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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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Case No. 2017AP2408-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

BENJAMIN R. TIBBS,  
Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION,  
ENTERED IN THE CIRCUIT COURT FOR PORTAGE  
COUNTY, BRANCH 2, THE HON. ROBERT  
SHANNON PRESIDING

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BRIEF AND APPENDIX OF  
PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

1. Does a prior California alcohol related conviction count as a prior offense under **Wis. Stat. § 343.307** when the prior conviction is “vacated” under California law but still countable as a prior offense in California?

The circuit court concluded that the California conviction is countable as a prior offense under **Wis. Stat. § 343.307**.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

## STATEMENT OF THE CASE AND FACTS

Benjamin Tibbs appeals a judgment convicting him of Operating While Intoxicated (OWI), contrary to **Wis. Stat. § 346.63(1)(a)**, as a second offense.(13). The conviction is based on a traffic stop that occurred in the City of Stevens Point on October 17, 2015. Tibbs was arrested for driving while intoxicated on that day.

Tibbs was convicted of OWI as a second offense at a court trial on September 18, 2017.(24). The trial was heard on stipulated facts. (7, 24). The stipulated facts included the Wisconsin driving record of Benjamin Tibbs, showing a prior conviction for OWI from California on 05/11/2007. (7:17-19). The Court found Tibbs guilty of OWI as a second offense.

Before trial, Tibbs asked the circuit court to exclude the California conviction as a prior offense under **Wis. Stat. § 343.307**. Tibbs’ Motion to Bar Consideration of Prior 2007 Conviction was filed on December 5, 2016. (1). The circuit court heard and denied this motion on

March 23, 2017. (23). The circuit court also issued a written decision denying the motion. (6).

Tibbs' motion to exclude the prior conviction relied on an Orange County, California, Order for Relief dated December 14, 2011. (7:3). This order contained language which provides that the conviction is "vacated." According to Tibbs, Wisconsin law provides that the defendant's prior convictions may be used for counting offenses in Wisconsin, but only if "unvacated" as provided in **Wis. Stat. § 340.01(9r)**. The circuit court rejected this rationale at the March 23, 2017 hearing, and decided that the California conviction could be counted as a prior offense under **Wis. Stat. § 343.307**.

The defendant now appeals the circuit court's decision denying the request to bar the prior California conviction as a countable prior conviction under **Wis. Stat. § 343.307**, and thus his conviction for Operating While Intoxicated as a second offense.

## ARGUMENT

### I. TIBBS' 2007 CALIFORNIA CONVICTION COUNTS AS A PRIOR CONVICTION UNDER WIS. STAT. §343.307.

#### A. Standard of Review.

The State agrees with the defendant that the appropriate standard of review is *de novo*. The parties stipulated to all of the facts resulting in conviction. The only question is how to apply **Wis. Stat. § 343.307**, as well as other statutes and published cases to the undisputed facts of this case.

#### B. Applicable statutes.

Whether a prior offense is countable for OWI sentence enhancement purposes is governed by **Wis. Stat. §§ 346.65, 343.307(1), and 340.01(9r)**. **Section 346.65**

“Penalty for violating sections 346.62 to 346.64” provides in relevant part that:

**(2)** (am) Any person violating s. 346.63 (1):

2. Except as provided in pars. (bm) and (f), shall be fined not less than \$350 nor more than \$1,100 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 person's 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.

**Section 343.307**, “Prior convictions, suspensions or revocations to be counted as offenses” provides in relevant part that:

**(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):

(a) Convictions for violations under s. 346.63 (1), or a local ordinance in conformity with that section.

(b) Convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.63 (1).

(c) Convictions for violations under s. 346.63 (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle.

(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.

(e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

(f) Revocations under s. 343.305 (10).

(g) Convictions under s. 114.09(1)(b)1. or 1m.

**Wisconsin Stat. § 340.01(9r)** supplies the definition of “conviction” for use in the motor vehicle code, including § 343.307(1). *State v. Carter*, 2010 WI 132, ¶ 43, 330 Wis. 2d 1, 784 N.W.2d 213. It provides as follows:

**340.01 Words and phrases defined.** In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

. . . .

**(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.

C. Wisconsin counts the convictions of other states for counting purposes under Wis. Stat. § 343.307

Long-standing Wisconsin precedent establishes that Wisconsin counts the convictions of other states for purposes of **Wis. Stat. § 343.307**. That is true even when the defendant's conviction is reduced or modified in some fashion. *See State v. List*, 277 Wis.2d 836, 2004 WI App 230, 691 N.W.2d 366.

In *List*, the defendant, Arthur List, argued that he was improperly convicted of second offense OWI because his Illinois first-offense should not count as a prior offense. *List*, 2004 WI App 230, ¶ 1. List argued that the first-offense should not count as a prior because Illinois placed him on court supervision and there had not been a formal "conviction." *List*, ¶ 5.

The *List* court evaluated the meaning of "conviction" for the purposes of counting OWI prior offenses using traditional statutory construction principles. The court evaluated Wis. Stat. § 340.01 (9r), and held that List "violated or failed to comply with the law in a court of original jurisdiction." *List*, ¶ 10.

The court further noted "the clear policy of the statute is to facilitate the identification of drunk drivers and their removal from the highways, the statute must be construed to further the legislative purpose." *List*, ¶ 11 (*citing State v. Neitzel*, 95 Wis.2d 191, 193, 289 N.W.2d 828 (1980)). In addition, "the purpose of general repeater statutes is to increase the punishment of persons who fail to respect the law after suffering the initial penalties and embarrassment of conviction." *Id.*, (*citing State v. Banks*, 105 Wis.2d 32, 49, 313 N.W.2d 67 (1981)).



- D. Wisconsin is not required to give full faith and credit to California's use of the word "vacated."

