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DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2015AP1335-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MENDELL STOKES,
Respondent-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE
KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE CHAD KERKMAN
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BY:

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ISSUE

Is there "competent proof" to support a defendant's conviction for Operating a Motor Vehicle while Revoked (hereinafter "OAR") where Mr. Stokes stipulated that the Court could rely on the Criminal Complaint as a factual basis for the defendant's plea and the Criminal Complaint set forth the factual basis for the crime? The Circuit Court answered the question "yes".

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

STATEMENT OF THE CASE

The State does not dispute the Statement of Facts submitted by Mr. Stokes in his appellate brief. The State would add, however, that in the plea colloquy, the Circuit Court asked Mr. Stokes:

THE COURT: Have you received and reviewed a copy of the Criminal Complaint?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Do you understand that I will use that Criminal Complaint as a factual basis for a finding of guilt?

THE DEFENDANT: Yes, sir. (Appendix of Defendant-Appellant, pp. 108-09).

The Criminal Complaint states that Mr. Stokes was operating a motor vehicle on October 17, 2013. (*Id.*, p. 101). The Complaint further states that Mr. Stokes' "driving status was revoked due to an alcohol related offense". (*Id.*, p. 102). It went on to say that "[a] teletype provided by the Wisconsin Department of Transportation reveals that the defendant's driver's license was revoked on November 21, 2011, and had not been reinstated as of the date of this offense." (*Id.*). In addition to the OAR count, Mr. Stokes was also charged and convicted of failing to install an ignition interlock device on his vehicle. (*Id.*, p. 103).

ARGUMENT

The State disagrees with Mr. Stokes' argument that his OAR conviction is defective. In the plea colloquy, Mr. Stokes agreed that the Circuit Court could rely on the Criminal Complaint as a factual basis for his plea. (Appendix of Defendant-Appellant, pp. 108-09). The Criminal Complaint stated that Mr. Stokes' "driving status was revoked due to an alcohol related offense" and specified that "[a] teletype provided by the Wisconsin Department of Transportation reveals that the defendant's driver's license was revoked on November 21, 2011, and had

not been reinstated as of the date of this offense." (*Id.*, p. 102). Mr. Stokes was also convicted of failing to install an ignition interlock device on his vehicle, which was a requirement of his prior Operating While Intoxicated (hereinafter "OWI") conviction. Mr. Stokes could not have reinstated his driver's license without complying with that requirement.

Mr. Stokes cites *State v. Spaeth*, 206 Wis.2d 135 (1996) for the proposition that the State was required to submit "competent proof" that Mr. Stokes' license was revoked due to an OWI-related offense. The *Spaeth* decision concerned a defendant convicted of OAR as a 5th offense. The Wisconsin Supreme Court issued the *Spaeth* decision on the same day as it released its decision in *State v. Wideman*, 206 Wis.2d 91 (1996). In *Wideman*, the Court addressed the quantum of proof necessary to impose the enhanced penalty for a 3rd-offense OWI. In both cases, the Court held that the State must introduce "competent proof" of Mr. Stokes' prior convictions to support enhanced penalties for subsequent OWIs and OARs. Neither case addressed the quantum of proof necessary to impose criminal penalties for an OAR. Indeed, Mr. Stokes has failed to cite any binding precedent to support his argument that the State should have introduced "competent proof" of Mr.

Stokes' OWI-related revocation in this case before the Court could impose sentence. The State is similarly unaware of any Wisconsin case that supports Mr. Stokes' argument.

Assuming, *arguendo*, that *Spaeth* and *Wideman* apply to this case, the Circuit Court did, in fact, have competent proof of Mr. Stokes' OWI-related revocation at the time of sentencing. Both *Spaeth* and *Wideman* held that the defendant's admission is competent proof. In *Spaeth*, the Court held that the defense attorney's admission that "some jail time is necessary" was insufficient proof that the enhanced penalty for an OAR 5th offense applied to the defendant. In *Wideman*, however, the Court noted that the defendant was repeatedly advised that he was charged with OWI as a 3rd offense and of the penalty range associated with that offense. 206 Wis.2d at 96-97. The Court also pointed out that the defense attorney asked the trial court to deviate from the sentencing guidelines and impose the mandatory minimum penalty for the offense. *Id.* at 97. Finally, the defense attorney admitted to the trial court that this was the defendant's third OWI conviction. *Id.* The Court ruled that the defense attorney may admit the prior OWI convictions on behalf of the defendant. *Id.* at 105.

In this case, the Criminal Complaint advised Mr. Stokes that a conviction for OAR carried a possible jail sentence. Mr. Stokes admitted that the Criminal Complaint could serve as a factual basis for his conviction. That Complaint stated that Mr. Stokes' license was revoked for an OWI-related incident. Mr. Stokes was also convicted of failing to install an ignition interlock device, a requirement imposed by his OWI conviction. All of these facts constituted competent proof that Mr. Stokes' license revocation was OWI-related.

In response to the State's argument regarding his stipulation to the Criminal Complaint as a factual basis for his plea, Mr. Stokes contends that "[a]n admission to the prior offense cannot be inferred from the plea." Defendant-Appellant's brief at 6. Mr. Stokes cites *State v. Goldstein*, 182 Wis.2d 251 (Ct. App. 1994) for the proposition that a defendant must specifically admit the existence of a prior conviction for the purposes of a penalty enhancer. In *Goldstein*, the defendant was convicted of a felony and a misdemeanor as a repeater pursuant to Wis. Stat. § 973.12(1), which required the State to prove the existence of a prior felony conviction. *Id.* at 252-53. The defendant in *Goldstein* never specifically admitted the existence of the prior felony

conviction, so this Court vacated those portions of his sentence which exceeded the unenhanced maximum penalties for his crimes. *Id.* at 262.

Unlike *Goldstein*, this case does not involve a penalty enhancer. The State charged Mr. Stokes with OAR in violation of Wis. Stat. § 343.44(2)(ar)(2). This offense carries a fine up to \$2,500 and up to one year in jail. The statute does not require proof of any prior offenses but simply that the defendant's driver's license was revoked as a result of a specific reason: "an offense that may be counted under s. 343.307(2)". Wis. Stat. § 343.307 contains a list of the types of OWI and refusal convictions that may enhance a subsequent OWI conviction. If a defendant's driver's license was revoked as a result of an OWI or refusal conviction listed in Wis. Stat. § 343.307, then any driving during that revocation period is a criminal offense subject to the penalties set forth in Wis. Stat. § 343.44(2)(ar)(2).

Mr. Stokes asks this Court to grant his appeal and modify his sentence to a civil forfeiture. That request reflects a fundamental misunderstanding of the OAR statute. In this case, the State offered Mr. Stokes a plea bargain in exchange for his plea to an OAR in violation of Wis. Stat. § 343.44(2)(ar)(2), and he accepted that plea. He

has now challenged that plea on appeal. If this appeal is successful, this Court should vacate the conviction and remand the case to the Circuit Court for further proceedings consistent with its decision. Both parties to the case would go back to square one, and Mr. Stokes would have to decide whether he wants to accept another plea bargain or try the case to a jury. The State has rights, too. If this case is remanded to the Circuit Court, the State is entitled to proceed with this case as charged and to produce evidence sufficient to convict Mr. Stokes of OAR as a criminal offense.

CONCLUSION

For the foregoing reasons, the defendant-appellant's conviction should be upheld.

Dated at Kenosha, Wisconsin, this 25th day of September, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 9 pages.

Dated this 25th day of September, 2015.

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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. 809.12(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 this 25th day of September, 2015.

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