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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2017AP002408-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BENJAMIN R. TIBBS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, BRANCH II, THE HONORABLE ROBERT SHANNON PRESIDING,
TRIAL COURT CASE NO. 15-CM-510

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. WHETHER MR. TIBBS' PRIOR OFFENSE FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT IN CALIFORNIA, ORANGE COUNTY SUPERIOR COURT CASE NO. 07NM03776, SHOULD HAVE BEEN EXCLUDED FROM CONSIDERATION AS A PENALTY ENHANCER IN THE PRESENT WISCONSIN CASE ON THE GROUNDS THAT UNDER CALIFORNIA LAW, MORE SPECIFICALLY CALIFORNIA PENAL CODE §§ 1203.4 AND 1203.4a, MR. TIBBS WAS "RELIEVED FROM ALL PENALTIES AND DISABILITIES RESULTING FROM THE OFFENSE"?

Trial Court Answered: **NO.** The circuit court reasoned that Cal. Penal Code § 1203.4 permitted consideration of prior offenses as penalty enhancers in California even under circumstances wherein the accusations relating to the prior offense have been dismissed, released, or probated, and therefore, Wisconsin should recognize such offenses as well. (R23 at 6:1-17.)

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question of law based upon a set of uncontroverted facts. The issues presented herein are of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the law at issue herein is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of law.

STATEMENT OF THE FACTS AND CASE

Because the instant matter involves but a single question of law based upon an undisputed set of uncomplicated facts, Mr. Tibbs has elected to combine the required Statement of the Case with the Statement of Facts below in an effort to focus the issue presented on only those matters which are relevant to a consideration of the question herein.

On October 17, 2015, the above-named defendant, Benjamin Tibbs, was charged in Portage County with, *inter alia*, Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), as a Second Offense pursuant to § 343.307(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to § 343.305(9)(a), as a Second Offense pursuant to § 343.307(1)(a). (R13 & R7 at 15, respectively). The foregoing violations were charged as second offenses based upon the fact that Mr. Tibbs allegedly had a prior conviction from May 11, 2007, which had been entered in the Superior Court for Orange County, Case No. 07NM03776. (R7 at 17-19; D-App. at 103-07.)

After entering Not Guilty pleas on the aforesaid charges, counsel for Mr. Tibbs filed a pre-trial motion challenging the use of Mr. Tibbs' prior California offense for operating while intoxicated [hereinafter "OWI"] as a penalty enhancer. (R1.)

A hearing on Mr. Tibbs' motion attacking his prior conviction was held on March 23, 2017. (R23.) At the hearing, Mr. Tibbs' counsel submitted a copy of an "Order for Relief Under Penal Code § 1203.4, § 1203.4a" which had been granted in Mr. Tibbs' California OWI case. (R7 at 3; D-App. at 103.) Mr. Tibbs argued that the prior California OWI could not be counted as a penalty enhancer because the "Order for Relief" unequivocally stated that "the plea, verdict, or finding of guilt [is] set aside and vacated and . . . the accusatory filing is dismissed." *Id.*

After entertaining both the State's and defense counsel's arguments, the circuit court held the following:

> But the fact that California would offer this to their residents or people who have been convicted of offenses in that state is certainly their right. The broader question is, what do we—what do we do with it? How do we—do we respect—what, what part of the California process do we respect? Do we respect the conviction or do we respect the, this—whatever this is under 1203? And it's an excellent case for the Supreme Court or the Court of Appeals to figure out. I don't have time to do the necessary research, but someone who does should probably answer that question conclusively for us.
>
> But absent authority indicating that a California court can't use a, an OWI conviction that's been discharged, I guess, under 1203 when, when they plead and prove a subsequent OWI offense in that state would indicate to me that this state should have the same right and ability.
>
> . . .
>
> So I admit freely this is not a, a complete evaluation or analysis of the law of California, but for purposes of the motion before the Court, for those reasons I deny that motion, ...

