historical or evidentiary facts" will not be overturned unless they are clearly erroneous. *State v. Chamblis*, 2015 WI 53, ¶ 21, 362 Wis. 2d 370, 383, 864 N.W.2d 806, 812 (citing *State v. Bollig,* 2000 WI 6, ¶¶ 13, 232 Wis.2d 561, 605 N.W.2d 199.). The trial court heard arguments on the admissibility of four documents submitted by Risse at the sentencing hearing and excluded one, while considering the others. Disregarding the document excluded by the court, the remaining documents were admissible under the rules of evidence.

The Connecticut Department of Motor Vehicle record document and the NHTSA paperwork are admissible public documents under seal pursuant to Wis. Stat. sec. 909.02(1). Public documents produced under seal are self-authenticating and:

> [e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following: **(1)** Public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state . . . or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

Wis. Stat. § 909.02(1). The NHTSA letter bears the seal of the U.S. Department of Transportation in the upper left corner and a signature on the second page. (Pl. Appellant's App. p. 64-65.) Likewise, State of Connecticut Department of Motor Vehicles document bears its seal on the upper left hand corner and a signature at the bottom. *Id.* at 60. While it is true that the Wisconsin CDR requires a separate signed

certification to be introduced as evidence, the document itself bears no authenticating signature. *See id.* at 58-59. This is easily distinguishable from the Risse documents accepted by the court, which bear not only a seal but an authenticating signature. The court did not err when admitting these documents even if the rules of evidence applied, because they were admissible as documents under seal.

Assuming, without conceding, that the CJB website is a direct analog to CCAP, that doesn't render the document inadmissible at sentencing. The State contends that *State v. Bonds*, 2006 WI 83, 292 Wis. 2d 344, 717 N.W.2d 133, stands for the proposition that a court may not consider CCAP records when determining prior convictions. Pl. Appellant's Br. p. 10-12. However the holding in *Bonds* was more nuanced that, instead finding that "by relying ***solely on the CCAP report, and without other evidence*** that could prove [a defendant's] repeater status beyond a reasonable doubt, the State did not offer sufficient evidence to constitute prima facie proof[.]" 2006 WI 83 at ¶ 49, 292 Wis. 2d 344 at 376, 717 N.W.2d 133 at 150 (emphasis added). The clear implication of *Bonds* is that while CCAP may not be sufficient, standing alone, to carry the burden of proof that a defendant has a prior conviction sufficient to satisfy a repeater allegation, the document itself was admissible.

In any case, the CJB website is distinguishable from the Wisconsin's CCAP system because the disclaimer on the CJB website is distinguishable from the disclaimer on the CCAP website which, on its face, dismisses the notion that it is

the official record.[2] By contrast the CJB website specifically indicates that "Each criminal and motor vehicle charge which resulted in a conviction within the past 10 years ***is shown***" (the State alleges Risse's Connecticut conviction occurred in 2008, well within that ten (10) year period). *State of Connecticut Judicial Branch Criminal/Motor Vehicle Case Look Up*, http://www.jud.ct.gov/crim.htm (emphasis added). No claim is made by the CJB website that it is not the official record and no reference is made to some other location or entity as being the official record. *See id.*

Finally, although the trial court did not articulate a specific reason for admitting the CJB website information, Wis. Stat. sec. 908.02(24) grants the court the authority to admit the evidence so long as it has "circumstantial guarantees of trustworthiness." The CJB website, on its face, has such circumstantial guarantees of trustworthiness, indicating that "[e]ach criminal and motor vehicle charge which resulted in a conviction within the past 10 years is shown[.]"

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[2] "The data available on the WCCA website is limited in the following ways: 1. Case information is uploaded to the WCCA website hourly unless periodic maintenance is being performed or the site is experiencing technical problems. The WCCA website information is accurate as of those updates. The WCCA program may be down for maintenance every night from 3:00 a.m. to 4:00 a.m. Central Time. 2. Each county began using the circuit court case management system at different times and made independent decisions about the conversion or backloading of old cases. Converted cases may display less information. 3. Records not open to public inspection are not displayed on the WCCA website. Confidential court records include adoptions, juvenile delinquency, child protection, termination of parental rights, guardianship, and civil commitments. 4. The official judgment and lien docket is located in the office of the clerk of circuit court for each county. Although ***WCCA is not the official judgment and lien docket***, it does accurately reflect the information entered into the circuit court case management system for that purpose." http://wcca.wicourts.gov/index.xsl (last visited August 23, 2015) (Emphasis added).

http://www.jud.ct.gov/crim.htm. Before determining whether it would be considered, the trial court not only reviewed the print out of the website, but also conducted an extensive direct examination of the website with counsel. The CJB website information was admissible to help rebut the State's claim that Risse had a prior offense in Connecticut.

The three documents relied upon by the trial court to rebut the State's claim that Risse had a prior countable OWI-related offense are admissible because the trial court has broad discretion on what information to consider at sentencing and the rules of evidence do not apply. But, even if the rules of evidence did apply, the documents are admissible under the applicable Wisconsin rules of evidence.

