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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Alfonso Loayza appeals his conviction of OWI (8th), contrary to Wis. Stat. §346.63(1)(a), and from the circuit court's denial of Loayza's postconviction motion for resentencing on the basis the State failed to provide competent proof of an alleged 1990 California conviction.

In his initial brief, Loayza established that the California case records offered by the State at sentencing fail to prove Loayza was convicted of an OWI offense in 1990, and suggest he was instead convicted only of operating while suspended or revoked. (App. Br. at 6-11.) The State does not dispute this argument. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (propositions not refuted are deemed conceded). Instead, the State argues the Wisconsin DOT's certified record of Loayza's driving record alone is competent proof of the California offense. (Resp. Br. at 5, 9-12.) However, the California records contradict the Wisconsin DOT record, showing it cannot be relied upon as competent proof in this case. Loayza therefore argues the State has failed to meet its burden of proving the alleged 1990 conviction, and he should be resentenced for a seventh-offense.

ARGUMENT

I. THE CALIFORNIA CASE RECORDS REBUT THE FACT OF THE ALLEGED 1990 CONVICTION; THEREFORE, THE WISCONSIN DOT RECORD ALONE IS NOT COMPETENT PROOF OF THAT CONVICTION

For the circuit court to impose an enhanced penalty under Wis. Stat. § 346.65(2), the State bears the burden of

establishing the prior offense. *State v. Wideman*, 206 Wis.2d 91, 104, 556 N.W.2d 737 (1996); *State v. McAllister*, 107 Wis.2d 532, 539, 319 N.W.2d 865 (1982). The existence of a prior offense must be proven to the court by a preponderance of the evidence. *State v. Braunschweig*, 2018 WI 113, ¶ 32, 384 Wis. 2d 742, 921 N.W.2d 199.

A defendant is permitted to challenge the existence of penalty-enhancing prior convictions. *McAllister*, 107 Wis.2d at 539; *see also Wideman*, 206 Wis.2d at 108 ("Defense counsel should be prepared at sentencing to put the state to its proof when the state's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses."). Although a certified DOT driving record is admissible and may constitute competent proof of defendant's prior offenses, *State v. Van Riper*, 2003 WI App 237, ¶ 2, 267 Wis. 2d 759, 672 N.W.2d 156, a defendant may still attempt to rebut the fact of prior OWI convictions. *Wideman*, 206 Wis. 2d at 105 ("the accused must have an opportunity to challenge the existence of the prior offense").

Here, the California documents submitted by the State at sentencing contradict the Wisconsin DOT's record of Loayza's driving record, calling into question the accuracy of the DOT record in this case. As a result, the State has failed to prove it more likely than not that Loazya was in fact convicted of the 1990 California offense. *See Braunschweig*, 2018 WI 113, ¶ 32 (State's burden is by a preponderance of the evidence). The State's Exhibit 2, the case record for the alleged 1990 offense, contains no information regarding a date of conviction or of any disposition for an OWI offense. (40:8-13; App. 116-21.) The only evidence that suggests the case resulted in any conviction is a plea waiver form and a docket sheet suggesting that Loayza was revoked from probation. (*Id.* at 6-7, 9; App. 114-15, 117.) However, the

plea form indicates 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.[1] (40:4; App. 112.) A conviction for this offense does not qualify as a prior conviction under Wis. Stat. § 343.307(1)(d). *See State v. Carter*, 2010 WI 132, ¶ 45, 330 Wis. 2d 1, 794 N.W.2d 213; *State v. Jackson*, 2014 WI App 50, ¶ 15, 354 Wis. 2d 99, 851 N.W.2d 465.

The California case records contradict the Wisconsin DOT's record of Loayza's driving record and cast doubt on the of the DOTs record; therefore, that record alone is not competent proof of the alleged 1990 offense. Notably, the DOT record also lists a 1989 offense, but the circuit court concluded in its order on Loayza's first postconviction motion that the evidence was insufficient to prove that offense. (50; App. 147-48.) Given the contradictory records, the State has failed to meet its burden to prove by a preponderance of the evidence that Loayza was convicted of an operating while intoxicated offense in 1990. Loayza should be resentenced for operating while intoxicated for a seventh offense.

CONCLUSION

For the reasons stated above and in his initial brief, Loayza asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for resentencing for OWI-7th.

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[1] 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."

Dated this 19th day of April, 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 806 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 19th day of April, 2019.

Signed:

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