

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III**

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

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v.

**KORY V. AMBROZIAK,**

Defendant-Appellant.

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

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

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## ARGUMENT

The parties agree that a certified copy of a driving record or a teletype of a driving record showing the existence of a prior conviction would be competent proof of the prior offense. However, the State failed to introduce the proper record showing a prior conviction. Even after defense counsel stated “I think to stave off appellate issues, I think, that the State should provide a driving record showing the prior convictions. I think that’s the way it has to be done here. If it’s not, I think it opens the door for appellate process. Because I think at sentencing, the Court has to determine whether or not there is a prior conviction and I can’t stipulate to that for the purposes of anything without Mr. Ambroziak agreeing to that.” (R.41:9/ ReplyApp 1). Defense counsel made it clear that the defense would not stipulate to a prior conviction.

While the 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), 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))

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.

The Wisconsin Department of Justice Crime Information Bureau Driver Record. (R.30:1-2) offered by the state did not establish a prior conviction. Furthermore, the Consolidated Court Automation Programs (CCAP), relied on by the court (R.31:1-3), is not competent proof sufficient to establish a prior conviction. *State v. Bond*, 2006 WI 83, 292 Wis.2d 344, 717 N.W.2d 133, see also *State v. Risse*, *unpublished*, 2015AP586, January 12, 2016.

The evidence introduced by the State and relied upon by the court does not meet the State’s burden to establish the prior conviction beyond a reasonable doubt. Because of this, the court’s finding is clearly erroneous.

Finally, the State argues that if the Court finds the State failed to establish the prior conviction, the remedy requested by the defense is not the appropriate remedy. See Brief of Plaintiff-Respondent, page 8. If the State failed to establish the prior conviction, the Court is left with no choice but to sentence Mr. Ambroziak under the provisions of an OWI first offense. Logic

dictates that a prerequisite for enhanced penalties under Wis. Stat. §346.65 is a prior countable conviction under Wis. Stat. §343.307. If the State failed to establish the prior countable conviction beyond a reasonable doubt, this can only be an OWI first offense.

### **CONCLUSION**

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 13<sup>th</sup> day of April, 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 9 pages. The word count is 1608.

Dated this 13<sup>th</sup> day of April, 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 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 13<sup>th</sup> day of April, 2017.

Respectfully submitted,

Piel Law Office

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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 13<sup>th</sup> day of April, 2017.

Respectfully submitted,

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## **APPENDIX**