STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1335-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MENDELL STOKES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Kenosha County Circuit Court, the Honorable Chad Kerkman, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUE PRESENTED

Mendell Stokes pled no contest to operating after revocation (OAR). The complaint alleged that his revocation was the result of a prior OWI; consequently, the penalties for OAR were enhanced from a $2500 forfeiture, to one year in jail and a $2500 fine. Wis. Stat. § 343.44(2)(ar)1-2. At the plea and sentencing, the State did not introduce any additional proof to support its allegation that the revocation stemmed from an OWI. Is Mr. Stokes entitled to have his sentence commuted to a forfeiture because the record does not include any "competent proof" that the revocation resulted from an OWI?

The circuit court ruled that Mr. Stokes was not entitled to have his sentence commuted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Stokes does not request oral argument or publication. This case involves a straightforward set of facts that can be decided by applying existing law.

STATEMENT OF FACTS

On November 13, 2013, the State filed a complaint charging Mendell Stokes with one count of failing to install an ignition interlock device, and one count of operating after revocation, contrary to Wis. Stat. §§ 347.417 and 343.44(1)(b). (1; App. 101-02). The charges arose after a traffic stop based on issues with the car's temporary license plate and registration lamp. (1:1-2; App. 101-02). As to the

operating after revocation charge, the complaint alleged that Mr. Stokes' license had been revoked due to "an alcohol related offense . . . ." (1:2; App. 102). The complaint alleged that because the reason for his license revocation was an alcohol related offense, the maximum penalty for OAR increased from a $2500 forfeiture to one year in jail and a $2500 fine. Wis. Stat. § 343.44(2)(ar)1-2. No evidence was attached to the complaint to prove that an alcohol offense was actually the basis for Mr. Stokes' license revocation.

Mr. Stokes pled no contest to both counts. (51:9; App. 112). In exchange for his pleas, the State agreed to recommend a $500 fine. (51:2; App. 105).

During the plea hearing, the circuit court recited the elements of operating after revocation: "Number one, you drove or operated a motor vehicle on a highway of this state. Number two, your operating privileges were revoked or suspended at the time that you drove or operated the motor vehicle. And, number three, you knew or had cause to know that your operating privileges had been revoked." (51:6; App. 109). Mr. Stokes confirmed he understood those elements. (51:6; App. 109). The court did not advise Mr. Stokes, nor did Mr. Stokes admit, that his license was revoked as a result of an alcohol related offense.

After accepting Mr. Stokes' pleas, the prosecutor made the following statement concerning sentencing: "The only thing I would add, Your Honor, is that the defendant's OWI conviction was from November of 2011 and the revocation of his license from that conviction was still in effect at the time of this incident." (51:10; App. 113). Neither Mr. Stokes, nor his attorney made any comments acknowledging the timing of, or basis for his license revocation.

The circuit court imposed a $300 fine on each count. (51:11; App. 114).

On May 1, 2015, Mr. Stokes filed a postconviction motion to commute his OAR conviction to a civil forfeiture. (33).[1] The motion argued that the State failed to sufficiently prove that the basis for Mr. Stokes' revocation was an alcohol related offense; therefore, he could not be subjected to the enhanced penalties for OAR. (33:2-5).

The circuit court denied the postconviction motion. The court found that Mr. Stokes was told at the plea hearing that the court would rely on the complaint to supply a factual basis for his plea, and ruled that Mr. Stokes could not subsequently try to amend his plea on appeal. (52:8; App. 122).

Mr. Stokes appeals.

ARGUMENT

I. This Court Should Vacate Mr. Stokes' Conviction for Operating After Revocation and Commute the Penalty to a Civil Forfeiture Because the Record Does Not Include Any "Competent Proof" Mr. Stokes' License Was Revoked as a Result of a Prior OWI.

This Court should vacate Mr. Stokes' conviction for OAR and commute the penalty to a forfeiture because the record does not include "competent proof" that his license was revoked as a result of a prior OWI. Whether the State has

[1] The motion also asked the court to vacate two $200 DNA surcharges. The circuit court vacated those surcharges after this Court's decision in ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756.

sufficiently proven the facts underlying a penalty enhancer at sentencing is a question of law, which this Court reviews de novo. *See* ***State v. Saunders***, 2002 WI 107, ¶ 15, 255 Wis. 2d 589, 649 N.W.2d 263.

Ordinarily, operating after revocation is not a criminal offense. It is a civil forfeiture with a maximum cost of $2500. Wis. Stat. § 343.44(2)(ar)1. However, certain enhancers can escalate an OAR to a criminal matter. Relevant to this case, the State alleged that Mr. Stokes was guilty of a misdemeanor, subject to a $2500 fine and one year in jail because the license revocation "resulted from an offense that may be counted under s. 343.307(2)." Wis. Stat. § 343.44(2)(ar)2.

To support an OAR enhancer, the State must establish prior offenses with "competent proof" of those offenses. ***State v. Spaeth***, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996). Although the State is not held to the same burden of proof as when it is attempting to prove prior convictions to support a repeater enhancer under Wis. Stat. § 939.62, the State is still required to prove the prior OAR with more than a mere allegation in the complaint or at sentencing: "It is difficult to discern the substance of a burden that the State may discharge with a mere assertion. Rather, the State discharges its burden of proving prior OAR convictions under § 343.44(2) when it presents to the court *competent proof* of each prior conviction." ***Id.*** at 153 (emphasis added).