The defendant argues that the California Order for Relief must be given full faith and credit. As such, according to Tibbs, the "vacated" California conviction can not be counted as a conviction under **Wis. Stat. § 340.01(9r)**, as the conviction was vacated. The defendant further argues that the court can not look at other provisions of California law, or the provisions of the order itself to determine whether Tibbs' conviction has been "vacated" as that term is used in **Wis. Stat. § 340.01(9r)**. As such, Tibbs wants only one portion of the order to be given full faith and credit, the word "vacate."

The defendant is correct that the California Order for Relief states that it "vacates" the defendant's conviction. According to the defendant, this Court must honor that language due to the full faith and credit provisions of the United States Constitution. (Defendant's brief, 5) But the defendant really wants this Court to ignore the plain meaning and effect of the order, by ignoring both California law and the plain language of the order.

The defendant fails to point out that the Order for Relief also states that the order is subject to implications of California Vehicle Code Section 13555. (7:3). As established herein, Section 13555 provides that a vacated conviction is still used for the purposes of counting prior convictions in California. The defendant does not ask this Court to give that provision of the order full faith and credit.

- E. The California conviction was not "vacated" as many of the consequences of conviction remain.

The California Order for Relief dated December 14, 2011, provides that the conviction is "vacated." But that

term is subject to different meanings depending on the consequences of the order. According to the Order for Relief:

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. (7:3).

But the other provisions of the Order for Relief show that the conviction is not “vacated” in any meaningful sense, or the sense used in Wis. Stat. § 340.01(9r). The order specifies that DNA testing is still required, that the conviction must still be disclosed in response to any questionnaire or application for public office, and the conviction may still bar a person from holding public office. (7:3).

Most significantly, the Order for Relief contains provisions which allow California courts to use the conviction for counting purposes in future OWI matters in California. Thus, the conviction is not vacated in the sense that many of the consequences, particularly those germane to this appeal, remain in full force and effect.

The order is based on California Penal codes section 1203.4, which provides:

1203.4. (a) (1) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court

shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she *shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code*. The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing. However, *in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed*. The order shall state, and the probationer shall be informed, that *the order does not relieve him or her of the obligation to disclose the conviction* in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission. (*emphasis added*)

As noted in **California section 1204**, many of the consequences of the conviction remain. Most importantly, the section points out that the conviction is vacated and dismissed, “except as provided in **Section 13555** of the Vehicle Code.”

**Section 13555** of the California vehicle code provides:

A termination of probation and dismissal of charges pursuant to Section 1203.4 or a dismissal of charges pursuant to Section 1203.4a of the Penal Code does not affect any revocation or suspension of the privilege of the person convicted to drive a motor vehicle under this chapter. Such person's prior conviction shall be considered a conviction for the purpose of revoking or suspending or otherwise limiting such privilege on the ground of two or more convictions.

F. The California Order for Relief does not “vacate” the conviction as that term is used in **Wis. Stat. § 340.01(9r)**

In *List*, the defendant argued that his Illinois matter was not a “conviction.” In this case, the defendant argues that a conviction must be “unvacated” as “conviction” is defined in **Wis. Stat. § 340.01(9r)** as an unvacated adjudication. The defendant further argues that the California Order for Relief vacates the conviction in California, which prohibits counting the conviction in Wisconsin. But in doing so, the defendant asks the Court to ignore the actual consequences of a “vacated” conviction in California. The question for the Court is whether the conviction was actually vacated for purposes of **Wis. Stat. § 343.307**, prior counting of OWI offenses.

The defendant argues that *List* prohibits any analysis of the consequences of the Order for Relief in California. According to the defendant,

...Wisconsin does not defer to how the other State treats the prior conviction. This approach was explicitly rejected in *List*. The *List* court held that “we turn instead to Wisconsin law to determine whether a disposition... is a conviction for the purposes of arriving at the correct OWI charge.” (Defendant’s brief, 9).

The defendant asks the Court to evaluate the California order by accepting the word “vacated” at face value without considering the additional provisions of the order, or any consequences of the order. But this is the approach *List* rejected. Wisconsin may determine whether the conviction was vacated by interpreting the circumstances and its own law. Just because the order uses the term “vacated” does not mean that the conviction was “vacated” as the term is used in **Wis. Stat. §340.01(9r)**.

Wis. Stat. § 340.01(9r) does not further define the term “vacate.” Black’s Law Dictionary provides that

“vacate” means cancel or annul. The California Order for Relief states that it vacates the conviction, but also states that the consequences of the conviction, especially as it relates to counting offenses, remain in effect. In that sense, the conviction has not been vacated as the term is defined in **Wis. Stat. §340.01(9r)**, even though that is the word the California order uses.

The defendant is correct that *List* requires the Court to interpret the effect of the orders of other states by analyzing Wisconsin law rather than the law of the other state. However, the law of the other state can be instructive in understanding the meaning of terms used or consequences of the orders of another state. This Court should decide that California’s use of the word “vacate” in the order for relief does not have the same meaning as the word “vacate” in **Wis. Stat. § 340.01(9r)**. As such, Tibbs’ California adjudication remains an unvacated adjudication in Wisconsin for purposes of counting prior OWI offenses under **Wis. Stat. 343.307**.

## CONCLUSION

For the foregoing reasons, this court should affirm the circuit court’s denial of the defendant’s motion to exclude the California conviction from counting as a prior offense, and affirm the conviction of the defendant for Operating While Intoxicated as a second offense.

Dated this 23rd day of March, 2018.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3361 words.

Dated this 23<sup>rd</sup> Day of March, 2018.

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Michael D. Zell  
Assistant District Attorney

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 this 23<sup>rd</sup> day of March, 2018.

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Michael D. Zell  
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