STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP2066 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALFONSO C. LOAYZA,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for Rock County,
the Honorable Richard T. Werner Presiding and
Denial of Postconviction Motion, the Honorable John M.
Wood Presiding, Circuit Court Case No: 2012CF1219

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Does the record lack sufficient proof to support of an alleged 1990 conviction to support Mr. Loayza's conviction for OWI-8th?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case, therefore neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the Amended Judgment of Conviction entered on January 22, 2015, wherein Alfonso Loayza was convicted of operating while intoxicated (8th), contrary to Wis. Stat. §346.63(1)(a), and from the circuit court's denial of Loayza's postconviction motion on October 9, 2018. (56; App. 101; 71; App. 163-64.)

On May 26, 2012, Loayza was arrested for operating while intoxicated in the City of Milton in Rock County, Wisconsin. (2.) The criminal complaint alleged Loayza had eight prior offenses pursuant to Wis. Stats. §§ 343.07 and 346.65(2). (*Id.* at 2.) Three of the alleged prior convictions stemmed from California offenses alleged to have occurred on or about March 1, 1989; March 5, 1990; and October 12, 1991; the remaining convictions occurred in Wisconsin. (*Id.*)

On August 16, 2013, Loayza pled guilty to one count of operating while intoxicated as a ninth offense, subject to

the state providing sufficient competent proof of all prior offenses at a later sentencing hearing. (93:9-10.)

Loayza was sentenced on December 2, 2013. At the hearing, the state submitted to the court as proof of Loayza's prior offenses: (1) a certified copy of defendant's driving record from the Wisconsin Department of Transportation; (2) a set of documents from San Mateo County, California relating to an offense on March 5, 1990; and (3) a set of documents from Santa Clara County, California relating to an offense on October 12, 1991. (39-41; App. 102-41.)

Loayza stipulated to the Wisconsin convictions and one California conviction for the offense dated October 12, 1991, (95:4-6), but argued the state failed to prove the two California convictions from alleged offenses in 1989 and 1990. (*Id.* at 7-8.) The court found that the state had provided sufficient proof of eight prior offenses. (*Id.* at 17.) Loayza was sentenced to five years initial confinement and five years extended supervision, consecutive to any other sentence. (*Id.* at 27.)

Loayza filed a postconviction motion on July 3, 2014, arguing the court erred in finding eight prior offenses, because it relied on inaccurate information regarding California's operating while intoxicated statute in determining that the state had proven the 1989 offense. (46.) After a hearing on the motion on October 3, 2014, the court granted the motion in a written decision on October 13, 2014. (96; 50.) The court concluded the evidence was not sufficient to establish the alleged 1989 conviction; however, the evidence was sufficient to establish the other seven prior convictions. (*Id.*)

On January 22, 2015, the circuit court reopened and vacated its previous sentence and amended Loayza's

conviction to operating while intoxicated (8th). (56; App. 101.) The court then resentenced Loayza to the same sentence he previously received: five years initial confinement and five years extended supervision, consecutive to any other sentence (97:9.)

Loayza filed a postconviction motion on July 29, 2015 on the basis that his sentence was unduly harsh or unconscionable. (58.) The court held a hearing on November 4, 2015, at which it denied the motion. (98:10.)

Loayza filed a no merit appeal on April 6, 2016. On March 8, 2017, the Court of Appeals requested additional briefing on the issue of whether the state had provided sufficient proof of a conviction for the 1990 California offense. On February 28, 2018, the court rejected the no-merit report on that basis and ordered counsel to further pursue this issue. (*State v. Loayza*, App. No. 2016AP216-CRNM Ct. App. Order, Feb. 28, 2018 at 4; App. 168.)

Loayza then filed a postconviction motion on May 18, 2018 arguing that the state had failed to provide sufficient proof of a 1990 California conviction. (64-66.) A hearing was held on the motion on October 9, 2018, at which the time the circuit court denied the motion. (99; App.149-62; 71; App. 163-64.)

ARGUMENT

I. THE RECORD DOES NOT CONTAIN SUFFICIENT COMPETENT PROOF OF AN ALLEGED 1990 CALIFORNIA CONVICTION

A. Legal Principles and Standard of Review

Wisconsin law establishes escalating penalties for multiple offenses of operating while under the influence. Wis.

Stat. § 346.65(2). The prior convictions, suspensions, or revocations to be counted as offenses for determining the penalty are defined by Wis. Stat. § 343.307. Courts must count as prior offenses convictions from other jurisdictions which meet the following description:

> (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 jurisdictions laws.

