STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2021AP001119
Circuit Court Case No. 2020CT78

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

EVAN J. SCHNOLL,
Defendant-Appellant.

BRIEF OF THE PLAINTIFF-RESPONDENT

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

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ISSUE PRESENTED

Should the defendant's prior "wet reckless" conviction in California count as a prior conviction for enhancing a subsequent OWI offense under Wisconsin Statute section 343.307(1)(d)?

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the arguments should be fully developed in the parties' briefs. Publication of this Court's opinion is warranted, since this case raises an issue of first impression.

STATEMENT OF THE CASE

Schnoll is charged with two crimes: operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC) after his arrest on January 11, 2020 in the Town of Rubicon, Dodge County, Wisconsin when he drove his car into a ditch. (R. 4) Dispatch informed the arresting officer that Schnoll had one prior OWI conviction in 2010 from the State of California. (*Id.*)

According to Schnoll's National Crime Information Center (NCIC) record, he was arrested on November 17, 2010 in California for violating California Vehicle Code sections 23152(a) and 23152(b). (R. 35, 36, 40 p. 11) Those charges were amended to a violation of California Vehicle Code section 23103.5(A). Schnoll pled nolo contendere on February 2, 2011. (*Id.*)

Schnoll filed a motion to determine the validity of the California conviction, arguing that the conviction should not be counted as a prior OWI offense. The circuit court denied Schnoll's motion in a written order, finding Schnoll's 2010 California "wet reckless" driving conviction would enhance a subsequent OWI offense in California; and therefore, counts as a prior conviction for OWI counting purposes in Wisconsin, pursuant to Wisconsin Statute section 343.307(1). (R. 40, 51).

STANDARD OF REVIEW

This 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, 691N.W. 2d 366.

ARGUMENT

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 Wisconsin Statute section 346.63(1)(a) is determined by Wisconsin Statute section 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)." *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 Statute section 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) (2019-20).

Wisconsin Statute section 340.01(9r) defines the term "conviction." It provides:

> (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) (2019-20).

Significant here, section 343.307(1)(d) instructs a court "to count" "[c]onvictions under the law of another jurisdiction that prohibit 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 . . ."

"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.").

Competent proof also 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.*

The Wisconsin Court of Appeals has approved the use of DOT records. In *Van Riper,* the 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. The court concluded that it was. *Id.* ¶ 2.

Applying *Spaeth* and *Wideman,* the Court of Appeals 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, the 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* recognize that a DOT record is competent proof of a defendant's

prior convictions, even when those convictions occur in a mix of jurisdictions. The defendant's certified WI DOT record clearly reports that the defendant was found guilty of "BAC-Blood Alcohol Content" in California, with a "Violation" date of "11-18-2010' and a "Conviction" date of "12-18-2010" (R. 40, p. 8-10).

An email from Carole Lange of the WI DOT further explained when and how the defendant's BAC conviction was added to his WI driving record (R. 40, p. 12). The CA Portal Record on file at WI DOT, also provided by Carole Lange, clearly showed that the defendant's California driver's license was suspended on 12/18/10 for "excessive blood alcohol level" with a violation date of 11/18/10. (R. 40, p. 13)

The DOT record makes clear that the defendant was *convicted* of the 2010 California Blood Alcohol Content violation and that his driver's license was suspended for this violation. Accordingly, the 2010 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 . . . .").

In spite of *Spaeth, Wideman,* and *Van Riper,* the defendant essentially challenges whether the certified WI DOT driving record is proof positive. The defendant presented page 19 from the defendant's NCIC record. (R. 35) The information on this document corresponds with the certified WI DOT driving record, that defendant was found guilty of Blood Alcohol Content (BAC) on 12/18/10. (*Id.*)

The defendant also presented page 22 from the same NCIC record. (R. 36) This document indicates that the defendant was arrested/detained/cited for two misdemeanors: "DUI Alcohol/Drugs (23152(A) VC) and "DUI/0.08 Percent (23152(B) VC)." (*Id.*) The page further indicates that these two specific charges were "Dismissed/Furtherance of Justice." (*Id.*) However, there is a third charge of "23103, 5(A) VC" listed, which directs one to "see comment for charge." (*Id.*) The record continued on page 23 from the same NCIC report, indicating that the defendant was convicted of a misdemeanor and placed on probation. (R. 40, p.11)

