STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001261-CR

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**STATE OF WISCONSIN**,
Plaintiff-Respondent,

v.

**JUSTIN A. BRAUNSCHWEIG,**
Defendant-Appellant.

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

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# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Plaintiff-Respondent (hereinafter "State") agrees that this appeal, as a one-judge appeal, does not qualify for publication. The State stands ready to provide oral argument should the Court deem oral argument to be necessary.

## STATEMENT OF THE ISSUES

1. Can the court impose the penalty for Operating While Intoxicated, 2nd Offense under §346.65(2)(am)2, Wis. Stats. if the prior counted conviction for Operating While Intoxicated (1st Offense) under §343.307(1), Wis. Stats. was expunged?
    - The circuit court answered: Yes.
2. Is a certified driving record from the Wisconsin Department of Transportation sufficient to prove the prior expunged conviction?
    - The circuit court answered: Yes.

## STATEMENT OF FACTS

As plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. The relevant facts and history will be presented where necessary in the Argument portion of this brief.

## STANDARD OF REVIEW

This court's review of the circuit court's sentencing decision is limited to determining if the circuit court's discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (citing *McCleary v. State*, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971)). This court may find the circuit court erroneously exercised its discretion if it finds the court based its sentencing decision on an error of law, which is subject to independent review. *See State v. Allen*, 2017 WI 7, ¶17, 373 Wis. 2d 98, 890 N.W.2d 245 (citations omitted). Additionally, if the Court views these issues as being a matter of law, this Court uses a de novo standard of review. *Id*.

## ARGUMENT

Braunschweig argues that the trial court was in error when it considered the defendant's prior expunged conviction for Operating While Intoxicated in determining a penalty under §§343.307(1), 346.65(2), Wis. Stats. because the expungement rendered the prior conviction a nullity. The State asserts that pursuant to *State v. Leitner*, 2002 WI 77, ¶41, 253 Wis. 2d 449, 646 N.W.2d 341, the expungement statute only applies to court records. *Leitner* specifically noted that other agencies' records of criminal

convictions, such as those from the Department of Transportation, survive expungement. *Id*. at ¶¶28-29. Furthermore, the expungement statute specifically excludes records of convictions as maintained by the Department of Transportation. *See* §§973.015(1m)(a)1, 343.23(1)(a), Wis. Stats. Under §343.23(2)(b), Wis. Stats., records of convictions for Operating While Intoxicated must be maintained permanently by the Department of Transportation. Finally, sections 343.307 and 343.65(2), Wis. Stats. require a court to consider DOT records of prior convictions when imposing a penalty under §346.65(2), Wis. Stats. Under *State v. Van Riper*, 2003 WI App 237, ¶ 21, 267 Wis. 2d 759, 672 N.W.2d 156, a certified Department of Transportation (DOT) driving transcript is sufficient to establish beyond a reasonable doubt a defendant's prior conviction for Operating While Intoxicated.

## I. IT IS ESTABLISHED LAW THAT THE PENALTY PROVISIONS FOR OPERATING WHILE INTOXICATED ARE NOT TO BE TREATED AS AN ELEMENT OF THE CRIME, AND THAT THE BURDEN OF PROOF IS LOWER THAN FOR OTHER PENALTY ENHANCERS.

The defense argues that in cases where the defense does not stipulate to the validity of the predicate offenses of operating while intoxicated, the prior convictions should be treated as an element of the crime. This would, presumably, be treated like the .02 limit in

prohibited alcohol concentration cases where that limit applies. In the cases where the .02 limit applies, the jury instructions require that the State prove, beyond a reasonable doubt, that "The defendant had three or more prior convictions, suspensions, or revocations, as counted under §343.307(1)." WIS JI-Criminal 2660C. However, if the defense stipulates to the existence of the prior record, the State does not need to prove this element, and in fact, the Jury is not even presented with the element to consider. WIS JI-Criminal 2660C. This is based on the Court's holding in *State v. Alexander*, which labeled the existence of the priors element a "status" element, and it was "an erroneous exercise of discretion," to admit evidence of the prior convictions if the element was stipulated to. 214 Wis.2d 628, 644-45, 651, 571 N.W.2d 662 (1997).

This argument, however, is inconsistent with the holding in *State v. McAllister* that specifically held that prior violations are not elements of the crime of driving under the influence of an intoxicant. 107 Wis.2d 532, 538, 319 N.W.2d 865 (1982). In its reasoning, the Court stated:

> The penalties for violation of OMVWI are contained in sec. 346.65(2), Stats. Repeated violations are subject to increasingly harsher penalties. This graduated penalty structure 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.
> *Id.* at 535.

