STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2066-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALFONSO C. LOAYZA,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER AND THE HONORABLE JOHN M. WOOD, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

The State proved Loayza's 1990 California OWI conviction when it presented his Wisconsin Department of Transportation (DOT) driving record, which lists eight prior OWI convictions, including his 1990 California OWI conviction. Loayza has never claimed that he was not convicted of OWI in 1990 and that his DOT record is wrong. He claims only that his DOT record is not sufficiently reliable to prove that conviction.

The circuit court found that the State proved Loayza's 1990 California OWI conviction. The court of appeals reversed, concluding that other information in the record casts doubt on Loayza's Wisconsin DOT record, rendering that record insufficient to prove his 1990 OWI conviction.

However, other information in the record does not disprove or even cast doubt on Loayza's DOT record. It confirms that the record is correct. It shows that Loayza twice admitted his 1990 OWI conviction, first when he pleaded guilty to a fourth offense OWI in 1991, and then when he collaterally attacked his 1990 conviction in this case. Loayza has not shown that his DOT record was wrong or even unreliable. The court of appeals' decision therefore must be reversed.

ARGUMENT

I. The court of appeals erred in concluding that the State failed to prove Loayza's 1990 California OWI conviction by a preponderance of the evidence.

The State met its burden of proving Loayza's prior convictions with his Wisconsin DOT driving record. Loayza failed to rebut the presumption of validity of his DOT record. Accordingly, this Court must reverse the court of appeals.

A. Loayza's Wisconsin DOT driving record proves his 1990 OWI conviction.

Loayza's Wisconsin DOT driving record proves that he had eight prior OWI convictions when he was convicted in this case, including a May 11, 1990 conviction for a March 5, 1990 OWI offense in California. (State's Br. 12–13; R. 39:6–7; A-App. 158–59.) Loayza's DOT record is sufficient competent evidence to prove his prior OWI conviction. *State v. Braunschweig*, 2018 WI 113, ¶ 40, 384 Wis. 2d 742, 921 N.W.2d 199. Although the State need only prove a prior OWI conviction by a preponderance of the evidence, *id.* ¶ 39, a certified DOT driving record, if unrebutted, proves the convictions it lists beyond a reasonable doubt. *State v. Van Riper*, 2003 WI App 237, ¶ 2, 267 Wis. 2d 759, 672 N.W.2d 156.

B. Nothing in the record rebuts Loayza's Wisconsin DOT driving record.

Loayza argues that a Wisconsin DOT driving record is sufficient proof of a prior conviction only if it is not rebutted. (Loayza's Br. 10–13.) The State agrees. It has never disputed that a DOT record can be rebutted or argued that a DOT record is the "end all and be all" or "conclusive, irrefutable" evidence of a conviction. (Loayza's Br. 17.)

But Loayza has not rebutted his DOT record. He has only pointed to the absence of other documents, such as a judgment of conviction from California, that would themselves prove his 1990 conviction. But the absence of a judgment of conviction from California does not disprove Loayza's 1990 California OWI conviction or rebut his Wisconsin DOT driving record. (State's Br. 14–20.)

Loayza argues that the court of appeals correctly concluded that he rebutted his Wisconsin DOT driving record because of: (1) the lack of information in the 1990 California record about how his case was resolved; (2) a plea form in the 1990 California record indicating that he pleaded guilty to operating after revocation (OAR); (3) the absence of evidence in the 1990 California record demonstrating that he was placed on probation for his 1990 case; and (4) the absence of a judgment of conviction for his 1990 case. (Loayza's Br. 11–12.)

But a lack of additional evidence proving the 1990 OWI conviction does not disprove or even cast doubt on Loayza's Wisconsin DOT driving record. It does not prove that he was not convicted of OWI in California in 1990, nearly 30 years previously, particularly when California law allows for destruction of records after 10 years. (State's Br. 16–17.)