The defendant also submitted what appeared to be criminal case information derived from a Kern County,

California website. (R. 37) This document does not appear to be certified. (*Id.*) It reports that the defendant was arrested on 11/17/10, which conflicts with the record discussed above. However, it does depict that the defendant was charged with violations of sections 23152(A) and 23152(B) of the California Vehicle Code, "DUI Alcohol/0.08 Percent." (*Id.*) Similar to the NCIC record, the California website document also lists a third charge of section 23103.5(A), "Plea to VC 23103 in lieu of DUI," reporting that the defendant pled nolo contendre on 02/02/11. (R. 35, 36, 40)

The remaining question then is whether the 2010 offense, as amended to a violation of California Vehicle Code section 23103.5(A), still fits within conduct prohibited in Wisconsin Statute section 343.307(1)(d). It does.

> The legislative history of Wis. Stat. § 343.307(1)(d) suggests that the legislature intended the scope of the statute to be broad. For example, in recreating Wis. Stat. § 343.307(1)(d) in 1989 the legislature removed the requirement that only violations of other statutes in conformity with Wisconsin law were to be counted for accelerated sentencing purposes.

State v. Carter, 2010 WI 132, ¶ 39. Moreover, *State v. Carter* explained that "the other jurisdiction need only have a law that prohibits conduct specified in Wis. Stat. § 343.307(1)(d)"... such as "operating while intoxicated" or "operating with an excess or specified range of alcohol concentrations." *Id.* ¶ 45.

Even if this Court finds that the WI DOT record is not competent proof, a review of the totality of records clearly shows that Schnoll's offense involved operating or driving a motor vehicle with an excessive blood alcohol content.

Schnoll provided the 2010 edition of the California Vehicle Code section 23103.5. (R. 38) California Vehicle Code section 23103.5(a) allows the prosecution to amend a drunk driving charge to a reckless driving charge. (*Id.*) Under California law, section 23103.5 is a criminal misdemeanor offense for which one may be placed on probation with alcohol and drug education programming as a condition. CA VC § 23103.5 (2017) In making an amendment such as this, the prosecution must state a factual basis on the record a which includes whether there was consumption of an alcoholic beverage by the defendant in connection with the offense.

Id. California Vehicle Code section 23103.5(b) requires the court to advise the defendant of the consequences of a conviction. CA VC § 23103.5(b) If the court accepts the plea and finds there was consumption of an alcoholic beverage by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purpose of counting second and subsequent drunk driving offenses. CA VC § 23103.5(c)

Interestingly enough, the California Court of Appeals specifically addressed whether drunk driving charges reduced to "wet reckless" driving charges may be counted as prior convictions to increase a sentence for drunk driving. *People v. Claire,* 229 Cal. App. 3d 647 (1991). They can.

Section 23103.5, enacted in 1981 as part of a comprehensive strengthening of the penalties for drunk driving, closes a former loophole which had allowed repeat drunk drivers to avoid the increased penalties for recidivism by pleading guilty to reckless driving rather than drunk driving. *Id.* When a drunk driving charge is reduced to a 'wet reckless' driving charge under section 23103.5, the resulting conviction is the same as one of drunk

driving for purposes of the penalties imposed upon recidivists. *Id. at* 650.

As a result, "section 23103.5 makes it more difficult to avoid a drunk driving charge by pleading to reckless driving; for purposes of the punishment for recidivists, a wet reckless conviction under section 23103.5 is equivalent to a conviction for drunk driving under section 23152." *Id.* at 651.

Therefore, the court held it was appropriate to count the prior "wet reckless" driving convictions "to protect the public from the danger posed by habitually drunk drivers such as appellant..." *Id.* at 655; (Cf. *People v. Hamer* (1989) 213 Cal.App.3d 1400, 1408-1410 [262 Cal.Rptr. 422].)

The legislative intent behind the creation of section 23103.5 was due to the overwhelming majority of drunk driving offenses being reduced to reckless driving offenses, and those reckless driving offenses not counting as priors for OWI counting purposes. *Id.* at 652; (Conf. Corn. Rep. on Assem. Bill No. 348, No. 019894 (1981-1982 Reg. Sess.) p. 3.) "Thus, the purpose of the statute is to ensure that a conviction of reckless driving under section 23103 following a plea to that crime—in exchange for dismissal of

pending drunk driving charges under section 23152—will, if the defendant is given fair warning of this fact, 'count as a prior...." *Id.*

California Vehicle Code section 23103.5's legislative intent aligns with the legislative intent of Wisconsin Statute section 343.307. Both California's and Wisconsin's laws prohibit identical conduct — operating or driving a motor vehicle while under the influence of alcohol. Likewise, both states aim to reduce habitual drunk drivers, such as Schnoll.

