STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021AP1119 CR
Circuit Court Case No. 2020CT78

State of Wisconsin,
Plaintiff-Respondent,

v.

Evan J. Schnoll,
Defendant-Appellant.

BRIEF

ON APPEAL FROM THE CIRCUIT COURT
FOR DODGE COUNTY, BRANCH 1,
THE HONORABLE BRIAN A. PFITZINGER PRESIDING

Respectfully submitted,

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STATEMENT OF ISSUE

Whether the defendant's prior California conviction for a "wet reckless" should be counted as a prior conviction, for using a motor vehicle while intoxicated or with an excess or specified range of alcohol concentration, under Wis. Stat. §343.307(1)(d)?

The circuit court decided "yes".

STATEMENT ON ORAL ARGUMENT

The defendant-appellant does not request oral argument of the issue presented, but stands ready to do so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented.

STATEMENT ON PUBLICATION

The defendant-appellant does request the decision of this Court be published because this is a case of first impression.

STATEMENT OF CASE

On November 17, 2010, the defendant was arrested in California (R: 45) (A-Ap. 135). He was charged with violating California Vehicle Code §23152(a) and California Vehicle Code §23152(b) (R: 45) (A-Ap. 134). Said Code provisions are similar in nature to Wisconsin's operating under the influence of an intoxicant statute, Wis. Stat. §346.63(1)(a) and (b).

However, on February 2, 2011, the prosecutor amended the complaint and added a third count. The third count was a violation of California Vehicle Code §23103.5(a) or what California calls a "wet reckless" (R: 45) (A-Ap. 137). The defendant entered a no contest plea to count three and counts one and two, were dismissed (R: 45) (A-Ap. 137).

On January 11, 2020, the defendant was arrested in Wisconsin for operating while intoxicated, in violation of Wis. Stat. §346.63(1)(a). On February 28, 2020, the State of Wisconsin filed a criminal complaint charging the defendant with operating a motor vehicle while under the influence, second offense and operating with a prohibited alcohol concentration, second offense (R: 4) (A-Ap. 102). The State charged the defendant with a second offense, alleging the defendant's 2010 wet reckless from California is a countable prior offense under Wis. Stat. §343.307(1)(d) (R: 4)(A-Ap. 105).

On November 16, 2020, the defendant filed a Motion to Determine Validity of Prior Conviction (R: 33) (A-Ap. 109). A brief hearing was held on November 17, 2020. (R:64 A-Ap. 159-167) Four exhibits were tendered to the Court (R:35-38) (A-Ap. 110-114). The State requested time to research the issue and file a position statement. The State did so on December 18, 2020; the defendant filed a response letter on April 29, 2021 (R: 40 and 45) (A-Ap. 115-127 and 128-139). The circuit court held a hearing on May 6, 2021, regarding whether the 2010 California wet reckless conviction should be counted as a prior conviction under Wis. Stat. §343.707(1)(d) (R: 52) (A-Ap.141-151). The circuit court ruled that it should be counted (R: 51) (A-Ap.140). The defendant then initiated this appeal.

STANDARD OF REVIEW

The issue presented in this case is one of statutory interpretation. This Court reviews questions of statutory interpretation de novo. State v. List, 2004 WI App 230, ¶ 3, 277 Wis.2d 836, 691 N.W.2d 366 (Wis. App. 2004). More specifically, the Supreme Court has stated, "Whether there exists sufficient evidence to prove a penalty enhancer presents a question of law that we review independently of the determinations rendered by the circuit court or court of appeals." State v. Loayza, 2021 WI 11, ¶ 24, 395 Wis.2d 521, 954 N.W.2d 358 (Wis. 2021).

ARGUMENT

First, the defendant asserts that a California wet reckless conviction does not qualify as a prior conviction within the parameters of Wis. Stat. §343.307(1)(d). Wisconsin Statute §343.307(1)(d) 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."

The wet reckless driving offense by definition is not an offense that prohibits "...using a motor vehicle while intoxicated... or with an excess or specified range of alcohol concentration..." (Wis. Stat. §343.307(1)(d)). The California Vehicle Code §23103.5 requires that "...the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of an alcoholic beverage or ingestion or administration of a drug, or both, by the defendant in connection with the offense." (emphasis added) (A-Ap. 155). The California Vehicle Code provision does not require the consumption of alcohol or drugs. Further, if alcohol was involved, the California Vehicle Code does not specifically require a specific alcohol level for the wet reckless conviction. Therefore, the California Vehicle Code does not meet the Wisconsin statutory requirement of intoxication or an "excessive" or "specified range" of alcohol concentration.