It is important to note the *McAllister* Court's use of the phrase, "similar to a repeater statute." It is this qualifying phrase that resolves any potential conflict between *McAllister* and *Banks* as raised by the Defense in their brief. While the enhancers are similar, their application is different. One major difference between a repeater enhancer and a prior countable OWI conviction is that the court has no discretion when a prior countable OWI conviction is the enhancer. *See State v. Banks*, 105 Wis. 2d 32, 39-40, 313 N.W.2d 67 (1981). *But see State v. Harris*, 119 Wis. 2d 612, 617-18, 350 N.W.2d 633 (1984)(stating, "Sentencing by using the process of the repeater statute is completely discretionary on the part of the trial court after the defendant is convicted of an offense and found to be a repeater.")

Furthermore, unlike the repeater enhancer under Wis. Stat. §939.62, an OWI conviction counts for enhancement purposes regardless of whether or not the conviction was accrued prior to the date of violation of the offense for which the enhancer is being considered. *See Banks*, 105 Wis. 2d at 46. Additionally, only prior OWI events count as priors. *Id.* Finally, unlike other repeater enhancers, which

are dependent on prior convictions, OWI charges are enhanced by the number of convictions, plus the total number of suspensions, revocations and other convictions counted under 343.307(1). *See* Wis. Stat. §346.65(2)(am).

Because of these fundamental differences, the State is not held to the same burden of proof when it comes to establishing prior OWI offenses. *See State v Van Riper*, 2003 WI App 237,¶11, 267 Wis. 2d 759, 672 N.W.2d 156. It is also why a certified driving record is the most competent way to prove the prior offenses at sentencing. *Id*. at ¶21.

## II. RECORDS FROM THE DEPARTMENT OF TRANSPORTATION (DOT) ARE NOT CONSIDERED EXPUNGED UNDER *LEITNER*.

In *State v. Leitner*, the court examined whether §973.015, Wis. Stats. required district attorneys and law enforcement agencies to expunge their records documenting the facts underlying an expunged record of conviction. *Leitner*, 2002 WI 77, ¶¶16-41. The court found that the statute was silent on whether the term "record" referred to just court records or records of other agencies as well. *Id*. at ¶20. The court noted that the word "record" appeared three times in §973.015, Wis. Stats. but was not modified by the word, "court." *Id*. The court also noted that records containing the facts underlying an expunged conviction exist in many different agencies including the "Department

of Correction, **Department of Transportation**, Department of Health and Family Services, a public defender's office, private counsel, or a victim's home or office." *Id*. at ¶28 (emphasis added). In resolving this ambiguity, the court noted that there was nothing in §973.015 that dictated what these other agencies should do with their records once the conviction that resulted from those records is expunged. *Id*. at ¶¶28-29. The court also noted that once an offender successfully completes his sentence, §973.015, Wis. Stats. only requires the detaining or probationary authority to notify the court of record of the successful completion. *Id*. The court indicated that had the legislature intended other agencies to expunge their records, it would have included a provision that the detaining or probationary authority also notify those other agencies upon successful completion of the sentence. *Id*. at ¶29. Based on this analysis, the court found that §973.015 only required court records be expunged, and therefore, a court may consider the facts underlying the record of an expunged conviction at sentencing if those facts are supplied from another source other than the court record. *Id*. at ¶¶29, 46-68.

Braunschweig argues that the decision in *Leitner* supports his claim that once a conviction is expunged, the conviction no longer exists. Specifically, Braunschweig

points to the following provision in which the *Leitner* court stated:

> 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. *Id*. at ¶43.

The State believes the record referred to in this provision is the court record, which the State acknowledges is rendered a nullity after expungement. Despite this provision, the court also explained that while the purpose of the expungement statute was to "shield youthful offenders from some of the harsh consequences of criminal convictions," nothing in the language of §973.015, Wis. Stats. indicates that the statute is meant to "wipe away all information related to an expunged record or a conviction or to shield a misdemeanant from all of the future consequences of the facts underlying a record of a conviction expunged under §973.015." *Id*. at ¶38.

In *State v. Allen*, 2017 WI 7, 373 Wis. 2d 98, 890 N.W.2d 245, the court expanded upon how information related to an expunged conviction could be considered in determining consequences for future criminal behavior. In *Allen*, the court held that under *Leitner*, a court is allowed to consider not just the facts underlying a

criminal offense of an expunged conviction at sentencing, it may also consider the facts underlying the expunged record of conviction "provided those facts are not obtained from expunged court records." *Id*. at ¶47. Allen plead no contest to homicide by intoxicated use of a vehicle and injury by intoxicated use of a vehicle resulting in great bodily harm. *Id*. at ¶7. Prior to sentencing, the court ordered a PSI, which showed that Allen had a prior conviction for substantial battery that had been expunged. *Id*. at ¶8. This information was obtained from a CIB/FBI Criminal Background report. *Id*. at ¶10. In imposing sentence, the court considered that Allen failed to learn from his prior experience of being on supervision through probation. *Id*. at ¶12. Allen argued that the trial court was in error for considering the fact that he previously completed supervision in a case where the conviction had been expunged. *Id*. at ¶19.

