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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2017AP000022 CR
Lincoln County Circuit Court Case No. 2015CT000062

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORY V. AMBROZIAK,

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION IN THE CIRCUIT COURT FOR LINCOLN COUNTY, THE HONORABLE JAY R. TLUSTY, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT KORY V. AMBROZIAK

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STATEMENT OF THE ISSUES

Did the State properly prove that Mr. Ambroziak had one countable prior operating while under the influence related offense?

The trial court answered yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Kory V. Ambroziak, (Mr. Ambroziak) was charged in Lincoln County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant as a second offense contrary to Wis. Stat. §§346.63(1)(a), on September 13, 2014. A jury trial was held on September 26, 2016, where the jury found Mr. Ambroziak guilty. Following the jury trial, the case immediately proceeded to sentencing where the court found that based on the information submitted, Mr. Ambroziak had one prior countable OWI related offense, and proceeded to sentence Mr. Ambroziak as a second offense. (R. 41:12-13/ A.App. 8-9). A Judgement of Conviction was entered on September 27, 2016 (R.29:1).

Mr. Ambroziak by counsel, timely filed a Notice of Intent to Pursue Post Conviction Relief on October 14, 2016. The defendant timely filed a Notice of Appeal on January 3, 2017. The appeal herein stems from the Court's finding at sentencing that Mr. Ambroziak had one countable prior OWI conviction.

The pertinent facts are as follows and were provided at the sentencing hearing on September 26, 2016. At sentencing, the court considered an offense from Shawno County. The court indicated that the OWI charge in that case was amended to

reckless driving, but there was also a refusal that was appealed. The state indicated that it had the "printout" of his OWI refusal in Shawno County and it indicated that the court of appeals upheld the refusal. (R.41:9/ A.App. 5). After reviewing the court of appeals decision and reviewing the CCAP entry for the Shawno County files, the court asked defense counsel if he agrees this is a second offense, counsel indicated that he could not stipulate to the prior countable OWI. (R41:5-13/ A.App. 1-9). Defense counsel indicated that the State should put forth a driving record showing the prior conviction. (R.41:9/ A.App. 5). The State introduced and the court considered an uncertified driving record printout (R.30:1-2/ A.App. 10-11) and a CCAP entry (R.31:1-3/ A.App. 12-14), and found that based on its review of those documents and the court of appeals decision, that there was one countable prior conviction and sentenced Mr. Ambroziak as a second offense. (R.41:12-13/ A. App. 8-9). However, the Driver Record submitted does not show the prior conviction for a Refusal. The court used the CCAP entry in part to determine that Mr. Ambroziak had a prior conviction for a refusal in Shawano County, and sentenced Mr. Ambroziak as a second offense.

A Judgment of Conviction was entered and an Order denying the defendant's motion was signed and filed on September 27, 2016. The defendant timely filed a Notice of Appeal on January 3, 2017. The sole issue on appeal is whether the information submitted and considered by the court was competent proof of the Mr. Ambroziak's prior offense beyond a reasonable doubt.

ARGUMENT

STANDARD OF REVIEW

On appeal, the circuit court's factual findings are reviewed pursuant to the clearly erroneous standard. The appellate court will uphold those factual findings unless they are clearly erroneous. ***State v. Popke,*** 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569. However, applying those facts to constitutional or statutory principles is a question of law that is reviewed *de novo.* ***Id.*** When evidence is purely documentary, the court reviews the evidence *de novo.* ***State. v. Love,*** 2005 WI 116, ¶70, 284 Wis.2d 790, 796, 709 N.W.2d 466.

A. BECAUSE THE STATE FAILED TO PROVIDE AN "OFFICIAL RECORD OR OTHER COMPETENT PROOF" SHOWING A PRIOR COUNTABLE "CONVICTION" UNDER WIS. STAT. §343.307, THE TRIAL COURT ERRED IN FINDING THAT MR. AMBROZIAK HAD A PRIOR COUNTABLE OFFENSE MAKING THIS A SECOND OFFENSE OWI

Wisconsin's OWI sentencing scheme provides enhanced penalties where individuals have prior countable convictions under Wis. Stat. §343.307. A second offense OWI within 10 years of a prior countable conviction is a criminal offense and subject to the enhanced penalties under Wis. Stat. §346.65(2)(am)2. A prior conviction for refusing, Wis. Stat.

§343.305(9), is a prior countable offense under Wis. Stat. §343.307.

