

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Appeal No. 2015AP1014

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RONALD MARSHALL JEWETT,

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
ENTERED IN THE CIRCUIT COURT FOR ST. CROIX
COUNTY, HONORABLE ERIC J. LUNDELL,
PRESIDING

PLAINTIFF-APPELLANT'S REPLY BRIEF

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ARGUMENT

**I. THE CIRCUIT COURT ERRONEOUSLY
FOUND JEWETT HAD NO PRIOR OWI
CONVICTIONS.**

The State proved Jewett's prior OWI convictions with the certified Wisconsin DOT driving record, and the Defendant did not successfully rebut Jewett's priors.

Wisconsin Statute § 343.307 (2013-14) provides that the court "shall count" prior convictions when determining the appropriate penalty.

A prior OWI is not an element of a pending OWI. State v. McAllister, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). As the State noted in its brief-in-chief, prior OWI convictions are to be proven at sentencing. See State v. Matke, 2005 WI App 4, 278 Wis. 2d 403, 692 N.W.2d 265. As the State further noted, priors can be proven by a certified Wisconsin DOT driving record. State v. Van Riper, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156.

Again, this certified DOT driving record was sufficient to prove Jewett's priors beyond a reasonable doubt. Additionally, as this Court recently and aptly noted in a similar case, "that the records were destroyed does not demonstrate the certified driving record abstract was incorrect." State v. Risse, No. 2015AP586, unpublished slip op., ¶ 14 (WI App Jan. 12, 2016)¹.

The State concludes by quoting this Court, where "Risse" could easily be replaced with "Jewett" here:

The State presented sufficient proof that Risse had a prior implied consent conviction, and the documents submitted by Risse failed to rebut this conviction. The circuit court's finding that Risse should be convicted and sentenced for first-offense OWI goes against the great weight and clear preponderance of the evidence, and therefore is clearly erroneous.

Id. ¶ 19.

The State proved Jewett's prior convictions with his certified Wisconsin DOT driving record; he did not successfully rebut his priors and the circuit court's ruling should therefore be reversed and remanded.

II. DOUBLE JEOPARDY DOES NOT BAR THIS APPEAL BECAUSE IT DOES NOT APPLY.

¹ Pursuant to Wis. Stat. § 809.23(3), this unpublished opinion is cited for its persuasive value and is attached in the Appendix.

The Double Jeopardy Clauses of the United States and Wisconsin Constitutions do not bar this appeal, nor the remedy sought by the State. “The double jeopardy clauses embod[y] three protections: ‘protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.’” State v. Lechner, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998) (citation omitted). Double jeopardy does not apply to sentencing decisions. “The Double Jeopardy Clause does not prohibit the government from appealing a sentencing ruling that does not result in acquittal.” United States v. Roasales, 516 F.3d 749, 757-58 (9th Cir. 2008) (citing United State v. Booker, 543 U.S. 220, 267 (2005)).

First, there was no acquittal in this case. Jewett was convicted of an OWI. Second, the State does not seek a second prosecution for the same offense; the State simply seeks remand for sentencing as a third offense. Third, remand would not result in “multiple punishments” as the penalty for OWI first offenses are monetary only, and any forfeiture previously paid could be applied to the OWI 3rd. Therefore, double jeopardy does not apply.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court reverse the decision of the circuit court and remand for further proceedings.

Dated this ____ day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND 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 537 words.

Dated this ____ day of January, 2016.

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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 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.

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CERTIFICATE OF MAILING

I certify that this brief was deposited into 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 expedition, on January 15, 2016.

I further certify that on January 15, 2016, I served three copies of this brief via United States Mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this ____ day of January, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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