STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001261 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JUSTIN A. BRAUNSCHWEIG,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT ENTERED IN THE
CIRCUIT COURT FOR JEFFERSON COUNTY
THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

Respectfully submitted,

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Defendant-Appellant

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STATEMENT OF THE ISSUES

I. CAN AN EXPUNGED CONVICTION BE USED AS A PREDICATE OFFENSE IN AN OWI CASE?

Trial Court's Answer: Yes

II. IN AN OWI SECOND OFFENSE CASE WHERE THE EXISTENCE OF A CONVICTION FOR THE REQUISITE PREDICATE OFFENSE IS NOT STIPULATED BY THE DEFENSE, MUST THE PRESENT EXISTENCE OF A VALID PRIOR CONVICTION BE PROVEN BEYOND A REASONABLE DOUBT?

Trial Court's Answer: No

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication.

STATEMENT ON ORAL ARGUMENT

Defendant-appellant believes oral argument affords clarification and exposition of the issues, and stands ready to provide argument if sought by the Court.

STATEMENT OF THE CASE AND FACTS

On September 2, 2016, Justin Braunschweig was stopped, detained, and arrested for operating under the influence. He submitted to a chemical test of his breath producing a result of .16 g/210 L of his breath. R. 1, p. 2. He was cited for operating under the influence and operating with a prohibited alcohol concentration. R. 2, R. 3. The criminal complaint cites one prior conviction as the necessary predicate offense to make this case criminal. R. 1, p. 3. It is undisputed that said conviction had been previously expunged. R. 31, p. 11. Braunschweig filed a motion challenging the sufficiency of an expunged conviction to serve as a predicate offense. R. 13. The trial court ruled against the defense. R. 30. Braunschweig then waived jury trial. R. 31. The matter was tried to the court. R. 32. The defense argued that the existence of at least one prior conviction is a status element in a second offense case that, if not stipulated to, is for the trier of fact, and must be proven beyond a reasonable doubt. R. 19. The trial court rejected that argument. R. 13. The case was then tried to the court, and Braunschweig was convicted. R. 24. From those convictions, this appeal is taken.

ARGUMENT

An expunged conviction is a nullity that cannot be considered at a sentencing proceeding for a subsequent offense. ***State v. Leitner***, 2002 WI 77, ¶ 43-44, 253 Wis. 2d 449, 474, 646 N.W.2d 341, 353. Retention of record of that expunged conviction by the Department of Transportation for use of the secretary pursuant to Wis. Stat. §343.23(2)(b) does not change this. The manner in which this Court in ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156 applied the Supreme Court's holdings in ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996) and ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996) does not address the State's ability to use a certified driving record as admissible and competent evidence of a conviction that it concedes was subsequently expunged pursuant to Wis. Stat. §973.015. The fact that a certified driving record abstract can serve as admissible and competent evidence that a conviction by a court of law once existed does not establish that it continues to exist. Just as where proof is brought forward to show that said conviction was reversed on appeal serves to deprive the State of the necessary predicate conviction, so too does expunction of that conviction.

I. IF *McALLISTER* CONTROLS, *BANKS* AND ITS PROGENY ARE IRRELEVANT.

While ultimately finding that the State proved appellant's prior conviction beyond a reasonable doubt by submitting a certified driving record reflecting the original entry of that sole prior conviction, R. 32, p. 16, the trial court also expressly

held that the existence of that required predicate conviction ". . . is not an element that must be proven beyond a reasonable doubt. Rather, it is a legal determination that the Court must make." R. 32, p. 13. To the extent this question has bearing on the sufficiency of a certified driving record reflecting the entry of a conviction to prove the ongoing existence of the requisite valid prior conviction, it is addressed first.

It is conceded at the outset that in ***State v. McAllister***, 107 Wis. 532, 319 N.W.2d 865 (1982), the Supreme Court held that prior convictions were not elements of the crime of driving or operating a motor vehicle under the influence. 107 Wis. 2d at 532-533, 319 N.W.2d at 866. However, that decision is based expressly upon the finding that the graduated penalty structure of Wis. Stat. § 346.65(2) ". . . is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense, i.e., the prohibited conduct, but rather goes only to the question of punishment." In this regard, the Supreme Court expressly found ***State v. Banks***, 105 Wis. 2d 32, 313 N.W.2d 67 (1981) irrelevant to the question before it. 107 Wis. 2d at 535, 319 N.W.2d at 867. ***McAllister*** therefore is distinguishable from subsequent decisions which follow ***Banks*** and distinguish the OWI repeater statute from general repeater statutes, like ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156. To the extent ***McAllister*** continues to answer the element question in an alleged second offense case like the instant case, the trial court's ruling is correct on that

point, but the trial court's extension of ***Van Riper*** to conclude an expunged conviction remains sufficient to serve as a predicate offense merely because it still shows up on appellant's driving record is in error.

