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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

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

Respectfully submitted,

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ARGUMENT

The Attorney General is asking this Court to legislate from the bench, and read an OWI exception into the expunction statute that does not exist. To do so would require this Court to overrule or modify its prior decision in ***State v. Leitner***, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341.

I. THE PLAIN LANGUAGE OF THE STATUTES INVOLVED REFUTES THE STATE'S ASSERTION THAT THERE IS AN OWI EXCEPTION TO THE EXPUNCTION STATUTE.

The expunction statute reads as follows:

> **973.015 Special disposition.**
> (1m)(a)1. Subject to subd. 2. and except as provided in subd. 3., when 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 language cannot only not be stretched and bent into an OWI exception to expunction, but expressly limits by enumeration the purposes for which the record of such a conviction as retained by the DOT can be used. Specifically, Wis. Stat. §343.23(2)(a) reads as follows:

> 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, any demerit points assessed under authority of s. 343.32(2), the information in all data fields printed on any license issued to the person, any notice received from the federal transportation security administration concerning the person's eligibility for an

> "H" endorsement specified in s. 343.17(3)(d)1m, the status of the person's authorization to operate different vehicle groups, a record of any out-of-service orders issued under s. 343.305(7)(b) or (9)(am), a record of the date on which any background investigation specified in s. 343.12(6)(a) or (d) was completed, a record of the date on which any verification specified in s. 343.165(1) and (3) was completed, all documents required to be maintained under s. 343.165(2)(a), and a record of any reportable accident in which the person has been involved, including specification of any type of license and endorsements issued under this chapter under which the person was operating at the time of the accident and an indication whether or not the accident occurred in the course of any of the following:
> 1. The person's employment as a law enforcement officer as defined in s. 165.85(2)(c), fire fighter as defined in s. 102.475(8)(b), or emergency medical services practitioner as defined in s. 256.01(5).
> 2. The licensee's employment as a person engaged, by an authority in charge of the maintenance of the highway, in highway winter maintenance snow and ice removal during either a storm or cleanup following a storm. For purposes of this subdivision, "highway winter maintenance snow and ice removal" includes plowing, sanding, salting and the operation of vehicles in the delivery of those services.
> 3. The licensee's performance of duties as an emergency medical responder, as defined in s. 256.01(4p).

Permissible uses by the secretary of the Department of Transportation are set forth in Wis. Stat. §343.23(2)(b):

> The information specified in pars. (a) and (am) must be filed by the department ***so that the complete operator's record is available for the 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. The record of suspensions, revocations, and convictions that would be counted under s. 343.307(2) shall be maintained permanently. The record of convictions for disqualifying offenses under s. 343.315(2)(h) shall be maintained for at least 10 years. The record of convictions for disqualifying offenses under s. 343.315(2)(f), (j), and (L), and all records specified in par. (am), shall be maintained for at least 3 years. The record of convictions for disqualifying offenses under s. 343.315(2)(a) to (e) shall be maintained permanently, except that 5 years after a licensee transfers residency to another state such record may be transferred to another state of licensure of the licensee if that state accepts responsibility for maintaining a permanent record of convictions for disqualifying offenses. Such

> reports and records may be cumulative beyond the period for which a license is granted, but the secretary, in exercising the power of suspension granted under s. 343.32(2) may consider only those reports and records entered during the 4-year period immediately preceding the exercise of such power of suspension. The department shall maintain the digital images of documents specified in s. 343.165(2)(a) for at least 10 years. [Emphasis added.]

None of the above-enumerated purposes contemplate the use of an expunged prior conviction as a predicate prior in a second or subsequent OWI/PAC prosecution, either at sentencing or at trial in those cases where the prior is elemental. The plain language of Wis. Stat. §§ 973.015(1m)(a)(1) and 343.23(2) limits by enumeration the purposes for which the information regarding an expunged conviction can be used. As the State notes in its brief, the Court "is not at liberty to disregard the plain, clear words of the statute." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663-664, 681 N.W.2d 110, 124.

