STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2017AP001261-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs-

JUSTIN A. BRAUNSCHWEIG,
Defendant-Appellant-Petitioner.

ON REVIEW OF A COURT OF APPEALS DECISION AFFIRMING
THE JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR JEFFERSON COUNTY,
THE HONORABLE RANDY R. KOSCHNICK, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

Respectfully submitted,

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ISSUES PRESENTED

A. CAN AN EXPUNGED PRIOR OWI CONVICTION BE CONSIDERED AT SENTENCING IN A SUBSEQUENT OWI CASE?

COURT OF APPEALS DECISION: Yes.

B. WHAT IS THE STATE'S BURDEN OF PROOF ON THE EXISTENCE OF A PREDICATE PRIOR OWI CONVICTION AT SENTENCING?

COURT OF APPEALS DECISION: Did not expressly address, but appears to have applied the beyond a reasonable doubt standard.

C. IF THIS COURT ELECTS TO REVISIT ***McALLISTER***, SHOULD IT SIMPLIFY THE LEGAL ANALYSIS BY REQUIRING PREDICATE PRIOR OFFENSES BE TREATED AS ELEMENTAL IN ANY CRIMINAL OWI/PAC CASE WHERE THE EXISTENCE OR CONTINUED VALIDITY OF SAME IS IN DISPUTE?

COURT OF APPEALS DECISION: Acknowledged preservation of a good faith argument.

STATEMENT ON PUBLICATION

While the relief sought could be granted by application of existing precedent in a *per curiam* disposition, to the extent this Court's opinion will clarify application of that precedent to a different set of facts likely to recur, this Court should nonetheless conclude that a published opinion is warranted.

STATEMENT ON ORAL ARGUMENT

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

STATEMENT OF THE CASE

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 made a good faith argument 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, an appeal was taken. On February 1, 2018, the Court of Appeals affirmed the trial court in an unpublished opinion authored by a single judge. On June 11, 2018 this Court granted Braunschweig's petition to review the decision of the Court of Appeals.

ARGUMENT

I. THE OWI GRADUATED PENALTY STRUCTURE IS NOTHING MORE THAN A PENALTY ENHANCER SIMILAR TO A REPEATER ENHANCER.

In Wisconsin, an unenhanced first offense OWI is not a crime. Such an offense becomes criminal if one or more countable predicate suspensions, revocations, or convictions exist. *See* Wis. Stat. §346.65(2)(am). In ***State v. McAllister***, 107 Wis. 2d 532, 319 N.W.2d 865, 866 (1982), this Court accepted certification from the Court of Appeals on the issue of whether prior violations of Wis. Stat. §346.63(1) as it existed at the time were elements of the crime of driving or operating a motor vehicle while under the influence. The case was argued to this Court on April 28, 1982, a few days before the then newly created prohibited alcohol concentration charge went into effect, a fact noted in footnote 4 of the Court's decision.

McAllister contended that "since he cannot be convicted of this crime unless there has been a previous civil or criminal conviction of the same offense, the previous conviction is an element of the offense and must be proven beyond a reasonable doubt to the jury." 107 Wis. 2d at 538, 319 N.W. 2d at 868. In rejecting McAllister's contention, this Court expressly held as follows:

> 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.***

> 107 Wis. 2d at 535, 319 N.W.2d at 867. [Emphasis added].

In doing so, this Court recognized this construction of repeater statutes as the construction of a legislative directive repeatedly upheld by this Court, not law made by this Court. 107 Wis. 2d at 538, 319 N.W.2d at 868.

II. AN EXPUNGED CONVICTION IS A NULLITY THAT CANNOT BE CONSIDERED AT SENTENCING FOR A SUBSEQUENT OFFENSE.

In ***State v. Leitner***, 2002 WI 77, ¶ 2, 253 Wis. 449, 454, 646 N.W.2d 341, 343, this Court addressed the following two issues.

> (1) Does Wis. Stat. §973.015 (1999-2000) require district attorneys and law enforcement agencies to expunge their records documenting the facts underlying an expunged record of a conviction? (2) May a circuit court consider, when sentencing an offender, the facts underlying a record of a conviction expunged under §973.015? [Footnotes omitted].

It chose to do so despite the fact that the case before it was arguably moot, noting that the case presented issues likely to arise again, requiring resolution by the Court. 2002 WI 77, ¶ 15, 253 Wis. 2d at 459, 646 N.W.2d at 346. To answer the questions presented, this Court was required to interpret the legislature's intent as to how information related to an expunged conviction can and cannot be utilized by a sentencing court. This Court accepted the uncontested proposition that Wis. Stat. §973.015 was "intended to provide a break to young offenders who demonstrate the ability to comply with the law." 2002 WI 77, ¶ 38, 253 Wis. 2d at 471, 646 N.W.2d at 352.

