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 AND AN ORDER DENYING A POSTONCVICTION MOTION, ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE RICHARD T. WERNER (ORDER) AND JOHN M. WOOD (JUDGMENT), PRESIDING.

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the State offer competent proof of Defendant-Appellant Alfonso C. Loayza's 1990 California conviction for operating while intoxicated to support his current sentence for operating while intoxicated, as an eighth offense?

The circuit court answered, "Yes."

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issue presented involves the application of well-established principles to the facts presented.

INTRODUCTION

Drinking and driving is a serious problem generally, and a serious problem for Loayza, who was convicted of his eighth drinking and driving related offense in this case. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here."). Loayza does not dispute the fact that he was drinking and driving—a blood test revealed an alcohol concentration of .165, which was well over Loayza's .02 limit. *See* Wis. Stat. § 340.01(46m)(c). Instead, Loayza challenges his sentence on the grounds that the State failed to offer competent proof that his 1990 California offense counted as a prior conviction to support his current sentence for operating while intoxicated, as an eighth offense.

The State offered competent proof. It is well-established that a Department of Transportation (DOT) record is competent proof of a defendant's prior convictions, even when the convictions occur in a mix of jurisdictions. Accordingly, the

State submitted competent proof that Loayza's 1990 California offense counted as a prior conviction when it submitted as an exhibit at Loayza's sentencing hearing a certified DOT record that established that Loayza had a 1990 California conviction for operating while intoxicated. Loayza was thus properly sentenced for operating while intoxicated, as an eighth offense.

STATEMENT OF THE CASE

In May 2012, officers stopped Loayza for a speeding violation. (R. 1.) During the stop, Loayza admitted he consumed "hard liquor" and had "too much to drink." (R. 1.) A preliminary breath test registered an alcohol concentration of .14. (R. 1.)

The officer ran Loayza's driving record, which showed eight "prior alcohol related convictions." (R. 1.) Given Loayza's prior convictions, he had a prohibited alcohol concentration of .02. (R. 1:1); *see* Wis. Stat. § 340.01(46m)(c). A blood test revealed a blood alcohol concentration of .165 (R. 10.) The State charged Loayza with one count of operating while intoxicated, as a ninth offense, and one count of operating with a prohibited alcohol concentration, also as a ninth offense. (R. 10.) The complaint outlined Loayza's prior convictions:

> The Wisconsin Department of Transportation records show that Loayza has eight prior convictions for operating while intoxicated as follows: three from the State of California for offenses committed on March 1, 1989, March 5, 1990, and October 12, 1991; and five convictions in Walworth County, Wisconsin, for offenses committed on October 31, 1992, March 26, 1995, March 16, 1997, December 21, 2001, and March 4, 2009.

(R. 2:2.)

Loayza later pled guilty to one count of operating while intoxicated, as a ninth offense. (R. 93:15.) But the parties

made Loayza's plea contingent on the State being able to prove his number of prior convictions at sentencing. (R. 93:7–10, 15–16.)

At sentencing, the State submitted three exhibits as proof of Loayza's prior convictions. (R. 95:9; 39–41.) First, the State submitted a certified copy of Loayza's driving record from Wisconsin DOT. (R. 39.) Second, the State submitted a series of documents from the Supreme Court of California, County of San Mateo, sent in response to a request for records related to Loayza's 1990 California offense from the Rock County District Attorney's Office. (R. 40.) The documents included the complaint, the plea questionnaire and waiver of rights form, and the criminal docket for the 1990 California offense. (R. 40.) Third, the State submitted a series of documents from the Superior Court of California, County of Santa Clara, sent in response to a request for records related to Loayza's 1991 California offense from the Rock County District Attorney's Office. (R. 41.) The documents included the complaint, a bench warrant, and a minutes sheet for the 1991 California offense. (R. 41.)

Loayza conceded that the State offered sufficient proof for the 1991 offense but argued that the State failed to offer sufficient proof for the 1989 and 1990 offenses. (R. 95:4–6.) Loayza argued that the State's submission of the "certified Wisconsin Department of Transportation record" qualified as "competent proof" of the Wisconsin violations, but it did not qualify as "confident proof with respect to the California violations." (R. 95:8.) The State argued that the certified DOT record "alone [was] sufficient proof of the prior convictions." (R. 95:9.)