In ***Spaeth***, the Wisconsin Supreme Court held that before imposing an enhanced penalty for an OAR, the State needed to offer "competent proof" of any prior convictions that supplied the basis for the enhancer. ***Id.*** at 148, 150. In that case, the State sought to prove that the defendant was subject to enhanced OAR penalties because he was a repeat

OAR offender. ***Id.*** at 140.[2] The only evidence in the record supporting the prior OAR convictions was an allegation in the complaint that the complainant checked with the Department of Transportation and discovered prior OARs. ***Id.*** at 141.

The Wisconsin Supreme Court held that these allegations were not enough. ***Id.*** at 153. The court held that the State could satisfy its burden to produce "competent proof" of a prior offense in one of three ways: "(1) an admission by the defendant; (2) copies of prior judgments of conviction for OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record." ***Id.*** Because the prosecutor in ***Spaeth*** merely relied on an allegation in the complaint, the Wisconsin Supreme Court reversed and remanded with instructions that the defendant's sentence be commuted under Wis. Stat. § 973.13.[3] ***Id.*** at 156.

Although ***Spaeth*** specifically concerned a penalty enhancer for *repeat* OAR offenders, there is no rational reason to apply a different standard in this case. ***Spaeth*** concerned enhancement of OAR penalties on the basis of prior OAR forfeitures; the present case concerns enhancement of OAR penalties on the basis of a prior OWI forfeiture. There is no substantive difference: the State is attempting to enhance an OAR penalty on the basis of prior forfeitures/tickets. Therefore, the State should be held to the same burden of production that was required in ***Spaeth***.

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[2] The defendant was charged with fifth offense OAR, which, at the time, was punishable by one year in jail and a $2500 fine. Wis. Stat. § 343.44(2)(3)1 (1993-94).

[3] "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." Wis. Stat. § 973.13.

In the present case, the record does not include any competent proof that Mr. Stokes' license was revoked due to an OWI. Mr. Stokes never admitted that his license was revoked as a result of an OWI. Like ***Spaeth***, the only evidence of the prior offense is an allegation. The State alleged that Mr. Stokes' license was revoked as a result of an OWI in the complaint and at sentencing. But, just as in ***Spaeth***, the State offered no substantive proof to support that allegation. Therefore, this Court should commute Mr. Stokes' sentence to an un-enhanced OAR (a forfeiture).

The State's duty to provide "competent proof" of the underlying OWI was not discharged when the court told Mr. Stokes that it would use the criminal complaint as a factual basis for the plea. At the plea hearing, the court asked if Mr. Stokes understood the court would use "the Criminal Complaint as a factual basis for a finding of guilt[.]" (51:5-6; App. 108-09). Mr. Stokes said he understood. By doing nothing more than failing to object to this statement, Mr. Stokes did not *admit* to that allegation in the complaint for purposes of the enhancer.

An admission to the prior offense cannot be inferred from the plea. A case applying the repeater enhancer under Wis. Stat. § 939.62 is instructive. In ***State v. Goldstein***, the defendant pled guilty to operating a motor vehicle without owner's consent. 182 Wis. 2d 251, 252-53, 513 N.W.2d 631 (Ct. App. 1994). The complaint alleged that the defendant was a repeat offender, and indicated the date of the prior conviction. ***Id.*** at 253-54. At the plea hearing, the court advised him of the enhanced penalties he was facing. ***Id.*** at 253. But the defendant never made any specific admission to the enhancer, nor did the State offer proof other than its allegation in the complaint. ***Id.*** at 253. This Court found that the State failed to carry its burden and commuted the

enhanced portion of defendant's sentence. The court held, in part, that the defendant's silence at the plea hearing could not waive a challenge to the enhancer; rather the defendant had to actually *admit* to the qualifying conviction. ***Id.*** at 255-56.

Similarly, there was no admission here. Mr. Stokes, just like the defendant in ***Goldstein***, entered his plea knowing the complaint alleged a prior offense. But as ***Spaeth*** makes clear, that simple allegation is not enough, even when coupled with the defendant's plea. There was never any admission by Mr. Stokes that his license was revoked as a result of an alcohol related offense. Consequently, there is no basis to impose the enhanced penalties.

This Court should commute Mr. Stokes' penalty for OAR to a forfeiture of $200.50. This was the ordinary, un-enhanced forfeiture for an OAR ticket at the time of the offense. STATE OF WISCONSIN REVISED UNIFORM TRAFFIC DEPOSIT SCHEDULE, at 25 (2013) *available at* http://www.wicourts.gov/publications/fees/docs/bondsched13.pdf (last visited Sept. 16, 2015). In the absence of the enhancer, Mr. Stokes' conviction was a simple OAR. Thus, this Court should commute Mr. Stokes' penalty to a $200.50 forfeiture.

CONCLUSION

For the reasons stated above, Mr. Stokes asks that this Court reverse the decision of the circuit court and remand with instructions to commute his sentence to a civil forfeiture.

Dated this _____ day of September, 2015.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov

Attorney for Defendant-Appellant

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 1,765 words.

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 § 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.

Dated this _____ day of September, 2015.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov
Attorney for Defendant-Appellant

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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of September, 2015.

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
haskelld@opd.wi.gov
Attorney for Defendant-Appellant

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