Specifically, the ***McAllister*** decision's reasoning is as follows:

> There is no presumption of innocence accruing to the defendant regarding the previous conviction or convictions; such convictions have already been determined in the justice system and the defendant was protected by his rights in those actions.
>
> The defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge prior to sentencing. However, the convictions may be proven by certified copies of conviction or other competent proof offered by the state before sentencing.

107 Wis. 2d at 539, 319 N.W.2d at 869.

Key to the ***McAllister*** decision as applied to the instant case is the Supreme Court's focus on the justice system as providing the relevant protections to the rights of the accused, ***not*** the DOT. As provided for by the ***McAllister*** decision, appellant here challenged the continued existence of the sole prior conviction that would make this case criminal, and the State conceded that said conviction had been expunged. The certified driving record abstract offered at trial proves only that a conviction was previously entered on the listed conviction date. It says nothing about the continued existence of that conviction at the time appellant was tried and sentenced in the case now on appeal. Appellant does not argue that the certified record is not admissible, or does not serve as competent proof that a conviction was previously entered. Appellant simply argues that said conviction no longer exists in the court records,

having been expunged. The State conceded this fact, but then convinced the trial court to extend ***Van Riper,*** *supra*, to hold that the fact the conviction no longer existed didn't matter. R. 30, pp. 22-23; R. 30, p. 10.

Given the irrelevance of ***Banks***, and presumably, its progeny to the application of ***McAllister*** to the primary question on appeal, during the court trial conducted to preserve that issue for appeal, the defense declined to stipulate to the existence of a valid prior at trial, or accept any burden shift on the validity and continued existence of the expunged prior conviction to avoid waiver. On appeal, the defense concedes the holding in ***McAllister***, noting only that Wis. Stats. §§ 346.63 and 346.65 have changed substantially since it was decided.

These changes would appear to underlie this Court's decision in ***Van Riper***, *supra*, a third offense case which the State advocated before the trial court as controlling here, in this second offense case. In ***Van Riper***, this Court's opinion concludes as follows:

> We conclude that the trial court properly exercised its discretion when it admitted Van Riper's certified DOT driving record as evidence and that such evidence established Van Riper's repeater status as an element of the offense beyond a reasonable doubt.
>
> 2003 WI App 237, ¶ 21, 267 Wis. 2d at 770-771, 672 N.W.2d at 161.

More recently, in ***State v. Jewett***, Appendix, pp. A-16 – A-28, [unpublished, but citable pursuant to Wis. Stat. §§ 809.23(3)(b) and 752.31(2)f] this Court held as follows:

> The fact of a prior OWI violation is not an element of the crime of second or greater-offense OWI, ***State v. McAllister***, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). Nonetheless, for the circuit court to impose an enhanced penalty under Wis. Stat. § 346.65(2), "the State must establish the prior offense," ***State v. Wideman***, 206 Wis. 2d 91, 104, 556 N.W.2d 737 (1996) (citing ***McAllister***, 107 Wis. 2d at 539, 319 N.W.2d 865) and that offense must be proven to the court beyond a reasonable doubt, *see* ***State v. Saunders***, 2002 WI 107, ¶ 3, 255 Wis. 2d 589, 649 N.W.2d 263. The State can establish a prior offense through "appropriate official records or other competent proof." ***Wideman***, 206 Wis. 2d at 108, 556 N.W.2d 737. Finally, the fact of prior OWI convictions is to be proven at sentencing. *See* ***State v. Matke***, 2005 WI App 4, ¶ 9, 278 Wis. 2d 403, 692 N.W.2d 265.
>
> ***Jewett***, ¶ 10.

Appellant believes this Court's quoted opinion in ***Jewett*** to be a reasonable attempt to reconcile the absence of any specifically stated burden of proof in ***McAllister*** with the subsequent developments in the law, both statutory and case law, that have occurred since 1982. To the extent, however, this case were to make it to the Supreme Court, appellant wishes to preserve a good faith argument for the simplification of the applicable legal analysis by establishing that required predicate(s) should be treated as elemental in any criminal OWI/PAC case where their existence or continued validity is not stipulated to by the defense.

II. AN EXPUNGED CONVICTION IS A NULLITY THAT CAN'T BE CONSIDERED TO ENHANCE SENTENCE.

The language of Wis. Stat. §343.307(1) is the key to the determination required here, and the State appears to concede that appellant's expunged conviction is the only thing that could possibly be counted as the required predicate under that

statute in this case. While the statute does list other types of record entries that can be used as the necessary predicate, none of those appear to apply here. R. 29, pp. 3-7.