Relying on the documents submitted in exhibits two and three, the circuit court concluded that the State offered sufficient proof for both the 1990 and 1989 California offenses. (R. 95:14–17.) Accordingly, the court imposed sentence for operating while intoxicated, as a ninth offense. (R. 95:24.) The

court sentenced Loayza to ten years of imprisonment, consisting of five years of initial confinement followed by five years of extended supervision. (R. 95:27.)

After sentencing, Loayza filed a motion for resentencing, challenging the circuit court's conclusion that the state submitted sufficient proof of the 1989 California offense. (R. 46.) Loayza argued that the documents submitted in exhibit three were insufficient. (R. 46:4–6.) The court granted Loayza's motion after a hearing. (R. 50; 96.) Apparently the court's decision was never appealed. As a result of its decision, the court amended Loayza's judgment of conviction to operating while intoxicated, as an eighth offense, and resentenced Loayza to the same length of sentence (a total of ten years of imprisonment, consisting of five years or initial confinement followed by five years of extended supervision). (R. 56; 97:9–10.)

After resentencing, Loayza filed a postconviction motion, alleging that his sentence was unduly harsh. (R. 58:1.) The court denied Loayza's motion after a hearing. (R. 61; 98:8–10.)

Loayza then filed a no merit appeal, which this Court ultimately rejected. (R. 62, A-App. 165–69.) This Court ordered Loayza to pursue the issue of whether the State offered sufficient proof of Loayza's 1990 California offense. (A-App. 168 ("Accordingly, counsel must further pursue this issue.").) Loayza filed a postoncviction motion to modify his sentence on the grounds that he should have been sentenced for operating while intoxicated, as a seventh offense. (R. 64:1.) After a hearing, the court denied Loayza's motion.[1] (R. 71:2;

[1] The Honorable Richard T. Werner presided over Loayza's plea, sentencing, motion for resentencing, and postconviction motion alleging that his sentence was unduly harsh. (R. 93; 95; 50; 61.) The Honorable John M. Wood presided over Loayza's postconviction motion to modify his sentence. (R. 71.)

99:6–18.) The court concluded that the State's three exhibits provided "more than sufficient competent evidence" to prove Loayza's 1990 California offense. (R. 99:18.)

Loayza now appeals.

STANDARD OF REVIEW

This Court must interpret and apply various statutes to decide this case. This Court reviews de novo the interpretation and application of statutes to undisputed facts. *State v. Jackson*, 2014 WI App 50, ¶ 3, 354 Wis. 2d 99, 851 N.W.2d 465.

ARGUMENT

The State offered competent proof to establish that Loayza's 1990 California offense counted as a prior conviction for sentencing purposes.

This Court should affirm the circuit court's order denying Loayza's motion. The State offered competent proof to establish that Loayza's 1990 California offense counted as a conviction when it submitted DOT's certified record of Loayza's driving record. DOT's certified record established that Loayza was convicted of "OWI-Operating While Intoxicated" in California in 1990. (R. 39:6, A-App. 107.)

A. Convictions under the law of another jurisdiction that prohibit a person from operating while intoxicated are counted when determining an offender's sentence under Wisconsin's accelerated penalty structure for OWI offenses.

The penalty for a violation of OWI under Wis. Stat. § 346.63(1)(a) is determined by Wis. Stat. § 346.65(2)(am)2., which explains that the penalty depends on "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)." *See also State v. Carter*, 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213 ("This Wisconsin legislature has established an accelerated penalty structure for OWI offenses in Wis. Stat. § 346.65(2). The severity of a defendant's penalty for OWI is based on the number of prior convictions under §§ 940.09 and 940.25 'plus the total number of suspensions, revocations, and other convictions counted under Wis. Stat. § 343.307(1)." (citing Wis. Stat. § 346.65(2)).

Wisconsin Stat. § 343.307(1) tells a court when an offense from another jurisdiction counts as a conviction for OWI counting purposes. Relevant here, it states:

> (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.

Wis. Stat. § 343.307(1)(d).

Wisconsin Stat. § 340.01(9r) defines the term "conviction." It provides, in relevant part:

> (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.