Wis. Stat. § 343.307(1)(d). In determining whether a prior out-of-state conviction meets the requirements of section 343.307(1)(d), the court must look to whether the out-of-state law under which the defendant was convicted prohibits the conduct specified in that section. *State v. Carter*, 2010 WI 132, ¶ 45, 330 Wis. 2d 1, 794 N.W.2d 213.

The definition of "conviction" set forth by Wis. Stat. § 340.01(9r), is used to determine whether a conviction is counted under Wis. Stat. § 343.307. *Id*. at ¶ 43. There, "conviction" is defined as:

> 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…

Wis. Stat. § 340.01(9r).

The state bears the burden of establishing prior convictions as the basis for the imposition of enhanced penalties under Wis. Stat. § 346.65(2), "by presenting 'certified copies of conviction or other competent proof…before sentencing.'" *State v. Wideman*, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996) (quoting *State v. McAllister*, 107 Wis.2d 532, 539, 319 N.W.2d 865 (1982)). In the context of escalating penalties for successive operating after revocation offenses, the Supreme Court of Wisconsin has held that "competent proof" of a conviction "must reliably demonstrate with particularity, the existence of each prior OAR conviction." *State v. Spaeth*, 206 Wis. 2d 135, 151, 556 N.W.2d 728 (1996). In such cases, a defendant's admission, copies of prior judgments of conviction, or a teletype of a defendant's Department of Transportation driving record will constitute sufficient proof. *Id.* at 153.

The question of whether a prior offense should be used to enhance a defendant's penalty for operating while intoxicated involves interpretation and application of Wis. Stat. § 343.307(1) to undisputed facts – a question of law this court reviews de novo. *State v. Jackson*, 2014 WI App 50, ¶ 3, 354 Wis. 2d 99, 851 N.W.2d 465 (citing *Carter*, 2010 WI 132, ¶ 19).

B. The State Failed to Provide Sufficient Competent Proof of the 1990 California Conviction at Sentencing

As proof of Loayza's prior convictions, the state submitted three exhibits at sentencing. Exhibit 1 contained a certified copy of defendant's driving record from the Wisconsin Department of Transportation. (39; App.102-08.)

Exhibit 2 contained a set of documents from San Mateo County, California, including a criminal complaint charging violations of operating while under the influence of an intoxicant and operating while suspended or revoked occurring on March 5, 1990; a plea questionnaire dated May 11, 1990; and a criminal case docket for the case. (40; App. 109-21.) These documents contain no indication of certification by the San Mateo court. (*Id.*)

Exhibit 3 contained a set of documents from Santa Clara County, California, including a criminal complaint for an offense of operating while under the influence of an intoxicant occurring on October 12, 1991, a bench warrant, an ex parte order for recall of probation violation warrant, a felony minutes sheet detailing a guilty/no contest plea dated October 30, 1991, and a sentence report. (41; App. 122-41.) With the exception of the criminal complaint, these documents contain a stamped seal stating, "The foregoing instrument is a correct copy of the original on file in this office. Attest: David H. Yamasaki. March 8, 2013." (*Id.*) Exhibit 3 also contained an uncertified printout, apparently from the California DMV, which lists offenses, but no information regarding convictions or sentences for any offenses. (41:20; App. 141.)

The sentencing court found, "it's apparent to me, under the reading of the minutes or the docket minutes [in

Exhibit 2], that Mr. Loayza entered a plea to that charge and was convicted on that particular charge." (95:15; App. 144.) The court went on to state:

> Exhibit 2 relates specifically to the March 5, 1990 conviction, and as I run through that recitation of what the minutes indicated that he was, in my mind, clearly convicted of that offense that is listed in the presentence as March 5, 1990, which, as indicated, would make it…Number 7 conviction…
>
> It's clear to me by reading this documentation that he was convicted of that, and I think this is competent proof of that particular conviction. It comes from the Superior Court of California provided by the deputy clerk in that – in the county of San Mateo. It has the seal or stamp from the clerk's office indicating that this information was provided. ... And the plea questionnaire that I previously referenced addresses that criminal complaint. The docket minutes address how that complaint was handled.
>
> … So I'm going to find that those convictions are valid; under the totality of the circumstances presented, the totality of the evidence presented here by the State, that those convictions are valid and should be counted here for sentencing purposes.

(95:16-17; App. 145-46.) Aside from conclusory statements that Exhibit 2 proved a conviction, the court did not identify exactly how the documents offered such proof.