The appellant further agrees that expunction of the court record in his prior case did not require expunction of DOT records. However, the retention of those DOT records pursuant to Wis. Stat. §343.23(2)(b) is "so that the complete operator's record is available for use ***of the secretary*** in determining whether the operating privileges of such person shall be suspended, revoked, canceled, or withheld, or the person disqualified in the interest of public safety." [Emphasis added]. If the legislature had intended those records to be used by anyone other than the DOT secretary for any purpose other than the one delineated in that statute, they would presumably have said so.

Therefore, for the purpose of criminally punishing appellant, the State needs the expunged conviction. The ability of a sentencing court to rely on an expunged conviction was addressed in ***State v. Leitner***, 2002 WI 77, ¶ 43-44, 253 Wis. 2d 449, 474, 646 N.W. 2d 341, 353.

> ¶ 43. The State concedes that a circuit court cannot consider an offender's prior expunged record of conviction at the offender's sentencing proceeding for a subsequent offense. According to the State, the record of conviction is, when expunged, a nullity.

Accordingly, it is respectfully argued that, as in ***Leitner***, a sentencing court "cannot consider an offender's prior expunged record of conviction" for sentencing purposes, and said expunged conviction cannot therefore serve as the requisite

predicate offense. In the absence of a valid conviction in existence at the time of sentencing, this case must be treated as a forfeiture offense.

At the conclusion of the initial hearing on appellant's motion, the trial court continued the matter to allow the parties to submit further authority, specifically requesting the parties to address the applicability of Wis. Stat. §939.62 to the question at hand. R. 29, pp. 23-24. Pursuant to ***State v. Delaney***, 2003 WI 9, ¶ 17, 259 Wis. 2d 77, 85-86, 658 N.W.2d 416, ___, the statute does apply, but not necessarily in the manner in which the trial court posed the question. In ***Delaney***, the Supreme Court rejected Mr. Delaney's argument that §939.62 did not apply to OWI offenses. However, the ***Delaney*** opinion affirms and distinguishes its prior holding in ***State v. Wideman***, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996), which held that the burden of proof requirements for prior OWI convictions were not governed by Wis. Stat. §939.62. *See* ***Delaney*** at ¶ 28. ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156 relied on ***Wideman*** to hold that the proof requirements of Wis. Stat. §973.12(1) do not apply in OWI cases. *See also* ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996) in relationship to OAR convictions. None of these cases obviate the need for proof that valid predicate prior convictions continue to exist at the time of sentencing.

The manner in which the State convinced the trial court to summarily apply the limited holding of ***Van Riper*** would preclude admission or consideration of any equally competent evidence that would rebut the continued existence of a conviction

reflected on a DOT abstract. That is an unwarranted extension of the holding in that case. Mr. Van Riper simply challenged the sufficiency of Wisconsin driver's license abstract to prove the existence of a prior countable conviction for Minnesota. No evidence was offered that the person convicted in Minnesota was not Mr. Van Riper, or that the conviction had been overturned in Minnesota, or expunged. By contrast, in the case before this Court, the State does not dispute that the challenged prior in this case was in fact expunged. R. 31, p. 11.

Based upon the above, it is argued that the real question before the Court is whether an expunged conviction retained in DOT records pursuant to the statutory authority under Wis. Stats. §343.23(2)(b) for the express purpose of making "the complete operator's record available for the use of the secretary . . ." can be counted to criminally enhance penalty even after said conviction has been expunged. The question is not therefore whether a certified driving record abstract is competent proof that a prior conviction occurred, but rather whether a subsequently expunged conviction can continue to be used to enhance penalty in a traffic case when Wis. Stat. §973.015 makes no exception for traffic cases. Therefore, under ***State v. Leitner***, 2002 WI 77, ¶ 43, a sentencing court cannot consider the defendant's prior expunged record at sentencing, even if the DOT secretary can continue to use it for the purposes enumerated in Wis. Stat. §343.23(2)(b), as for the purposes of using it in court, the conviction is a nullity.

CONCLUSION

As the Supreme Court found in both ***McAllister*** and ***Delaney***, *supra*, other than for the timing purposes addressed in ***Banks***, *supra*, and determined to be irrelevant to the Supreme Court's holding in ***McAllister***, the OWI repeater statute is to be treated like just another repeater statute. The relaxation of the form of the proofs required by the inapplicability of Wis. Stat. §973.12(1) likewise does not change the need for proof of the ongoing existence of the required predicate at the time of sentencing in a second offense case. ***Leitner*** therefore controls the question before this Court. Appellant's criminal conviction must be reversed, and the matter remanded to the trial court for disposition as a forfeiture conviction.

Dated at Jefferson, Wisconsin this 11th day of September, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and foot notes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,437 words.

I further 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 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: September 11, 2017.

Signed:

Michael C. Witt
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APPENDIX

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

I further certify that if this appeal is taken from a circuit court order or 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: September 11, 2017.

Signed:

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