That leaves only the Court of Appeals' determination to read such an exception into the definition of conviction set forth in Wis. Stat. sec. 340.01(9r):

> "Conviction" or "convicted" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of property deposited to secure the person's appearance in court, a plea of guilty or no contest accepted by the court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. It is immaterial that an appeal has been taken. "Conviction" or "convicted" includes:
> (a) A forfeiture of deposit under ss. 345.26 and 345.37, which forfeiture has not been vacated;
> (b) An adjudication of having violated a law enacted by a federally recognized American Indian tribe or band in this state.
> (c) An adjudication of having violated a local ordinance enacted under ch. 349;

> (d) A finding by a court assigned to exercise jurisdiction under chs. 48 and 938 of a violation of chs. 341 to 349 and 351 or a local ordinance enacted under ch. 349.

The legislature has specifically set forth examples of what it meant by the phrase "unvacated adjudication of guilt" in subsections (a) through (d), and none of the enumerated circumstances include, expressly or by inference, an expunged prior conviction. Neither the decision of the Court of Appeals or the State's brief quote or address subsections (a) through (d), instead quoting and reading Wis. Stat. §340.01(9r) as if those subsections don't exist.

Furthermore, as noted above, once a conviction has been expunged, sections 973.015 and 343.23 independently limit by enumeration those purposes for which the records retained by the DOT may be used, and using those records in court to establish a predicate prior is not one of them. The express limitations placed on the use of information regarding an expunged conviction maintained in DOT records by the plain language of Wis. Stats. §§973.015(1m)(a)(1) and 343.23 put the construction of §340.01(9r) relied upon by the Court of Appeals and advanced by the State before this Court at loggerheads. Reading §340.01(9r) in this fashion to trump the express terms of the expunction statute would require the Court to carve out an OWI exception to the expunction statute not created by the legislature, and doing so would require the Court to overrule or modify ***Leitner.***

II. A SEPARATE, LOWER BURDEN OF PROOF ON PRIORS IN OWI CASES THAT ARE PAIRED WITH PAC CASES WHERE THE BURDEN IS BEYOND A REASONABLE DOUBT WOULD INVITE INCONSISTENT VERDICTS.

In cases involving allegations of three or more prior offenses, the predicate priors are status elements on the PAC charge that must be proven beyond a reasonable doubt to the trier of fact if not stipulated to by the accused. *See* ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). This creates a situation where in the same trial, the predicate priors are status elements on the PAC charge, but matters left for sentencing on the OWI charge.

A. OWI/PAC Cases Must be Tried Together By Law.

OWI and PAC charges are paired charges that must be tried together, regardless of the applicable PAC level, under Wis. Stat. §346.63(1)(c):

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. ***If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined***. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require. [Emphasis added.]

Therefore, in cases where the lower PAC applies, and proof of the prior conviction is elemental on the PAC charge, by advocating for a lower burden of proof on the existence of the required predicate priors at sentencing, the State advocates giving it

the ability to use a prior not proven beyond a reasonable doubt to a jury to enhance penalty on the companion OWI nonetheless.

This unique pairing scheme sets the issue here apart from the penalty scheme at issue in ***Almendarez-Torres v. United States***, 523 U.S. 224 (1998), and presents a circumstance closer to that at issue in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000). Concededly, this precise scenario is not before the Court on the facts of this case. However, should the Court consider the State's invitation to apply a lesser burden, the resulting dichotomy must be taken into account, as that lesser burden will apply in those cases as well.

Furthermore, the facts presented on this case are argued to represent a circumstance where the expunged predicate prior does dramatically increase Braunschweig's maximum sentence in both relative and absolute terms, a circumstance tacitly acknowledged by the State[1] to require a higher burden of proof than a mere preponderance. Specifically, without the expunged predicate prior, this offense would not be a crime at all.

B. Should the Court Choose to Revisit *McAllister* and Make Proof of the Required Predicate(s) Elemental, the "Beyond a Reasonable Doubt" Standard Would Clearly Apply.

In ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996) this Court expressly found the combination of large numbers of OWI prosecutions and the fact that, at the time, they were all misdemeanors avoided any due process or equal

[1] State's Response Brief at pp. 38-39, *citing* ***U.S. v. Watts***, 519 U.S. 148, 156, n. 2, and ***Apprendi***, 530 U.S. at 495, among other cases.

protection problems with the legislative imposition of relaxed proof requirements for repeat offenders charged under the OWI repeater statute as compared to the general repeater statute.

> We conclude that the difference between the two statutes rests upon a rational basis. The nature of OWI offenses and the penalties under §346.65(2) justify the legislature's imposing on the State different proof requirements than those prescribed by §973.12(1). Large numbers of OWI offenses are prosecuted. Moreover, in contrast with §973.12(1), the enhanced penalties under §346.65(2) are penalties for misdemeanors, with relatively short periods of incarceration and moderate fines. The efficient administration of the justice system militates in favor of the legislature's choice not to require the same method of establishing repeat offenses under §346.65(2) as under §973.12(1).
>
> ***For these reasons*** we hold that there is no due process or equal protection violation when the legislature imposes different proof requirements for repeat OWI offenders under §346.65(2) and repeat offenders charged under the general repeater statute, §973.12(1).
>
> 206 Wis. 2d at 106-107, 556 N.W.2d at 744. [Emphasis Added.]

What was true in 1996, however, is no longer the case, with felony penalties applying to all fourth offense OWI/PAC cases. *See* Wis. Stat. §346.65(2)(am)(4). In each and every one of those fourth offense PAC cases, proof of the predicate priors is an elemental proof that must be established at trial to the beyond a reasonable doubt standard. It is conceded that the Court need not revisit ***State v. McAllister***, 107 Wis. 2d 532, 319 N.W.2d 865 (1982) to simply decline the Attorney General's invitation to legislate from the bench, apply ***Leitner***, and grant the relief requested in this case. However, should it choose to do so, either to distinguish the OWI statute from the general repeater statute, or simply in recognition of the changes in the law that have

occurred since, these previously recognized due process and equal protection concerns must be considered in light of changes to the relevant law. Requiring all disputed predicates to be proven beyond a reasonable doubt at trial in both OWI and PAC cases would simplify the legal analysis, and eliminate any due process or equal protection concerns.

C. Adopting the "Beyond a Reasonable Doubt" Standard Will Not Limit the State's Ability to Use a Driving Record to Establish the Existence of Predicate Priors.

In ***State v. Van Riper***, 2003 WI App 237, ¶ 21, 267 Wis. 2d 759, 770, 672 N.W.2d 156, 162, the Court of Appeals established that in the absence of evidence of mistaken identity, or evidence that a reflected conviction was improperly entered or no longer exists, a certified driving record is sufficient to prove the existence of required predicate prior(s) beyond a reasonable doubt.[2] Applying the same burden of proof at sentencing on the OWI that is required on the PAC at trial does not change this, nor would making proof of those priors elemental in all cases prevent a certified driving record from providing that elemental proof in the absence of an affirmative contradictory showing by the defense.

[2] The application of the "beyond a reasonable doubt" burden and its satisfaction by a certified copy of the accused's driving record was precisely the result reached by the Court of Appeals in the unpublished case of ***State v. Jewett***, 371 Wis. 2d 759, 886 N.W. 2d 592 (Table), Appeal No. 2015AP1014-CR, unpublished slip op., ¶ 10; ¶ 15, (WI App August 30, 2016), Appendix pp. A-1 – A-13. The State apparently took no exception the application of the beyond a reasonable doubt standard in that case, as according to the case history, review by this Court was not sought.

CONCLUSION

This Court should decline to create an OWI exception to the expunction statute. It should apply ***Leitner***, reverse the Court of Appeals, and remand the matter to the trial court with instructions that Braunschweig's expunged prior conviction cannot be used at sentencing. It should also confirm that the burden of proof as to predicate priors is beyond a reasonable doubt in all OWI/PAC cases, whether at sentencing, or at trial.

Dated at Jefferson, Wisconsin this 1st day of October, 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 and appendix 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 2,848 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 1, 2018.

Signed:

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APPENDIX

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