STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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Appeal No. 2017AP000022CR
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 RESPONSE BRIEF OF THE PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT OF THE ISSUES

Did the State properly prove that Mr. Ambroziak had one (1) prior offense countable under Wis. Stats. Sec. 343.07(1)?

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

As indicated in the brief of the Defendant-Appellant, at trial the State introduced a non-certified Department of Transportation print out of the Defendant's driving record showing a 12-19-2014 violation appeal status for an August 30, 2014 implied consent violation. Also as indicated in the Defendant-Appellant's brief, after the Court questioned the State about the status of the appealed implied consent violation, the State presented a CCAP printout for the purpose of establishing that the implied consent violation reflected on the driving record had been resolved in the Court of Appeals with a finding that the refusal had been unreasonable. A significant fact omitted from the Defendant-Appellant's brief is that the Circuit Court in Lincoln County reviewed the Court of Appeals decision prior to sentencing, noted that the Court of Appeals affirmed the Circuit Court in Shawano County on the refusal and concluded that the refusal finding in Shawano County was justified. The Court further indicated that the Court of Appeals ruling corresponded with a Stipulation and Order signed by Mr. Piel, who represented

the Defendant in both Shawano and Lincoln Counties, on September 30, 2015. The Court noted that it appeared that the Court of Appeals decision was dated September 23, 2015 and a week later Mr. Piel signed a stipulation concerning the disposition of the Shawano County Operating a Motor Vehicle While Intoxicated Offense. The Lincoln County Court further questioned Mr. Piel if the Court's recitation was consistent with Mr. Piel's understanding to which Mr. Piel indicated "That sounds correct your honor. It sounds right." (R.41 P.9 L. 24 through R. 41 P. 10 L. 17)(App. 2 L. 24-App. 3 L. 17)

ARGUMENT

STANDARD OF REVIEW

The Defense accurately sets forth case law concerning the standard of review to be applied in this case. However, the State does not believe that the evidence in this case can be characterized as purely documentary because it also includes Defense Counsel's response to a specific recitation by the Trial Court of a Court of Appeals decision and the acknowledgement of a subsequent stipulation based upon the Court of Appeals decision.

A. THERE WAS PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD A PRIOR COUNTABLE CONVICTION UNDER WIS. STAT. § 343.307(1)

The Defendant correctly acknowledges that either a teletype of the Defendant's Department of Transportation driving record or a certified copy of the Department of Transportation driving record are competent proof of a Defendant's prior violation. The Defendant acknowledges that the non-certified driver record presented to the Court in this case would have been sufficient proof under *State v. Spaeth*, 206 Wis.2d 135, 556 N.W.2d 728 (1996) and *State v. VanRiper*, 2003 WI App 237, 267 Wis.2d 759, 672

N.W.2d 156 were it not for the submitted document showing the implied consent violation was under appeal. The Defendant argues that admission of the CCAP entry by th State in addition to the submission of the Department of Transportation driving record printout showing a conviction under appeal is not sufficient evidence for the Court to have found beyond a reasonable doubt that the Defendant had a prior countable conviction under Wis. Stat. Sec. 343.307(1). In both of the case cited by the Defense for this proposition, either CCAP records or an out-of-state online database entries were found not to be sufficiently reliable standing alone to provide sufficient proof of what was in the database. *State v. Bond*, 2006 WI 83, 292 Wis.2d 344, 717 N.W.2d 133 and *State v. Risse*, *unpublished*, 2015AP586, January 12, 2016. While the Defendant in *Risse* did submit documents in addition to the computer database information, the Court of Appeals found that none of those documents had probative evidence on the issue, so the computer database information was standing alone.

This case is clearly distinguishable because the information from the CCAP database was not standing alone. As previously indicated there are four (4) portions of evidence which were developed concerning whether or not the Defendant had a prior implied consent violation which was on his record and countable. First there was the Department of Transportation print out showing the implied consent violation date and the appellate status as of December 15, 2015. Second there was a CCAP printout indicating that the appellate status had subsequently been resolved with a finding that the refusal in question had been deemed unreasonable by the Court of Appeals. Third the Trial Court took the time to review the actual Court of Appeals decision affirming the implied consent violation which the State was relying upon for the enhanced sentencing

status. Fourth, the Trial Court specifically recited what it had found in the record including a stipulation made in light of the Court of Appeals decision one week prior which had been signed by counsel who was representing the Defendant in Lincoln County as well as having represented the Defendant in the Shawano County matter. Defense counsel acknowledged to the Court that the Court's recitation concerning the Court of Appeals decision and the stipulation he had entered into in Shawano County sounded correct and right. Based upon the totality of this evidence it is clear that the Court was not relying upon CCAP entries standing alone and that this case is distinguishable from *State v. Bond* and *State v. Risse*. Based upon the totality of the evidence, the Trial Court was justified in finding a prior countable offense under Wis. Stat. Sec. 343.307(1) and sentencing the Defendant accordingly.

As the Respondent the State will not get an opportunity to rebut the Defendant-Appellant's reply brief. The State anticipates that the Defendant may claim that there was a misunderstanding between the Court and Defense Counsel based upon Counsel's statement on (R. 41, P. 11 L. 10-12) (App. 4, L 10-12) which reads as follows: "The refusal I was talking about was in this particular case, Your Honor, not in that case." The State believes that it is absolutely impossible that Mr. Peil was confused about which refusal situation the Court was enquiring of, since on a prior Transcript page Mr. Piel had previously advised the Court that Counsel was aware that there had not been a refusal determination in Lincoln County. (R. 4, P. 4 L. 21-23)(App. 1, L 21-23) If Defense Counsel makes a claim that he believes the Lincoln County Circuit Court was referring to the status of the Lincoln County refusal when the Court questioned Trial Counsel at (R.

41, P. 10 L. 15-17)(App. 3, L. 15-17) Trial Counsel would be disingenuous at best and engaging at fraud on the tribunal at worst.

B. SHOULD THE DEFENDANT PREVAIL ON THE ARGUMENT THAT THERE WAS INSUFFICIENT EVIDENCE TO FIND THE DEFENDANT HAD A PRIOR COUNTABLE VIOLATION UNDER WIS. STAT. § 343.307(1) THE DEFENSE HAS FAILED TO ESTABLISH AUTHORITY FOR THEIR REQUESTED REMEDY

The Defendant's requested relief in this case in the event that he is successful is a request that the sentence be vacated and that the Lincoln County Circuit Court be instructed to sentence the Defendant to first offense penalties. The Defendant has not submitted any authority in support of this being the correct remedy in the event that he prevails on this appeal. Since the Defense has provided no authority for their position and since it would be a waste of resources to address an issue which is not properly before the Court, the State will not be arguing this issue either. However, if the Court of Appeals were to find in the Defendant's favor the State requests that supplemental briefs be requested to address the issue of the appropriate remedy.

Dated this 29th day of March, 2017.

Respectfully Submitted

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certifies that this response 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 professional serif font. The length of this brief is 12 pages. The word count is 1,865.

Dated this 29th day of March, 2017.

Respectfully Submitted

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this response brief, excluding the appendix, if any, which complies with the requirements of 809.19(12).

I further certify that:

This electronic reply 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 29th day of March, 2017.

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APPENDIX CERTIFICATION

I hereby certify that 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 court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgement entered in a judicial review of an administrative decision, the appendix contains the findings of the administrative agency.

I further certify that if the record is requires by law to be confidential, the portions of the record included in the appendix are produced 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 produced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of March, 2017.

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APPENDIX