On the other hand, the postconviction court relied on documents in Exhibit 3 relating to the 1991 offense for proof of the 1990 conviction. (99:13; App.157.) In denying Loayza's postconviction motion, the court found:

> [W]hen I reviewed the 1991 documents from Santa Clara County where on the -- looks like a minute sheet here, it's the document entitled other sentence and I'm not sure if it's choice or what that word is because there is a whole punch that went through that word. But it's certainly referencing on Count 2 of that particular case three prior DUI felony convictions. And, once again, that bears the seals from the Clerk of Courts office from Santa Clara County. The Superior Court of Santa Clara County is on that document, as well. When I look at the once again the Criminal Complaint filed in that particular matter, once again certified and signed under the penalties of perjury to be true and correct, listing the prior convictions. And I note also from the municipal court of California felony minute sheet which is, in fact, signed by a judicial officer signed by Timothy Hanifin, H-A-N-I-F-I-N, which references the three priors admitted when they took the plea, that there is more than an abundance of reliable information upon which I think Judge Werner could have found the State met its burden of proof.

Id. at 13-14; App. 157-58.)

Contrary to the court rulings below, the record does not contain sufficient proof of the alleged 1990 California conviction. The State's Exhibit 2 does not prove a conviction occurred for the alleged 1990 offense. No judgment of conviction is included in the materials and the case docket does not list any information regarding disposition or conviction. (40:8-13; App. 116-21.) None of the materials provide a date of conviction. (*Id.*; App. 109-21.) There is a plea waiver form (*id.* at 6-7; App. 114-15); however, neither the "case synopsis" nor the "record of case events" shows that anything occurred on or near the date that form was signed.

(*Id.* at 8-13; App. 116-21.) The case docket sheet suggests that Loayza was revoked from probation. (*Id.* at 9; App. 117.) However, nothing in the case docket or other materials shows that Loayza was ever placed on probation in that case. (*Id.*; App. 109-21.) Notably, the agreement listed on the plea form does not include a probation sentence. (*Id.* at 6; App. 114.)

Even if the materials in Exhibit 2 can prove a conviction occurred, they do not prove that Loayza was convicted of operating while intoxicated as required by Wis. Stat. § 343.07(1)(d) (counting convictions under law of another jurisdiction that prohibit "using a motor vehicle while intoxicated"). The plea form states that Loayza pled guilty to "Vehicle Code, § 14601.2(a)," which corresponds to the statute number used in the complaint for count three, operating while suspended and revoked. (40:4; App. 112.) Nothing in the plea form suggests Loayza pled guilty to operating while intoxicated, nor is there any other typical evidence of conviction of this charge. (*Id.* at 6-7; App. 114-15.)

California Vehicle Code § 14601.2(a) provides, "A person shall not drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for a conviction of a violation of Section 23152 or 23153 if the person so driving has knowledge of the suspension or revocation." The conduct prohibited by this statute does not permit that conviction to qualify as a prior conviction under Wis. Stat. § 343.307(1)(d), because it does not relate to using a motor vehicle while under the influence of alcohol or drugs. *State v. Carter*, 2010 WI 132, ¶ 45, 330 Wis. 2d 1, 794 N.W.2d 213 (court must look to whether the out-of-state law under which the defendant was convicted prohibits he conduct specified in Wis. Stat. § 343.307(1)(d)). "Every term in subsection (1)(d) relates in some way to a person operating

a motor vehicle with either drugs or alcohol, or both, in his or her system." *State v. Jackson*, 2014 WI App 50, ¶ 15, 354 Wis. 2d 99, 851 N.W.2d 465.

In *Jackson*, the defendant appealed his conviction for OWI-5th on the basis that an Illinois conviction for reckless driving was improperly counted as a prior conviction under Wis. Stat. § 343.07(1). *Id.* at ¶ 2. The record showed that the defendant had originally been arrested for OWI, but the charge was later amended to reckless driving. *Id.* at ¶ 13. The defendant pled and was convicted of the amended reckless driving charge. *Id.* The state argued the court should look to what the original charge was, the sanctions imposed by the court, and the impact of the conviction on the defendant if he were to be convicted of another OWI offense in Illinois. *Id.* at ¶ 16. However, the court held that it was limited to examining the conduct prohibited by the offense for which the defendant was actually convicted to determine whether it matched the definition of a prior conviction in Wis. Stat. § 343.07(1)(d). *Id.* at ¶¶ 15-16.

In holding that the reckless driving charge could not be counted as a prior conviction, the *Jackson* court stated, "Every term in subsection (1)(d) relates in some way to a person operating a motor vehicle with either drugs or alcohol, or both, in his or her system. That critical aspect is completely absent from the reckless driving offense of which Jackson was convicted." *Id.* at ¶ 15. That same critical aspect is absent from the offense of operating while suspended or revoked under California Vehicle Code § 14601.2(a), so proof of a conviction for this offense does not provide proof of a prior conviction under Wis. Stat. § 343.07(1)(d).