II. THE TRIAL COURT PROPERLY FOUND THAT THE DEFENSE HAD REBUTTED THE STATE'S ASSERTION THAT THE DEFENDANT HAD A PRIOR COUNTABLE CONVICTION UNDER §343.307 AND THAT THE STATE HAD THEREFORE HAD FAILED TO MEET ITS BURDEN OF PROOF.

The trial court's finding that the State had failed in its burden to prove a no prior countable conviction for Risse was supported by the evidence and should not be disturbed. An appellate court "will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous." *Chamblis*, 2015 WI 53 at ¶ 21, 362 Wis. 2d at 383, 864 N.W.2d at 812 (citing *State v. Bollig,* 2000 WI 6, ¶¶ 13, 232 Wis.2d 561, 605 N.W.2d 199.). It is well established law that in order for a trial court's finding of facts to be clearly erroneous, they must "contrary to the great weight and clear preponderance of the evidence." *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457, 465 (1984) (citing *State v. Mazur,* 90 Wis.2d 293, 309, 280 N.W.2d 194 (1979)). The existence of a prior conviction for purposes

of determining the penalty level for an OWI is Wisconsin must be "proven to the satisfaction of the judge[.]" *McAllister*, 107 Wis. 2d at 539, 319 N.W.2d at 869.

While it is true that, in the absence of other evidence, the State may rely solely upon the CDR for proof of a prior countable OWI-related offense, the CDR merely creates a rebuttable presumption that the prior offense exists. *See id.* The State relies primarily on *Van Riper* and *State v. Devries*, 2011 WI App 78, 334 Wis. 2d 430, 801 N.W.2d 336, to argue that the trial court was clearly erroneous in finding that the State had failed to meet its burden. Reliance on both cases is misplaced.

The defendants in *Van Riper* and *Devreis* did not provide evidence to rebut the State's CDR information, but Risse did. In *Van Riper*, there is no indication that the defendant presented any evidence to rebut the State's claim that he had prior convictions, but rather he alleged that the CDR was "inadmissible evidence" and it was "insufficient to establish his repeater status . . . beyond a reasonable doubt." 2003 WI App 237 at ¶ 1, 267 Wis. 2d at 761, 672 N.W.2d at 157. In *Devreis*, the defendant was found to have prior OWI-related countable offenses based upon non-appearances in out-of-State drunk driving charges for which she was arrested, but never appeared in court. 2011 WI App 78, 334 Wis. 2d 430, 801 N.W.2d 336. Her unsuccessful challenge was in relevant part based not upon the existence of the prior incidents (her trial counsel conceded that at least one of the events occurred), but rather on whether they constituted a conviction. *Devries*, 2011 WI App 78, ¶ 8, 334 Wis. 2d at 440, 801 N.W.2d at 340. Neither case is directly analogous nor controlling to the case at bar.

Risse specifically challenged the existence of the alleged Connecticut conviction, not the admissibility or sufficiency of the CDR, and he presented

competent evidence sufficient to persuade the trial court that the State had failed to meet its burden of proof. This evidence came from several independent different agencies, each of which tasked with maintaining records for convictions, including OWI-related offenses. After considering the one piece of evidence presented by the State, namely the CDR, cutting in favor of the existence of an OWI-related conviction and the three pieces presented by Risse, the CJB website information, the Connecticut Department of Motor Vehicle record and the NHTSA form collectively, cutting against the existence of an OWI-related offense, the trial court determined that the State failed to meet its burden of proof, in essence that the State has failed to prove the "prior conviction[] . . . to the satisfaction of the judge[.]" *McAllister*, 107 Wis. 2d 532 at 539, 319 N.W.2d at 869.

For the same reason that the *Van Riper* trial court's decision that the State had proven prior convictions was upheld, so the trial court's decision that the State hadn't proven them against Risse must be upheld: the judge had a reasonable basis to conclude as he did, his decision was made in accordance with accepted legal standards, and it was supported by the facts. *See Van Riper*, 2003 WI App 237 at ¶ 8, 267 Wis. 2d at 764, 672 N.W.2d at 158-59. Moreover, upon considering the evidence provided by both the State and Risse, the Court's conclusion was not "contrary to the great weight and clear preponderance of the evidence" and must be left undisturbed. *See Woods*, 117 Wis. 2d at 715, 345 N.W.2d at 465.

CONCLUSION

The trial court properly considered the documents Risse submitted at sentencing and properly found that the State had failed to prove a prior, countable OWI-related offense. The trial court's decision to admit documents at sentencing that aided in gathering information helpful in determining the proper penalty to be imposed was not clearly erroneous, rather it was in accordance with the appropriate action affirmatively required of the judge at sentencing. While the rules of evidence do not apply at a sentencing hearing, the self-authenticating and reliable documents were properly considered even if the rules of evidence had applied.

The trial court's determination that the State had failed to meet its burden of proof was not clearly erroneous because it was not contrary to the great weight and clear preponderance of the evidence. Rather, it was strongly supported by the information considered by the court. For these reasons, the defendant-respondent respectfully requests that this Court affirm the determinations of the trial court.

Dated at Green Bay, Wisconsin, this 27th day of August, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3117 words.

Dated at Green Bay, Wisconsin, this 27th day of August, 2015.

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CERTIFICATE 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 with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Green Bay, Wisconsin, this 27th day of August, 2015.

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