Existence of the prior offense is not an element of the underlying crime of OWI second offense. ***State v. McAllister,*** 107 Wis.2d 532, 538, 319 N.W.2d 865 (1982). However, before the court can enhance the penalty under Wis. Stat. §346.65(2)(am), the state must establish the prior offense. ***State v. Wideman,*** 206 Wis.2d 91, 104, 556 N.W.2d 737 (1996). The burden is on the state to establish the prior offense beyond a reasonable doubt. *See* ***State v. Saunders,*** 2002 WI 107, ¶3, 255 Wis.2d 589, 649 N.W.2d 263. The burden is met only if "appropriate official records or other competent proof" establish the prior conviction. ***Wideman,*** 206 Wis.2d at 108.

In ***State v. Van Riper,*** 2003 WI App 237, ¶16, 267 Wis.2d 759, 672 N.W.2d 156, the court, relying on ***State v. Spaeth,*** 206 Wis.2d 135, 556 N.W.2d 728 (1996), found that either "a teletype of a defendant's DOT driving record" or a "certified DOT driving record" are competent proof of a defendant's prior conviction.

In Mr. Ambroziak's case, the state introduced an uncertified Wisconsin Department of Justice Crime Information Bureau Driver Record. (R.30:1-2/ A.App. 10-11). While this

record would be competent proof as required under ***Spaeth*** and ***Van Riper,*** it is clear on the face of the document that this record does not show a prior countable conviction under Wis. Stat. §343.307. Thus, the "Driver Record" introduced by the state does not meet their burden of proof showing the prior conviction beyond a reasonable doubt.

Because the above record failed to show a prior countable conviction, the state proceeded to introduce a three page print out of the Consolidated Court Automation Programs (CCAP), alleging a prior offense in Shawano County. (R.31:1-3/ A.App. 12-14). Based in part on a review of that information, the court found that there was a prior conviction on December 19, 2014. (R.41:12/ A.App. 8). The issue is whether a CCAP entry is competent proof of a prior countable OWI conviction.

In ***State v. Bond,*** 2006 WI 83, 292 Wis.2d 344, 717 N.W.2d 133 the court considered whether a CCAP record could be sufficient proof to establish a prior conviction under the repeater provisions of Wis. Stat. §973.12. In ***Bond***, the State attempted to meet its burden of proving the prior offense by introducing records from Wisconsin's online CCAP system. ***Id.*** at ¶33, 35. The court concluded that "[w]e cannot…consider the contents of a CCAP report to rise to the level of reliability

sufficient to establish prima facie proof that a defendant has a prior qualifying conviction." ***Id.*** at ¶49. Consequently, because of the lack of reliability of CCAP reports, a CCAP report is not sufficient proof of a prior conviction. While the ***Bond*** court specifically dealt with CCAP records in terms of the repeater provisions of Wis. Stat. §973.12, the rationale equally applies to the enhanced sentencing provisions of Wis. Stat. §346.65.

Subsequently, in an unpublished case, cited only for persuasive authority, the appellate court applied the rationale of ***Bond*** to cases involving enhanced penalties for OWI convictions. ***State v. Risse,*** *unpublished,* 2015AP586, January 12, 2016. The ***Risse*** court found that an online database record was insufficient to establish the existence or nonexistence of a prior OWI conviction. ***Id.*** In ***Risse,*** the defendant tried to use a State of Connecticut online printout, similar to Wisconsin's CCAP, to rebut the State's allegation of a prior conviction. ***Risse*** at ¶16. The court, citing to ***Bond,*** found that "just as the State could not rely on the information in Wisconsin's CCAP database to prove a prior conviction…the Connecticut database with a comparable lack of reliability was not properly used by the circuit court to question whether a conviction exists." ***Risse*** at ¶17. ***Bond*** and the rationale in ***Risse*** make it clear that a

CCAP record is insufficient to prove the existence of a prior OWI conviction for sentencing enhancement under Wis. Stat. §346.65.

Thus, because a CCAP record does not rise even to the level of "prima facie" evidence of a prior conviction, the court's reliance on the CCAP entry introduced by the State in part to establish Mr. Ambroziak's prior OWI conviction was clearly erroneous. Furthermore, because the "Driver Record" fails to show a prior countable OWI conviction, the court's finding that Mr. Ambroziak had one prior countable conviction is clearly erroneous.

CONCLUSION

Because the State failed to prove Mr. Ambroziak's prior conviction beyond a reasonable doubt, the trial court erred in finding Mr. Ambroziak had one prior conviction, and sentencing him under the enhanced penalties for a second offense OWI. Thus, the Court should reverse the judgment of conviction and remand for sentencing consistent with an OWI first offense.

Dated this 13th day of March, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 17 pages. The word count is 3044.

Dated this 13th day of March, 2017.

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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. 809.19(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 this 13th day of March, 2017.

Respectfully submitted,

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APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a 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 13th day of November, 2017.

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APPENDIX

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