Wis. Stat. § 340.01(9r).

In short, and as relevant here, section 343.307(1)(d) instructs a court "to count" "[c]onvictions under the law of another jurisdiction that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws." And "[c]onviction" is defined in section 340.01(9r), 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 . . . ."

Accordingly, a court should count "unvacated adjudication[s] of guilt" or "determination[s] that a person has violated of failed to comply with the law" of "another jurisdiction that that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws" to determine an offender's penalty under Wis. Stat. § 346.65(2). Wis. Stat. §§ 343.307(1)(d); 340.01(9r).

B. A State must present competent proof to establish an offender's prior convictions.

"The State bears the burden of establishing prior offenses as the basis for the imposition of enhanced penalties." *Carter*, 330 Wis. 2d 1, ¶ 25. The State satisfies that burden when it places "before the circuit court 'competent proof' of prior convictions." *State v. Spaeth*, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996) (quoting *State v. McAllister*, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982) ("[T]he convictions may be

proven by certified copies of conviction or other competent proof offered by the state before sentencing.")).

Establishing prior convictions "by competent proof is not an onerous task." *Spaeth*, 206 Wis. 2d at 155. For proof to be competent, it "must reliably demonstrate, with particularity," the existence of each prior conviction. *Id.* at 150. But it need not be admissible at trial since "[t]here is no presumption of innocence accruing to the defendant regarding . . . previous . . . convictions; such convictions have already been determined in the justice system and the defendant was protected by his rights in those actions." *Id.* at 150–51 (alterations in original) (quoting *McAllister*, 107 Wis. 2d at 539).

Competent proof includes an accused's admission to the prior offense. *State v. Wideman*, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996) ("If an accused admits to a prior offense that admission is, of course, competent proof of a prior offense and the State is relieved of its burden to further establish the prior conviction.").

And it includes "copies of prior judgments of conviction" or "a teletype of the defendant's Department of Transportation (DOT) driving record." *Spaeth*, 206 Wis. 2d at 153. In fact, the supreme court "anticipated that in most cases the State will satisfy the [competent proof] standard by attaching to the complaint the DOT teletype of the defendant's driving record," and it expressly approved of that practice. *Id.*

This Court has also approved the use of DOT records. In *Van Riper*, this Court considered whether the State's submission of Van Riper's certified DOT driving transcript was admissible and sufficient to establish Van Riper's repeater status as an element of the offense of "PAC-.08" beyond a reasonable doubt. *State v. Van Riper*, 2003 WI App

237, ¶¶ 1, 6, 267 Wis. 2d 759, 672 N.W.2d 156. This Court concluded that it was. *Id.* ¶ 2.

Applying *Spaeth* and *Wideman*, this Court reasoned that if "a teletype of a defendant's DOT driving record [was] admissible and sufficient evidence of prior offenses for purposes of penalty enhancement in a sentencing proceeding, then certainly a *certified* DOT driving record [was] admissible and sufficient to prove the status of an alleged repeat offender in a PAC prosecution." *Van Riper*, 267 Wis. 2d 759, ¶ 16. Moreover, this Court said the rule applied even though one of the prior convictions occurred in another jurisdiction. *Id.* ¶ 19 ("That one of Van Riper's convictions occurred in Minnesota does not change our decision.").

Applied together, *Spaeth*, *Wideman*, and *Van Riper* instruct that a DOT record is competent proof of a defendant's prior convictions, even when those convictions occur in a mix of jurisdictions.

C. The State presented competent proof establishing that Loayza's 1990 California offense counted as a conviction when it submitted DOT's certified record of Loayza's driving record.

The certified DOT record, which the State submitted as exhibit one at the sentencing hearing, recited that Loayza was convicted of "OWI-Operating While Intoxicated" in California, with a "violation" date of "03-05-1990" and a "conviction" date of "05-11-1990." (R. 39:6, A-App. 107.) Here's the relevant snippet from the DOT record:

Violation : 03-05-1990 GUILTY
Conviction : 05-11-1990 **Points** : 00
Reason : OWI-OPERATING WHILE INTOXICATED
Operation : CLASS D
State : CALIFORNIA
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(R. 39:6, A-App. 107.)