(R23 at 19:10 to 20:2; 20:14-17; D-App. at 108-09; R6; D-App. At 111-112.) The circuit court interpreted California law as allowing the use of a charge dismissed under § 1203.4 as a penalty enhancer in future California cases, and based upon that interpretation, the court felt that Wisconsin should follow the same pattern. (R23 at 20:7-11.)

On September 18, 2017, Mr. Tibbs waived his right to a trial by jury (R7 at 4), and the parties had a *pro forma* trial to the court. (R24.) The court adjudicated Mr. Tibbs guilty of the OWI offense and sentenced him as a second offender. (R13; D-App. at 101-02.) Thereafter, Mr. Tibbs moved for a stay of his sentence pending the outcome of this appeal, which stay was granted by the court. (R11.) By Notice of Appeal filed December 7, 2017, Mr. Tibbs appealed his conviction to this Court. (R18.)

STANDARD OF REVIEW ON APPEAL

This appeal presents a question of law related to the construction of California Penal Code § 1203.4, and the legal effect the application of this statute has upon whether the prior California offense may permissibly be counted as a penalty enhancer under Wisconsin Statute § 343.307(1)(d) for purposes of making the OWI charge in the present case a second offense. This is a question of law based upon an undisputed set of facts. As such, this Court reviews the question *de novo*, without deference to the Court below. *State v. Robins*, 2002 WI 65, ¶ 20, 253 Wis. 2d 298, 646 N.W.2d 287.

ARGUMENT

I. CALIFORNIA PENAL CODE § 1203.4 PRECLUDES THE USE OF MR. TIBBS' PRIOR CONVICTION AS A PENALTY ENHANCER IN THE INSTANT CASE BECAUSE THE PRIOR JUDGMENT WAS "SET ASIDE AND VACATED" UNDER CALIFORNIA LAW AND THEREFORE DOES NOT CONSTITUTE A PRIOR "CONVICTION" UNDER WIS. STAT. §§ 343.307(1)(d) and 340.01(9r).

A. Statement of the Law In California As It Relates to Relief Under Penal Code §§ 1203.4.

On May 11, 2007, Mr. Tibbs was convicted in the Superior Court of California, County of Orange, of operating while intoxicated in *People of the State of California v. Benjamin Tibbs*, Case No. 07NM03776. (R7 at 17-19; D-App. at 103-07.) Subsequent to this conviction, however, on December 14, 2011, the Orange County Superior Court granted an "Order for Relief Under Penal Code § 1203.4, § 1203.4a" which provided the following:

> **GRANTED:** It appears to the court from the records on file in this matter, and from the petition, that the defendant is eligible for the relief requested. It is hereby ordered that the plea, verdict, or finding of guilt in the above-entitled action be set

> aside and vacated and a plea of not guilty be entered, and that the accusatory filing is dismissed.

This is a lawful Order of the Superior Court of California. Pursuant to what is known as the "Full Faith and Credit Clause" of the United States Constitution, each state is required to give full faith and credit to the laws and judgments of every other state. U.S. Const. Art. IV, § 1; *see also, Ellis v. Estate of Toutant*, 2001 WI App 181, ¶ 28, 247 Wis. 2d 400, 633 N.W.2d 692. As a general rule, judgments of the courts of another state are given greater deference than the laws of that state. *See*, R. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945); *see also,* 28 U.S.C. § 1738 (1948); *Mills v. Duryee*, 11 U.S. 481 (1813).

It is Mr. Tibbs' contention that the plain language of the foregoing Order unequivocally establishes that the conviction originally entered against him in California has not only since been vacated, but additionally, the entry of a Not Guilty plea on his behalf by the Orange County Superior Court must, under the Full Faith and Credit Clause, be given the authority in Wisconsin it manifestly supposes, to wit: there is no admission on Mr. Tibbs' part of any of the elements of the underlying OWI charge.