Loayza argues that California's record retention laws are irrelevant because his 1990 California record was not destroyed. (Loayza's Br. 12 & n.2.) However, while the *entire* 1990 record has not been destroyed, the existing record is obviously incomplete. For instance, while the record contains a plea form indicating that "Loayza pled guilty to operating while suspended or revoked" (Loayza's Br. 11), it does not contain a judgment of conviction for OAR, or any information about his sentence for that conviction. But just as the lack of complete documentation of his OAR conviction

does not disprove his OAR conviction, the lack of documentation of his OWI conviction does not disprove his OWI conviction.

The lack of a judgment of conviction or documentation that Loayza was placed on probation for his 1990 OWI conviction also does not prove that he was not convicted of OWI. And as the State will explain in Section IC of this brief, a document indicating that Loayza's probation for his 1990 OWI conviction was revoked supports only one inference—that he had been placed on probation in that case. Similarly, evidence that Loayza pleaded guilty to OAR is not proof that he was not also convicted of OWI. As the State will explain in Section IC, when Loayza pleaded guilty to OWI in 1991, he admitted that he was convicted of both OWI and OAR in his 1990 case.

Loayza asserts that the State's argument about him waiting nearly 30 years to challenge his 1990 California conviction is "irrelevant to whether the evidence provided by the State met its burden of proof." (Loayza's Br. 12 n.2.) But the State met its burden with Loayza's Wisconsin DOT driving record. The issue is whether Loayza rebutted his DOT record. That he waited nearly three decades to challenge his 1990 conviction, and apparently did not do so when he was convicted of OWI six more times between 1991 and 2009, is hardly irrelevant, particularly when court records may lawfully be destroyed after ten years.

C. Information in the record confirms Loayza's 1990 California OWI conviction.

The State proved Loayza's prior convictions with his Wisconsin DOT driving record, and also provided documents from the existing California records for both cases. The circuit court recognized that documents from Loayza's 1991 Santa Clara County case proved that he was convicted of

OWI in San Mateo County in 1990. (State's Br. 18–19; R. 99:14, A-App. 147.)

Loayza asserts that the State forfeited its argument that evidence presented at sentencing in addition to his Wisconsin DOT driving record confirmed that he was convicted of OWI in 1990. (Loayza's Br. 13.) He claims he argued in the court of appeals that the record as a whole did not contain sufficient proof of his 1990 OWI conviction because the California records called into question whether he was convicted of OWI, and the State did not argue that the California materials showed he was convicted of OWI. (Loayza's Br. 13.)

However, Loayza's argument was that "the record does not contain sufficient proof of the alleged 1990 California conviction." (Loayza's Ct. App. Br. 8.) He claimed the California documents did not, themselves, prove his 1990 California OWI conviction, so the proof was insufficient. As the State pointed out, that argument was plainly wrong. Loayza's Wisconsin DOT driving record was sufficient to prove his 1990 conviction. Loayza did not assert that the California documents rendered his Wisconsin DOT driving record unreliable until his reply brief, giving the State no opportunity to address this argument. (Loayza's Ct. App. Reply Br. 1–3.) The State did not forfeit its right to explain why Loayza's new argument is wrong.

This Court should consider the entire record in determining whether the court of appeals erred in reversing the circuit court's decision. "[O]n review in this court, this court will affirm a circuit court's judgment or order on a new ground, even if the circuit court reached its result for the wrong reason, as long as the record is adequate and the parties have had an opportunity to brief the issue here." *State v. Dowdy*, 2012 WI 12, ¶ 61, 338 Wis. 2d 565, 808 N.W.2d 691. The issue here is whether the State proved

Loayza's 1990 OWI conviction by a preponderance of the evidence. To determine whether the circuit court found that the evidence proved the conviction, this Court must consider the evidence in the record. That evidence, which includes Loayza's Wisconsin DOT driving record and the records from California that the State submitted,[1] prove his 1990 conviction.

Loayza argues that documents from his 1991 California OWI conviction do not support the existence of his 1990 California OWI conviction. He notes that a person may be charged with OWI but convicted of a different offense. (Loayza's Br. 14.) He argues that the criminal complaint in his 1991 case, which alleges he was convicted of OWI in 1990, does not prove he was convicted of OWI in 1990. (Loayza's Br. 13–14.)