The DOT record makes clear that Loayza was *convicted* of the 1990 California offense. (R. 39:6, A-App. 107.) Accordingly, the 1990 California offense qualifies as a "conviction," as that term is defined under the statute. Wis. Stat. § 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 . . . .").

The only remaining question then is whether the California offense fits within conduct prohibited in Wis. Stat. § 343.307(1)(d). It does.

As noted above, Wis. Stat. § 343.307(1)(d) directs a court to count "[c]onvictions under the law of another jurisdiction that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws." Loayza was convicted in California in 1990 of "OWI-Operating While Intoxicated." (R. 39:6, A-App. 107.)

Wisconsin's drunk driving statute, which is titled, "Operating under influence of intoxicant or other drug," prohibits a person from, among other things, driving or operating a motor vehicle "[u]nder the influence of an intoxicant." Wis. Stat. § 343.63(1). California and Wisconsin's laws prohibit substantially similar conduct—operating while under the influence of an intoxicant. Given the above, California's offense of operating while intoxicated fits squarely within Wis. Stat. § 343.307(1)(d).[2]

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[2] *See State v. Van Riper*, 2003 WI App 237, ¶ 20, 267 Wis. 2d 759, 672 N.W.2d 156 ("The certified DOT transcript recites that Van Riper was convicted of 'operating under influence' in Minnesota with a violation date of '11/21/89.' Wisconsin's drunk

Outside of mentioning that the State submitted his DOT driving record, Loayza does not address the record and instead attacks the proof offered in exhibits two and three. (Loayza's Br. 6–11.)

Focusing on exhibit two, Loyaza argues that it did not "prove that Loayza was convicted of operating while intoxicated as required by Wis. Stat. § 343.[3]07(1)(d)." (Loayza's Br. 9.) At most, Loyaza said, exhibit two proved that he was convicted of operating after revocation, but that conviction did not count under section 343.307(1)(d). (Loayza's Br. 9.) Even assuming exhibit two did not prove a countable conviction, Loayza's DOT record (exhibit one) did. (R. 39:6, A-App. 107.) The DOT record clearly established that Loayza was convicted in California in 1990 of "OWI-Operating While Intoxicated." (R. 39:6–7; Pet-App. 107.) Loayza also misstates that "[n]one of the materials provide a date of conviction," as the DOT record shows a "[c]onviction" date of "5-11-1990." (Loayza's Br. 8); (R. 39:6, A-App. 107.)

As discussed above, the law provides that a DOT record is competent proof of a prior conviction. *Spaeth*, 206 Wis. 2d 135, 153 (holding that the State meets its burden of establishing the existence of a prior conviction when it "introduces into the record at any time prior to the imposition of sentence," "a teletype of the defendant's Department of Transportation (DOT) driving record"); *Van Riper*, 267 Wis. 2d 759, ¶ 16 (holding that if "a teletype of a defendant's DOT driving record" is sufficient, "then certainly a *certified*

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driving statute, Wis. Stat. § 346.63, is entitled, 'Operating under influence of intoxicant or other drug.' A subset of this statute, and one means of violation this statute, is operating a motor vehicle with ap prohibited alcohol concentration. Sec. 346.63(1)(b). From this information, the trial court correctly observed that the Minnesota laws governing drunk driving were substantially similar to Wisconsin's OWI laws.").

DOT driving record is admissible and sufficient to prove the status of an alleged repeat offender in a PAC prosecution").

In sum, the State submitted competent proof, via a certified DOT record, that established that Loayza's 1990 California offense for "OWI-Operating While Intoxicated" qualified as a conviction under Wis. Stat. § 340.01(9r) and squarely fell within conduct prohibited in Wis. Stat. § 343.307(1)(d). (R. 39:6, A-App. 107) As a result, the State satisfied its "burden of establishing prior offenses as the basis for the imposition of enhanced penalties." *Carter*, 330 Wis. 2d 1, ¶ 25. Loayza was therefore properly sentenced for his eighth offense of operating while intoxicated.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Loayza's postconviction motion.

Dated this 1st day of April, 2019.

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 3,100 words.

Dated this 1st day of April, 2019.

_____
JENNIFER R. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 1st day of April, 2019.

_____
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