As noted above, Wisconsin Statute section 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." Here, it is clear that the defendant operated or drove a motor vehicle while under the influence of alcohol. The defendant's driver's license was suspended on 12/18/10 for having an excessive blood alcohol level. Although the defendant was not ultimately convicted of the criminal charge of "DUI Alcohol/Drugs" (CA VC § 23152(A)) or "DUI Alcohol/0.08 Percent" (CA VC § 23152(B)), he was convicted of a misdemeanor "wet reckless" driving charge and placed on probation. The

defendant pled no contest and the plea was accepted by the court. This is an unvacated adjudication of guilt or a determination that the defendant violated or failed to comply with California law. The enactment of such an available amendment and plea in California was because repeat offenders were escaping prior drunk driving convictions. A "wet reckless" driving conviction is equivalent to a conviction for drunk driving. *People v. Claire,* at 651.

Schnoll also asserts that Wisconsin should not count his California conviction because it meets California's purge criteria. This argument is tenuous. Schnoll assumes that had he been arrested in California on January 11, 2020 instead of Wisconsin, California would not have charged this as a second offense due to purge criteria. (Def's Appeal) Schnoll also makes reference to WI DOT's Carole Lange's email in which she writes "The reckless driving and the BAC suspension met CA purge criteria so they no longer show on the CA record." (R. 40, p. 12) However, Schnoll fails to mention what Lange continued to write – "WI does not have a purge criteria for WI or for out of state BAC's so we do not purge them from the WI records." (*Id.*) As stated above, the penalty for a violation of OWI under Wisconsin Statute section 346.63(1)(a) is

determined by Wisconsin Statute section 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)." *State v. Carter,* 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213 (emphasis added).

Under Wisconsin Statute section 343.307(3), even "[a] prior expunged operating while intoxicated (OWI) conviction constitutes a prior conviction under sub. (1) when determining the penalty for OWI-related offenses." *State v. Braunschweig*, 2018 WI 113, ¶ 41, 384 Wis. 2d 742, 921 N.W.2d 1999. Simply because the conviction may have been purged from California's driving record does not mean Wisconsin cannot or should not charge a repeat offense as a second offense.

At the motion hearing, the circuit court denied Schnoll's motion. (R. 52) The California officer could not have written a citation to Schnoll for a "wet reckless" violation under 23103.5 of the California Penal Code. (*Id.*) The circuit court explained that the 23103.5 statute is a dispositional statute that was put into place as a softer way to deal with their operating while under the

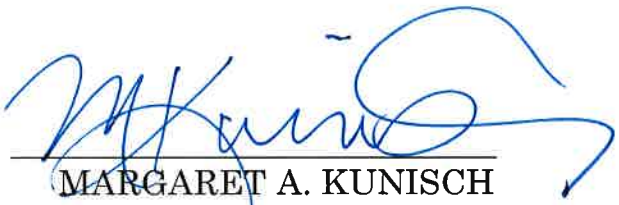
influence laws. (*Id.*) The court continued to explain it is a dispositional statute as opposed to a violation that can be written which then explains why California law resolves charges under 23103.5 essentially as OWIs; they do not treat them any differently than OWIs. (*Id.*) The circuit court ruled that when the California court looks at the "wet reckless" charge, they look at it as an OWI for California purpose and violation, despite the disposition. (*Id.*) It is the kind and nature of a charge that would be used for enhancement of Wisconsin OWI cases under section 343.307(1)(d).

CONCLUSION

For the above reasons, this Court should affirm the circuit court's non-final order and hold that Schnoll's 2010 California "wet reckless" driving conviction enhances a subsequent OWI offense in California and therefore counts as a prior conviction for OWI counting purposes in Wisconsin, pursuant to Wisconsin Statute section 343.307(1).

Dated this 24th day of January, 2022.

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 3208 words.

Dated this 24th day of January, 2022.

MARGARET A. KUNISCH
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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 24th day of January, 2022.

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