B. Statement of the Law In Wisconsin As It Relates to the Counting of Prior Out-of-State Convictions.

Wisconsin Statute § 343.307(1)(d) provides in relevant part:

> **(1)** The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under ss. 114.09(2) and 346.65(2):
>
> …
>
> **(d)** Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled

> substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

Notably, the foregoing section refers to "convictions" being counted under subpara. (d). The question which applies in the context of this case is what exactly shall be considered a "conviction"? Shedding significant light on this issue is the decision in *State v. List*, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366.

In *List*, the defendant had been placed on supervision in Illinois for a drunk driving offense, successful completion of which resulted in a discharge and dismissal of the conviction. *List*, 2004 WI App 230, ¶ 5. Specifically, the Illinois law held: "Discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." *Id.* When the defendant was subsequently charged in Wisconsin for operating while intoxicated, the Illinois "conviction" was used to enhance the sentence. List appealed his enhanced conviction, arguing that the prior Illinois offense could not be counted as a penalty enhancer because that charge had been dismissed under the supervision agreement. The Wisconsin Court of Appeals disagreed and held that the definition of "conviction" under Wis. Stat. § 340.01(9r) allowed for use of the prior conviction because there was an initial determination that the defendant "violated or failed to comply with the law in a court of original jurisdiction" by virtue of List's initial plea of guilty. *Id.* ¶ 10.

List is distinguishable from the present situation because here, the guilty plea itself was vacated and a not guilty plea was specifically entered prior to the dismissal. (R7 at 3; D-App. at 103.) This is different than a deferred conviction agreement where everyone agrees there was a violation or failure to comply with the law. Here, the California Court chose to reverse any determination that the defendant violated the law by allowing the original plea to be withdrawn before dismissing the case.

In other words, *List* held that an agreement of deferral, whereby the underlying conviction is "[d]ischarge[d] and

dismiss[ed] upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt," could nevertheless be a classified as a "conviction" in Wisconsin because there was an original finding on the underlying charge that the defendant "violated or failed to comply with the law in a court of original jurisdiction." *List*, 2004 WI App 230, ¶¶ 5, 10. This original finding is one of the ways in which § 340.01(9r) defines a "conviction." This category of "finding" was never specifically vacated in *List* as it was here.

The original finding in Mr. Tibbs' Orange County case was vacated when the California Order unequivocally and explicitly stated "that the plea, verdict, or finding of guilt in the [Orange County] action ***be set aside and a plea of not guilty be entered***." (R7 at 3; D-App. at 103.)(Emphasis added.) Thus, there does not exist an original finding on the underlying charge that Mr. Tibbs violated the law because a not guilty plea, having been entered *vis a vis* the "Order for Relief Under Penal Code § 1203.4, 1203.4a," means that Mr. Tibbs denied the elements, and the facts pled in support, of the crime with which he was charged. That is what "not guilty" means, and more importantly, what distinguishes Mr. Tibbs' case from the Illinois law examined in *List.*

The foregoing authority removes Mr. Tibbs' case from under the umbrella of the definition of "conviction" found in § 340.01(9r). Once his prior offense has been distinguished from the types of offenses like those described in *List,* there is nothing left for the State upon which to hang its hat in its effort to have the California prior counted as a penalty enhancer on the Wisconsin offense.

C. Application of Wisconsin Law to the Counting of Mr. Tibbs' California Conviction.

Before beginning any analysis of whether Mr. Tibbs' California offense should be counted as a "prior conviction" under § 343.307(1)(d), it is worth noting that it is not Mr. Tibbs' burden to establish that the conviction should not be counted, but rather, it is the State that bears the burden of establishing prior offenses as

the basis for the imposition of enhanced penalties. *State v. Wideman*, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996).