However, Loayza fails to address the "Felony Minutes, Commitment, Certification" from his 1991 case, which indicates that Loayza pleaded guilty to OWI and admitted to three prior OWI convictions under VC 23152A and one prior OAR conviction under VC 14601.2A. (R. 41:18, A-App. 190.) The felony complaint explains that those prior convictions were for three violations of Vehicle Code Section 23152(A), "FELONY DRIVING UNDER THE INFLUENCE OF ALCOHOL" and one violation of Vehicle Code Section 14601.2(A), "DRIVING WHEN PRIVILEGE SUSPENDED FOR PRIOR DUI CONVICTION." (R. 41:6–8, A-App. 178–80.) The three prior convictions for "FELONY DRIVING UNDER THE INFLUENCE OF ALCOHOL" that Loayza admitted when he pleaded guilty in his 1991 case were

[1] Loayza's waiver argument also fails because the State introduced the California documents in the circuit court. The State did not forfeit the right to argue that its own evidence satisfied is burden.

committed on August 30, 1987, March 1, 1989, and March 5, 1990. (R. 41:6–8, A-App. 178–80.) The March 5, 1990 OWI conviction is the San Mateo County conviction at issue in this case. (R. 41:6–8, A-App. 178–80.)

The criminal complaint and Felony Minutes, Commitment, Certification in Loayza's 1991 case prove he was convicted of OWI in 1990. Those documents confirm that Loayza's Wisconsin DOT driving record is correct.

Loayza argues that the 1991 documents do not prove his 1990 OWI conviction because prior convictions are not an element of an enhanced OWI offense. (Loayza's Br. 14.)

But while a prior OWI conviction is not an element of an enhanced OWI offense under California law (or Wisconsin law), that only means a prior conviction need not be proved beyond a reasonable doubt. A person cannot be convicted of an enhanced OWI without proof of the requisite prior convictions. Loayza could not be convicted of OWI as an eighth offense in Wisconsin without proof of seven prior convictions. And he could not be convicted of OWI as a fourth offense in California without proof of three prior convictions. Loayza provided that proof in 1991 when he admitted the priors and pleaded guilty to OWI as a fourth offense. (R. 41:18, A-App. 190.)

The available court record for Loayza's 1990 San Mateo County case also contains a docket printout (R. 40:8–13, A-App. 167–172), which states that Loayza's probation for that case was later revoked (R. 40:11–13, A-App. 170–72). The court of appeals discounted this document, somehow concluding that the reference to Loayza's probation being revoked did not support an inference that he was ever placed on probation. *Loayza*, 2019 WL 6518289, ¶ 12.

Loayza now makes the same argument, asserting that the docket printout stating that his probation for his 1990

OWI conviction was later revoked "does not provide support for the assertion that Loayza was placed on probation for an OWI offense." (Loayza's Br. 14–15.) But what other inference can be drawn? Given the pile of evidence that Loayza was convicted of OWI in California in 1990, the notation that Loayza's probation for his 1990 conviction was revoked can lead only to the inference that he was convicted of OWI and OAR and placed on probation. It makes no sense to infer that the absence of documentation that he was placed on the probation that was later revoked means that he had not been placed on probation.

Finally, Loayza argues that he did not admit his 1990 OWI conviction when he collaterally attacked it in this case. (Loayza's Br. 15.) He claims that while he said in his affidavit that he did not remember whether he was represented by counsel in his 1990 case or whether the court advised him that he had the right to counsel, he did not admit the existence of a conviction. (Loayza's Br. 15.)

