STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP1335-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MENDELL STOKES,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief in the Kenosha County Circuit Court, the Honorable Chad Kerkman, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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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 "Competent Proof" That Mr. Stokes' License Was Revoked as a Result of a Prior OWI.

The State was required to supply "competent proof" that Mr. Stokes' license was revoked as a result of a prior OWI. Because the State failed to meet that burden, Mr. Stokes could not be subject to the enhanced, criminal OAR penalties. Therefore, this Court should vacate the judgment of conviction and commute the penalty to a civil forfeiture for operating after revocation.

The State concedes that it "must introduce 'competent proof' of Mr. Stokes' prior convictions to support enhanced penalties for subsequent OWIs and OARs." (Respondent's Brief at 3); ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996); ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996). However, in the very next sentence, the State argues that neither ***Spaeth*** nor ***Wideman*** "addressed the quantum of proof necessary to impose criminal penalties for an OAR." (Respondent's Brief at 3). But that is precisely what ***Spaeth*** addressed. ***Spaeth*** requires the State to submit "competent proof" of prior offenses before imposing enhanced penalties for OAR. 206 Wis. 2d at 148. The court then offered specific examples of how the State could meet its burden: (1) "an admission" from the defendant, (2) "copies of prior judgments of conviction," or (3) "a teletype of the defendant's" driving record. ***Id.*** at 153.

No judgments, tickets, or other documentary evidence of Mr. Stokes' driving history exists in the record. Similarly, neither Mr. Stokes nor counsel said anything about his prior offenses at sentencing. In the absence of any direct evidence, the State attempts to meet its burden by miscasting Mr. Stokes' plea to OAR as evidence that he also admitted to a prior OWI conviction.

At the plea hearing, the Court never advised, and Mr. Stokes was never asked to admit, that the basis for the revocation was a prior OWI. Here, the circuit court *told* Mr. Stokes that it would be relying on the complaint as a factual basis for his plea. (56:5-6; App. 108-09). Mr. Stokes was never asked whether he agreed that he had a prior OWI conviction, let alone whether it was the reason for his license revocation. When discussing the nature of the offense, the circuit court recited the elements for an unenhanced OAR. (56:6; App. 109). And when asking Mr. Stokes for his plea, the circuit court only asked for his plea to the unenhanced "Operating After Revocation." (56:9; App. 112). The Court made absolutely no statement to Mr. Stokes about the requirement that the reason for his license revocation be an OWI.

The State compares this case to ***Wideman***, where the Wisconsin Supreme Court held the State satisfied its burden to provide "competent proof" of prior OWIs through trial counsel's admission. 206 Wis. 2d at 109. ***Wideman*** is easily distinguished from the present case. There, the defendant's attorney expressly advised the circuit court that it was the defendant's third OWI offense. ***Id.*** at 97, 109. That admission was plainly "competent proof" of the prior OWIs. ***Spaeth***, 206 Wis. 2d at 148 ("a defendant's admission, whether given personally or imputed through counsel, is competent proof of prior OAR convictions."). In contrast, the present case does

not include any admission by Mr. Stokes or his attorney. They simply said nothing about his prior record.

The State is attempting to transform its burden to provide "competent proof" of an OWI into a defendant's burden to disprove the prior offense. But by saying nothing about any prior offenses, Mr. Stokes effectively put the State to its burden: "If the accused or defense counsel challenges the existence of applicability of a prior offense, or asserts a lack of information *or remains silent about a prior offense*," the State must provide "competent proof" of the prior offense. ***Wideman***, 206 Wis. 2d at 95 (emphasis added). Thus, the State cannot transfer its burden to Mr. Stokes, and it should be held to its failure to provide "competent proof" of any prior offenses.

Finally, the State argues that if this Court finds Mr. Stokes is entitled to relief, it should vacate the conviction and allow the State to do what it needed to do in the first place: prove the enhancer. The State cites to no authority to support this remedy.

The State does not get a "do-over" after it fails to meet a basic burden of production. Appellate courts have repeatedly observed that "while prosecutors face difficult tasks, properly pleading and proving repeater allegations are not among them." ***State v. Koeppen***, 195 Wis. 2d 117, 130, 536 N.W.2d 386; ***Wideman***, 206 Wis. 2d at 107 n.24; ***State v. Theriault***, 187 Wis. 2d 125, 132 n.1, 522 N.W.2d 254 (Ct. App. 1994). Consequently, the State cannot rely on postconviction procedures to cure its failure to prove those repeater allegations. ***Koeppen***, 195 Wis.2 d at 130-31.

In ***Spaeth***, the State failed to supply "competent proof" of the prior convictions, so the conviction was vacated and commuted. 206 Wis. 2d at 156. The State was not invited to

supply proof that it should have supplied in the first place. There is no logical reason for a different result here. Therefore, this Court should vacate Mr. Stokes' conviction and commute the penalty to a civil forfeiture.

CONCLUSION

For the reasons stated above and in his initial brief, 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 the 1st day of October, 2015.

Respectfully submitted,

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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 937 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 1st day of October, 2015.

Signed:

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