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

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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Defendant-Appellant

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The issues presented on appeal are straight forward. First, can an expunged conviction be used as a predicate offense in an OWI case, and second, when the existence of a valid predicate is not stipulated to by the defense, what is the State's burden of proof to establish its existence? These issues were raised and ruled on by the trial court prior to trial, and present questions of law to be reviewed *de novo.*

I. THE STATE INCORRECTLY ASSERTS THAT WIS. STATS. §§ 346.65(2) AND 343.307 REQUIRE A COURT TO CONSIDER DOT RECORDS.

The State asserts, without any supporting authority, that "sections 343.307 and 346.65(2), Wis. Stats. require a court to consider DOT records of prior convictions when imposing a penalty under §346.65(2), Wis. Stats." State's Brief at p. 3. Simply examining the language of the cited statutes reveals that this is not true.

In this case, the operative language of the relevant subsection of Wis. Stat. §346.65(2)(am)(2) is as follows:

> . . . shall be fined not less than $350.00 nor more than $1,100.00 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the persons lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1) within a 10-year period, equals 2, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

It is undisputed that in this case, the State needs the expunged conviction. R. 29, pp. 3-7.

Likewise, Wis. Stat. §343.307(1) makes absolutely no reference to "record" or "driving record", nor refer directly in any other way to records generated by the Department of Transportation. Indeed, the ability of the State to use the shortcut of a certified driving record abstract generated by the DOT to establish the existence of a required predicate conviction is established in case law, not statute. *See* ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156.

Furthermore, Wis. Stat. §340.01(48m) defines "record of conviction" as "a report of conviction furnished to the department by a federally recognized American Indian Tribe or band in this state or by another jurisdiction or as required by Chs. 340 to 349 and 351." The legislature has thus defined the "record of conviction" as the report forwarded to the DOT by the adjudicative body, ***not*** the resulting entry on a DOT abstract.

Perhaps even more importantly, while referencing Wis. Stat. §343.23(2)(b), the State completely ignores the limiting language of that statute, imposed by the legislature when authorizing the retention of records of convictions like the one at issue here. Specifically, the express purpose of said retention is "so that the complete operator's record is available for the use ***of the secretary*** . . . ." (Emphasis added). As argued to both the trial court and this Court in appellant's principal brief, 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

have said so. This Court deems unrefuted arguments to be conceded. ***Charolais Breeding Ranches v. FPC***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

II. THE SUPREME COURT'S RECENT DECISION IN *ALLEN* DOES NOT EXPAND *LEITNER*.

The State argues that the Supreme Court's recent decision in ***State v. Allen***, 2017 WI 7, 373 Wis. 2d 98, 890 N.W.2d 245 "expanded upon how information related to an expunged conviction could be considered in determining consequences for future criminal behavior." State's Brief at p. 8. This is simply not a correct reading of that case. The issue in ***Allen*** was framed by the Supreme Court as follows:

> ¶16. We are asked to determine whether ***Leitner*** prohibited the sentencing court from considering the fact that Allen previously completed supervision in a case where the record of conviction had been expunged pursuant to Wis. Stat. § 973.015.

Mr. Allen was arguing that ***Leitner*** required interrelated facts between the case involving the expunged record of conviction and the case before the sentencing court. ***Id.*** at ¶ 25. The Supreme Court simply rejected that contention, ruling that no such connection was required. 2017 WI 7 at ¶ 27.

Allen did not involve the application of an enhancer, and the decision in ***Allen*** did not touch in any way the applicable holding in ***Leitner*** regarding the inability of a sentencing court to rely on an expunged ***conviction.***

> ¶ 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.
>
> ***State v. Leitner***, 2002 WI 77, ¶ 43-44, 253 Wis. 2d 449, 474, 646 N.W.2d 341, 353.

The State in the instant case acknowledges that the record of appellant's prior conviction as previously entered in court records is a nullity, having been expunged. State's Brief at p. 8. While ***Allen*** emphasizes that the facts and circumstances underlying an expunged conviction can be utilized at sentencing if the source of that information is other than the expunged court records, the conviction itself is still a nullity.

There is therefore no case law supporting the distinction the State convinced the trial court to draw between the OWI repeater statute and other repeater statutes as those differences are argued to apply to the issue before this Court. Both the OWI repeater statute and the other repeater statutes the State refers to require proof of the ongoing existence of a ***conviction,*** not just the offering of facts and circumstances underlying an expunged conviction drawn from other sources.

III. REGARDLESS OF WHEN THE EXISTENCE OF A REQUIRED PREDICATE MUST BE PROVEN, IT MUST BE PROVEN BEYOND A REASONABLE DOUBT.

The State does not appear to take a clear position on what its burden of proof is on the existence of a valid predicate prior conviction, but advocates vaguely for

some unspecified lesser burden. State's Brief at p. 6. This Court should, as it did in the unpublished case of ***State v. Jewett***, Appellant's Appendix, pp. A-16 through A-28, clearly establish that the State's burden is beyond a reasonable doubt.

IV. APPELLANT CONCEDES THE CONTROLLING NATURE OF *McALLISTER*.

Given the amount of time the State spends on the question in its reply, it bears repeating that appellant concedes ***State v. McAllister***, 107 Wis. 532, 319 N.W.2d 865 (1982) is controlling on the ancillary question of whether a predicate prior is an element of a criminal OWI offense, and simply wishes to preserve a good faith argument for its modification. ***McAllister*** was decided before there was a PAC statute, at a time when criminal OWI charges not involving serious injury or death were all misdemeanors, and records of conviction were only retained for five years by the DOT. Should this case make it to the Supreme Court, appellant simply wishes to preserve a good faith argument for another look at this question.

CONCLUSION

For all of the foregoing reasons, as well as those argued in appellant's principal brief, his conviction must be reversed, and the matter remanded to the trial court for disposition as a forfeiture conviction.

Dated at Jefferson, Wisconsin this 27th day of October, 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 1,701 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: October 27, 2017.

Signed:

MICHAEL C. WITT
STATE BAR NO. 1013758