However, when Loayza collaterally attacked his 1990 conviction, he admitted that conviction. In his "Motion To Collaterally Attack Prior OWI Convictions," he asked for an order preventing the State "from using one or more of the Defendant's three prior convictions for Operating While Intoxicated from the State of California (dates: March 1, 1989; March 5, 1990; and October 12, 1991) for sentencing in the present matter, on the grounds that the pleas in those cases were entered without a valid waiver of counsel." (R. 18:1, A-App. 193.) In his "Affidavit in Support of Collateral Attack on Prior OWI Convictions," Loayza said he was collaterally attacking his "Prior California DUI/OWI Convictions from 1989, 1990, and 1991," and that he "does not recall whether he was represented in court at sentencing for any of the above referenced cases." (R. 24, A-App. 197.)

Loayza attacked his 1990 California conviction on the ground that he was denied the right to counsel when he pleaded and was sentenced. Loayza's DOT driving record proves his 1990 OWI conviction, and documents from California and Loayza's admission in his collateral attack confirms that his Wisconsin DOT record is correct.

II. To successfully challenge a conviction proved by a Wisconsin DOT driving record, a defendant should be required to prove that the record is inaccurate.

When a defendant challenges an OWI conviction alleged in a criminal complaint, it is the State's burden to prove the conviction by a preponderance of the evidence. *Braunschweig*, 384 Wis. 2d 742, ¶ 39. When the State presents "competent proof" of a prior conviction, which includes a Wisconsin DOT driving record, it satisfies that burden. *State v. Spaeth*, 206 Wis. 2d 135, 148, 153, 556 N.W.2d 728 (1996); *Braunschweig*, 384 Wis. 2d 742, ¶ 40.

In its initial brief, the State asked this Court to establish that when a defendant puts the State to its proof, and the State satisfies its burden with a DOT driving record, the defendant can only overcome the DOT record by showing that the record is wrong. Simply pointing to a lack of other evidence that would prove the conviction if the conviction was not listed on the DOT record is insufficient.

Loayza claims that the State argued in the circuit court and court of appeals that his 1990 California OWI conviction "was established solely" by his Wisconsin DOT driving record, and that it implicitly argued that "the court's inquiry should stop there." (Loayza's Br. 16.) The State did, of course, argue that Loayza's DOT record establishes his 1990 conviction. It does. But the State did not implicitly argue that a court cannot consider other information that

could disprove the DOT record. The State acknowledged that a court can consider other information. But here there is no information that shows that Loayza's DOT record is wrong. There is no information showing he was not convicted of OWI in California in 1990.

Loayza argues that a defendant should not have the burden to prove "the state's assertion of a prior conviction to be incorrect." (Loayza's Br. 18.) But the State did not merely assert a prior conviction. It proved the conviction. The issue is how can a defendant overcome that proof.

Loayza claims that the court of appeals set forth the proper rule for assessing evidence to determine the existence of a prior conviction: "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." (Loayza's Br. 18 (quoting *Loayza*, 2019 WL 6518289, ¶ 7).

However, a court should presume the reliability of a certified DOT driving record, which is sufficient competent evidence to prove a prior conviction, *Braunschweig*, 384 Wis. 2d 742, ¶ 40. For a certified DOT driving record to be so unreliable that it does not prove a prior conviction, a defendant should have to show that the DOT record is wrong.

Loayza has not shown that his DOT record is wrong. He has never even alleged that he was not convicted of OWI in California in 1990. He has not presented or even pointed to *any* evidence proving or even suggesting that the 1990 OWI conviction does not exist. And he admitted to his 1990 conviction when he pleaded guilty to OWI as a fourth offense in 1991, and again when he collaterally attacked it in this case. Yet, the court of appeals concluded that Loayza's

certified DOT driving record is unreliable. In essence, the court found, in the absence of *any* evidence disproving it, that the DOT record is wrong. *Loayza*, 2019 WL 6518289, ¶ 7.

To successfully challenge a certified Wisconsin DOT driving record that proves a conviction, a defendant should be required to allege and show that the conviction does not exist, and the DOT record is wrong.

CONCLUSION

This Court should reverse the court of appeals' decision and affirm the judgment of conviction and the order denying Loayza's motion for postconviction relief.

Dated this 12th day of October 2020.

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 2,974 words.

Dated this 12th day of October 2020.

MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 12th day of October 2020.

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