The application of Wisconsin's counting rule relating to out-of-state convictions under § 343.307(1)(d) is relatively straight forward. Only those offenses which are deemed to be prior "convictions under the law of another jurisdiction" may be counted. A "conviction" is defined pursuant to § 340.01(9r) as an "unvacated adjudication of guilt, ..." Wis. Stat. § 340.01(9r). The Order entered in California not only "vacates" and "sets aside" Mr. Tibbs' Orange County offense, thereby vitiating the notion that the adjudication was "unvacated" under subsec. (9r), but additionally, because the Order also enters "a plea of not guilty" on Mr. Tibbs' behalf, it undercuts subsec. (9r)'s notion that there was an "adjudication of guilt." (R7 at 3; D-App. at 103.) No clearer picture can be painted in which the California offense is removed from consideration as a "prior conviction."

Only the most convoluted reasoning or twisted logic could abuse the plain language of the California Code, the California Order, and the relevant Wisconsin Statutes in such a way as to make the prior California offense count under § 343.307(1)(d). Such interpretations are to be avoided when the plain language of a statute can be read without ambiguity, as in this case. That is precisely what the "plain-language rule" is designed to ensure. *See generally, State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110; *see also, Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659 (if the meaning of the statute is plain, the inquiry ordinarily stops); *cf. State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997)(a statute is ambiguous when it is capable of being understood in two or more senses). Any attempt to force a reading of the California court's Order to make it seem as though Mr. Tibbs' prior offense was not "vacated" and that the entry of a "not guilty" plea on his behalf somehow constituted an admission of the elements of the underlying charge would be a legal fiction and run contrary to the plain meaning of the terms "vacated," "set aside," "dismissed," and "not guilty," *all* of which were used in the

Order and which appear in the relevant statutes in one form or another.

Where the lower court erred, at least in part, was relying upon its limited understanding of how *California* treated a disposition under Cal. Penal Code § 1203.4. Besides admittedly not having "the time to do the research" and "admit[ting] freely [it did] not [undertake] a, a complete analysis of the law in California," the circuit court allowed itself to be persuaded by the idea that "when [California] plead[s] and prove[s] a subsequent OWI offense in that state . . . this state should have the same right and ability." Nothing could be further from accurate with respect to the approach taken in Wisconsin. It has already been settled that when determining whether an out-of-state prior will act as a penalty enhancer, Wisconsin does *not* defer to how the other state treats the prior conviction. This approach was explicitly rejected in *List*, 2004 WI App 230, ¶¶ 9-10. The *List* court held that "[w]e turn instead to Wisconsin law to determine whether a disposition . . . is a 'conviction' for the purposes of arriving at the correct OWI charge." *Id.* ¶ 10. Keeping the focus on how Wisconsin would treat the offense, as discussed in Section I.B., *supra*, leads to but one conclusion, namely: a plea, verdict, or finding of guilt which has been set aside and vacated and for which a plea of not guilty has been entered is *not* a prior "conviction" under § 343.307(1)(d), and therefore, cannot be used to enhance Mr. Tibbs' penalties under § 346.65(2).

Likewise, this Court cannot otherwise justify counting his prior offense on the ground that it does so because it believes that is how California would have treated Mr. Tibbs' offense lest it violate the plain language of the *List* holding. Thus, no matter whether one approaches the issue presented herein from the perspective of the definition of "conviction" under §§ 343.307(1)(d) and 340.01(9r), or alternatively, under a theory of how California would have treated the offense after it had been vacated pursuant to Cal. Penal Code § 1203.4, either method leads to the same end: it cannot be used as a penalty enhancer, and therefore, the court below erred.

CONCLUSION

Because California law clearly "sets aside and vacates" prior operating while intoxicated offenses from being considered "accusatory findings" under § 1203.4, the Court below should not have "reinstated" the conviction in Mr. Tibbs case by using it as a prior conviction. Mr. Tibbs therefore respectfully requests that this Court remand his case to the court below with directions to vacate his second offense conviction for Operating a Motor Vehicle While Under the Influence of an Intoxicant.

Dated this _____ day of February, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Matthew M. Murray
State Bar No. 1070827
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,877 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on February 26, 2018. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of February, 2018.

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_____

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APPENDIX

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