The ***Leitner*** case arose out of a traffic crash which resulted in serious injury. Originally charged with hit and run causing great bodily harm, Leitner entered a no

contest plea to the amended charge of reckless driving causing great bodily harm. 2002 WI 77, ¶ 4, 253 Wis. 2d at 455, 646 N.W.2d at 344. This Court expressly recognized that record of a conviction expunged under Wis. Stat. §973.015 might continue to be found in numerous locations, including in the records of the Department of Transportation. 2002 WI 77, ¶ 28, 253 Wis. 2d at 465-466, 646 N.W.2d at 349. While holding that the facts underlying expunged convictions as might be gleaned from such records can be used at sentencing, this Court expressly held that the convictions themselves cannot.

> Expunction of a court record of a conviction enables an offender to have a clean start so far as the prior conviction is concerned. As the State points out, expunging the court record provides substantial advantages to the offender: ***An expunged record of a conviction cannot be considered at a subsequent sentencing;*** an expunged record of a conviction cannot be used for impeachment at trial under §906.09(1); ***and an expunged record of a conviction is not available for repeater sentence enhancement.***
>
> 2002 WI 77, ¶ 39, 253 Wis. 2d at 472, 646 N.W.2d at 352. [Footnotes omitted, emphasis added].

III. ABSENT AN EXPRESS LEGISLATIVE DIRECTIVE TO TREAT EXPUNGED OWI CONVICTIONS DIFFERENTLY, THIS COURT'S PRIOR CONSTRUCTIONS OF THE APPLICABLE STATUTES MUST STAND.

This Court determined in ***McAllister*** that the graduated penalty structure applicable in OWI cases is nothing more than a penalty enhancer similar to any other repeater enhancer. This Court determined in ***Leitner*** that an expunged record of conviction is not available for use at sentencing or to serve as a predicate for a repeater enhancer. Both ***McAllister*** and ***Leitner*** involved this Court's binding interpretation of legislative intent in the construction of the applicable statutes.

Absent a clear legislative directive to carve out an exception to the application of this precedent in OWI cases, this Court cannot condone or create such an exception unless it is prepared to overrule or modify those decisions. This binding precedent renders the Court of Appeals' determination in ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156 irrelevant to the question at hand. Accepting that a certified DOT abstract can serve as sufficient proof of the existence of a prior conviction at an OWI sentencing, under ***Leitner***, an expunged conviction still cannot be used at sentencing even if it continues to be reflected in those DOT records. In this case, where it is undisputed that the predicate prior was expunged, consideration of that expunged conviction at Braunschweig's sentencing was contrary to ***Leitner***, and the resulting criminal conviction must be reversed.

IV. *McALLISTER* IS SILENT ON THE STATE'S BURDEN OF PROOF AT SENTENCING.

After Braunschweig filed a motion in the trial court seeking a determination on the sufficiency of his expunged conviction to serve as the required predicate prior offense, R. 13, the State's initial response in the trial court argued that ***State v. Leitner***, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, controlled the trial court's use of an expunged conviction. R. 14. Braunschweig agreed. R. 15. At the hearing on the motion, the State abandoned the argument that ***Leitner*** was controlling, and instead asserted that ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156 was the controlling case. R. 29, pp. 22-23.

On April 7, 2002, Van Riper was arrested for operating under the influence and operating with a prohibited alcohol concentration. Under the statutory structure applicable at the time, Wisconsin's prohibited alcohol level was set at .10, however, an individual with two or more prior convictions was subject to a lower .08 prohibited alcohol level. 2003 WI App 237, ¶¶ 3 and 4, 267 Wis. 2d at 762, 672 N.W.2d at 158.

Prior to trial, Van Riper stipulated that he had been operating a motor vehicle, and that he had an alcohol concentration in excess of .08 at the time. He disputed the existence of the necessary predicate priors, however, and the parties agreed that this status element question would be resolved by means of a court trial. ***Van Riper***, 2003 WI App 237, ¶ 4, 267 Wis. 2d at 762, 672 N.W.2d at 158.

> At the ensuing trial, the State filed a certified DOT transcript of Van Riper's driving record, which reflected a November 1989 OWI conviction in Minnesota and an October 1993 OWI conviction in Wisconsin. The issue at the trial was whether the certified DOT transcript was admissible evidence and, if so, whether it sufficed to prove Van Riper's repeater status beyond a reasonable doubt. The trial court received the DOT driving record as evidence at the trial and further ruled that it established Van Riper's status as a repeat offender beyond a reasonable doubt. Van Riper appeals from the ensuing judgment of conviction.
>
> 2003 WI App 237, ¶ 5, 267 Wis. 2d at 762-763, 672 N.W.2d at 158.

The Court of Appeals affirmed the trial court.

> 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, 672 N.W.2d at 162.