Next, the State argues that the Wisconsin Department of Motor Vehicles Certified Record is proof positive that the defendant was previously convicted of a qualifying offense under Wis. Stat. §343.307(1)(d). According the Wisconsin Supreme Court, "...the State bears the burden of establishing prior offenses as the basis for the imposition of enhanced

penalties under § 346.65(2)." State v. Wideman, 206 Wis.2d 91, 94, 556 N.W.2d 737, (Wis. 1996). "It must do so by a preponderance of the evidence." State v. Loayza, 2021 WI 11, ¶ 26, 395 Wis.2d 521, 954 N.W.2d 358 (Wis. 2021). A Department of Transportation certified driving transcript is admissible evidence to establish repeater status. Id. at ¶ 30.

However, the Supreme Court has further stated, "Although we determine that Loayza's challenge to the veracity of the DOT driving record is unsuccessful, we emphasize that the information contained in a DOT driving record is not unassailable." State v. Loayza, 2021 WI 11, ¶ 41, 395 Wis.2d 521, 954 N.W.2d 358 (Wis. 2021). "We further emphasize that a challenge to a DOT driving record does not involve any burden shifting." Id. ¶ 44. "Both the burden of production and the burden of proof remain on the State to prove prior convictions by a preponderance of the evidence whether or not a defendant raises an objection." Id. The Supreme Court further stated, "...'[a] DOT record may be sufficiently reliable when that is the only information available, but additional information may cast doubt on the reliability of a DOT entry to a degree that makes the entry insufficiently reliable to meet the State's burden.'" Id. at ¶ 43.

The defendant's driving record contains several

inaccuracies. The State acknowledges that the defendant was convicted of the amended wet reckless charge (R: 40) (A-Ap. 119). However, according to the defendant's Wisconsin driving record, the defendant was convicted of "BAC - Blood Alcohol Content" on December 18, 2010 (R: 40) (A-Ap.124). The defendant was not convicted of a "Blood Alcohol Content" violation. The defendant was not convicted of violating California Vehicle Code §23152(b); that charge was dismissed (R: 45) (A-Ap. 134, 137).

Further, a wet reckless is not a "Blood Alcohol Content" charge. As stated above, the California Vehicle Code §23103.5 requires that "...the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of an alcoholic beverage or ingestion or administration of a drug, or both, by the defendant in connection with the offense." (A-Ap. 155). The California Vehicle Code provision does not require the consumption of alcohol or drugs. Nothing in the court record reflects a finding of alcohol consumption (R: 45) (A.- Ap. 137).

Not only is the charge reported incorrectly but the arrest and conviction dates are incorrect. According to the court record, the defendant was arrested on November 17, 2010,

and sentenced February 2, 2011 (R: 45) (A-Ap, 135-136). The certified driving record indicates a violation of November 18, 2010 and a conviction of December 18, 2010 (R: 40) (A-Ap. 124). Since the court record clearly indicats the defendant was not convicted of a Blood Alcohol content offense, and the driving record contains inaccuracies as to the offense and conviction dates, the Department of Transportation record cannot be relied upon.

Finally, the circuit court ruled that the California wet reckless conviction should be counted as a prior countable offense under Wis. Stat. §343.307(1)(d) because the wet reckless counts as a prior impaired driving offense in California (R: 52)(A-Ap. 144-145). The circuit court also ruled that it should be counted because a statute defining a wet reckless is a purely depositional statute. As such, the defendant could not be arrested for a wet reckless (R: 52) (A-Ap. 144). While all of that is true, the State tendered to the court an email from Carole Lange of the Department of Transportation wherein she states, "The reckless driving and BAC suspension met CA purge criteria so they no longer show on the CA record" (R: 40) (A-Ap. 126). It would then follow, that if the defendant was arrested in California, rather than in Wisconsin, he would not be charged with a second offense

operating while under the influence because the State of California has already purged his record from 2010. If California would not pursue a second offense, then neither should Wisconsin.

CONCLUSION

For the reasons stated herein, the defendant asserts the 2010 California wet reckless conviction should not be counted as a prior countable offense under Wis. Stat. §343.307(1)(d). As such, he should be charged with a first offense, not a second offence, Operating While Intoxicated/Prohibited Alcohol offense.

Dated this 23rd day of December, 2021.

Signed,

ELBERT & WOLTER, LTD.

By: *electronically signed by Jacquelyn L. Wolter*

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b),(bm), & (c) (2019-2020) for a brief (in that it is Desktop Publishing or Other Means monospaced font, 10 characters per inch, double-spaced, a 1.25 inch left and right margins, and top and bottom margins 1 inch). The length of the brief is 14 pages.

Dated this 23rd day of December, 2021.

Signed,

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT.

§809.19(12)(comment)- ELECTRONIC BRIEF CERTIFICATION.

I hereby certify that I have submitted an electronic copy of the Defendant-Appellant's Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12).

Dated this 23rd day of December, 2021.

Signed,

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