Neither does the State's Exhibit 3, containing case documents relating to the 1991 case, provide sufficient proof

a conviction for the alleged 1990 offense. (41; App. 122-41.) The postconviction court reasoned that because the 1991 complaint listed a prior conviction in 1990, that complaint and Loayza's later guilty plea in the 1991 case were competent proof of a 1990 conviction. (99:13-14; App. 157-58.) The mere fact that defendant plead guilty to charges stemming from a criminal complaint that also alleged a 1990 prior offense is nothing more than a secondary source report, lacking a guarantee of reliability that it accurately reflects what happened in the 1990 case. Because the prior offense was not an element of the 1991 offense proven beyond a reasonable doubt by the state of California as a necessary prerequisite for conviction, the 1991 conviction is not competent proof of any prior offenses. *See* CA Veh. Code § 23152 (1992); *Curl v. Superior Court*, 51 Cal.3d 1292, 1306 n.8, 801 P.2d 292 (1990) (prior operating while intoxicated offenses treated as sentencing enhancers not elements of underlying offense)

Because the record does not contain sufficient competent proof that Loayza was convicted of an operating while intoxicated offense in 1990, as required by Wis. Stat. § 343.07(1)(d), Loayza should be resentenced for a operating while intoxicated as a seventh offense.

C. Mr. Loayza Did Not Waive His Challenge to Counting the 1990 California Conviction

Loayza challenged the state's proof of his prior convictions at his plea hearing and original sentencing hearing. (93:9-10; 95:7-8; 99:6, 9; App. 150, 153.) Loayza's first postconviction motion did not challenge this conviction. (46.) Because of this fact, the postconviction court opined during the October 9, 2018 hearing that Loayza had waived his right to challenge this conviction. (99:14; App. 158.)

Loayza argued the court should not use postconvinction counsel's representations during his first postconviction motion and hearing as a basis to find the issue waived, because counsel either did not possess the full court record or acted ineffectively at the time. (*Id.* at 15; App. 159.) In the Court of Appeals' Order regarding Loayza's No-Merit Report dated February 28, 2018, the court noted regarding counsel's failure to note information on the plea form relating to the 1990 conviction,

> It may be that counsel's failure to note this statute number on the plea form occurred because counsel does not have the second page. In the original exhibit, the plea form is a two-sided document. It may be that when the clerk of the circuit court copied the record for counsel, the clerk did not notice that there was writing on the back, and did not copy the back.

(Order at 4&n.1; App. 168.) Upon receiving this order, undersigned counsel reviewed her files to determine whether in fact she had received the full court record. (99:15; App. 159.) Counsel believes, but is not certain of the fact[1], that at the time the first postconviction motion was filed, counsel had not received photocopies of double-sided pages and therefore did not have the full court record – particularly the plea form indicating a plea to California vehicle code 14601.2(a). (*Id.* at 15-16; App. 159-60.)

[1] Because counsel was appointed to represent Loayza on two separate occasions in this case – after the original sentencing in December 2013 and after the resentencing in January 2015 – she received the court record twice. (99:15-16; App. 159-60.) Counsel discovered that in one of the photocopies of the court record she received, double-sided pages were not copied. (*Id.*) Counsel believes, but cannot be certain, that she did not receive the double-sided pages at the time she filed the initial postconviction motion in 2014. (*Id.*)

The circuit court did not make an explicit finding on the waiver issue after receiving this factual background from counsel. (*Id.* at 17; App. 161.) Instead the court returned to its earlier position that documents relating to the 1991 conviction provided enough reliable information to establish a 1990 conviction. (*Id.*; App. 161)

Because the circuit court did not rely on waiver but proceeded to the substantive legal arguments on the issue, this court should as well. *State v. Ndina*, 2009 WI 21, ¶¶ 37-38, 315 Wis. 2d 653, 761 N.W.2d 612 ("this court should not spend time deciding this case either on the defendant's failure at trial to object timely … or on the State's failure during the postconviction hearing to object to the defendant's lapse. The values protected by the forfeiture and waiver rules would not be protected in the instant case by applying a forfeiture or waiver rule to either the defendant or the State."); *State v. Dyess*, 124 Wis.2d 525, 535-36, 370 N.W.2d 222 (1985) (Appellate court "ha[s] the option of considering issues if it appeared to the court to be in the interest of good judicial administration to do so.") (citation omitted).

CONCLUSION

For the foregoing reasons, Loayza asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for resentencing for OWI-7th.

Dated this 14th day of January, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,460 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served by mail on all opposing parties.

Dated this 14th day of January, 2019.

Signed:

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CERTIFICATION AS TO APPENDIX

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 this 14th day of January, 2019.

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