Despite the fact that ***Van Riper*** appears to establish, or at least assume that the State's burden of proof on priors is beyond a reasonable doubt, in the instant case, the State argued, and the trial court agreed that a lower burden applied. R. 31, pp. 12-13.[1]

In the Court of Appeals, the State appeared to continue to advocate for some unspecified lesser burden in the instant case, citing to ***Van Riper,*** 2003 WI App 237, ¶11, 267 Wis. 2d at 765, 672 N.W.2d at 159. Court of Appeals Brief of Plaintiff-Respondent at p. 6.[2] That section of the ***Van Riper*** opinion extensively quotes this Court's opinion in ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996) addressing the inapplicability of Wis. Stat. §973.12 to OWI sentencings. It is argued that both this Court's opinion in ***Wideman*** and the statute address the timing and manner of proof, not the burden of proof. The Court of Appeals in ***Van Riper*** appeared to agree, clearly applying the beyond a reasonable doubt standard to the proof of Van Riper's priors. Regardless of what position the State may take before this Court, it is respectfully argued that proof of predicate priors in both OWI and PAC cases must be beyond a reasonable doubt, whether at sentencing, or at trial, and this Court should so state to avoid similar confusion going forward.

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[1] The trial court did ultimately find that Braunschweig's certified driving abstract did meet the higher burden, should it apply. R. 31, p. 16.

[2] This Court's order granting review ordered the parties to file additional copies of their briefs to the Court of Appeals with this Court. Upon information and belief, no record cite is available.

V. IN THE EVENT THIS COURT CHOOSES TO OVERRULE OR MODIFY *McALLISTER*, IT SHOULD CONSIDER THE CHANGES IN THE LAW THAT HAVE OCCURRED OVER THE INTERVENING DECADES.

As argued above, this Court does not need to modify or overrule ***McAllister***, ***Leitner,*** or ***Van Riper*** to resolve the questions presented by this case. Should this Court elect to do so, it is respectfully argued that substantial changes in the law since ***McAllister*** was decided warrant reconsideration of the determination that predicate priors are not elemental. At the time McAllister was arrested and charged, there was no such thing as a prohibited alcohol concentration charge.

However, once the legislature created differing prohibited alcohol levels based on the number of predicate priors, those prior convictions became status elements in those PAC cases, which pursuant to Wis. Stat. §346.63(1)(c) must be tried together with the companion OWI charge. Where the existence of these status elements on the PAC charge is not stipulated, ***McAllister*** creates a dichotomy in the timing and manner of proof as to predicate priors on paired OWI and PAC charges. On PAC charges, where the continued existence or validity of predicate priors is disputed, the question is for the jury, but on the companion OWI, is reserved to the sentencing court. *See*, for example, Wis. JI Criminal 2660C, Operating a Motor Vehicle With a Prohibited Alcohol Concentration – Criminal – More than 0.02 Grams - §346.63(1)(b), as set forth in pertinent part below:

> NOTE: THE DEFENDANT'S ADMISSION OF THREE OR MORE PRIOR CONVICTIONS DISPENSES WITH THE NEED FOR PROOF OF THE FOLLOWING ELEMENT. IF THERE IS AN ADMISSION, DO NOT INSTRUCT ON THIS ELEMENT

> AND PROCEED TO THE PARAGRAPH CAPTIONED "HOW TO USE THE TEST RESULT EVIDENCE."
>
> [3. The defendant had three or more convictions, suspensions, or revocations, as counted under §343.307(1).]
>
> Wis. JI Criminal 2660C, p. 2 [footnotes omitted].

Such an instruction could easily be applied to both the OWI and PAC charges in cases where the existence of the necessary predicate priors is not stipulated to.

Furthermore, at the time ***McAllister*** and ***Wideman*** were decided, simple OWI charges were all misdemeanors, a fact noted by the Court in ***Wideman.*** 206 Wis. 2d at 106, 556 N.W.2d at 744. In contrast, current law applies a .02 prohibited alcohol level to an accused with three or more predicate priors, and all fourth and subsequent offenses are felonies. A disputed predicate prior therefore currently not only makes the difference between a criminal conviction and a forfeiture conviction as presented on the facts of both the instant case and ***McAllister***, but also the difference between a misdemeanor and a felony for an accused alleged to have at least three predicate priors. Should the Court elect to revisit ***McAllister***, it is respectfully argued that it should make the existence of predicate priors an element of proof in all criminal OWI and PAC cases, submitting this status element to the jury on both charges in cases where the continued existence or validity of predicate priors is in dispute.

CONCLUSION

Consistent with ***McAllister***, this Court should expressly apply ***Leitner*** to OWI cases, reverse the Court of Appeals, remand this case to the trial court with instructions that Braunschweig's expunged prior conviction cannot be considered at

sentencing, and confirm that the burden of proof at sentencing in criminal OWI cases is beyond a reasonable doubt.

Dated at Jefferson, Wisconsin this 27th day of July, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) 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 petition is 3,482 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: July 27th, 2018.

Signed:

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APPENDIX

PAGE

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: July 27th, 2018.

Signed:

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