The Wisconsin Supreme Court disagreed and held that the trial court was not in error, as the information regarding the defendant's prior supervision was obtained from a CIB/FBI Criminal Background report, not the court record. *Id*. at ¶33. Furthermore, the court noted that under *Gallion*, a sentencing court is expected to consider a defendant's "character and behavior, including his failure

to learn the consequences of breaking the law." *Id*. at ¶¶35-36. Because a sentencing court is expected to explain why it is imposing the sentence, the court found it proper that the trial court considered the fact that the defendant had previously completed supervision. *Id*.

As the cases *Leitner* and *Allen* make clear, expungement only applies to court records. The State may not rely on court records that have been expunged to prove a prior OWI conviction. However, as the court in *Leitner* noted, the court is not the only institution that maintains records associated with criminal cases. The District Attorney's Office, Department of Transportation, various law enforcement agencies, and other agencies and institutions maintain such records, and §973.015, Wis. Stats. does not require these agencies and institutions expunge their records as well. While §973.015, Wis. Stats. confers benefits on offenders whose convictions are successfully expunged, this is not one of them.

The State would agree that when a conviction is expunged, the court record of conviction is a nullity. However, this does not erase the fact that the conviction occurred. It is not the court record the State relied upon to show the prior conviction in this matter. The State relied upon the certified driving record from the Wisconsin

Department of Transportation. And pursuant to *Leitner*, that record is not considered expunged despite the fact the court record for the same offense is.

## III. RECORDS FROM THE WISCONSIN DEPARTMENT OF TRANSPORTATION (DOT) ARE SPECIFICALLY EXEMPTED FROM THE EXPUNGEMENT STATUTE, AND A CERTIFIED DRIVING RECORD FROM THE DOT IS A VALID WAY OF PROVING A PRIOR OWI CONVICTION FOR PURPOSES OF IMPOSING A PENALTY UNDER §343.65(2), WIS. STATS.

The current expunction statute, Wis. Stat. §973.015(1m)(a)1 states:

> . . . .[W]hen a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition. This subsection does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23(2)(a). (emphasis added).

This last provision concerning §343.23(2)(a), Wis. Stats. has remained unchanged since 2011, when the offense the defendant had expunged was committed. *See* §907.015(1m)(a)1, Wis. Stats. (2009-10).

Section 343.23(2)(a) states in pertinent part, "The department shall maintain a file for each licensee or other person containing the application for license, permit, or endorsement, a record of reports or abstract of convictions

. . . ” (emphasis added). Under §343.23(2)(b), Wis. Stats., the records “must be filed by the department for use of the secretary in determining whether operating privileges of such person shall be suspended, revoked, canceled, or withheld, or the person disqualified, in the interest of public safety.” Furthermore, “The record of suspensions, revocations, and convictions that would be counted under s. 343.307(2), Wis. Stats., shall be maintained permanently.” *See* §343.23(2)(b), Wis. Stats. A conviction under §346.63(1), Wis. Stats. is enumerated in §343.307(2), Wis. Stats. as a conviction that is counted under the statute that must be maintained permanently. *See* §343.307(1)(a), Wis. Stats. Under §343.307, Wis. Stats., a court shall count any convictions under §343.63(1) for purposes of determining the penalty for Operating While Intoxicated. *See* §§343.307(1)(a), 343.63(1)(a), & 346.65(2), Wis. Stats. (emphasis added). Because the expungement statute specifically exempts records maintained by the Department of Transportation relating to convictions, and the court is required to consider the DOT record when imposing a penalty for Operating While Intoxicated, a conviction for Operating While Intoxicated is not rendered non-existent just because the court record of that conviction has been expunged.

Finally, in *State v. Van Riper*, the Court of Appeals held that a certified Department of Transportation (DOT) driving transcript is sufficient to establish beyond a reasonable doubt a defendant's prior conviction for Operating While Intoxicated. *Van Riper*, 2003 WI App 237, ¶ 21.

## CONCLUSION

In this matter, the State used a certified Department of Transportation (DOT) driving transcript to prove that Braunschweig had a prior OWI conviction, which made the conviction in this matter a second offense. Pursuant to *Van Riper*, the certified driving transcript was sufficient to prove the prior conviction beyond a reasonable doubt. Even if the prior conviction was expunged from court records, it was not expunged from Department of Transportation records. Under §§973.015 and 343.23(2)(a), Wis. Stats., a prior conviction for Operating While Intoxicated maintained by DOT is exempted from the expungement statute. This record, which the DOT is required to maintain permanently, must be considered by the court when imposing a penalty for Operating While Intoxicated. As such, the trial court's decision that the State met its burden in proving the defendant was previously convicted of Operating While Intoxicated through the use of a certified driving

transcript from the Department of Transportation was not in error.

Dated this _10___ day of October, 2017.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a monospaced serif font. The length of this brief is 14 pages with 2,707 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this __10_ day of October, 2017.

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