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STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0161

State of Minnesota,
Appellant,

vs.

Gary Demetrius Bonds Jones,
Respondent.

Filed July 6, 2020
Reversed and remanded
Johnson, Judge

Hennepin County District Court
File No. 27-CR-19-15229, 27-CR-19-24555

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Erik A. Nilsson, Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

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Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and John P. Smith, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Gary Demetrius Bonds Jones is charged with, among other things, four counts of third-degree driving while impaired (DWI), which were enhanced from misdemeanor charges to gross-misdemeanor charges because a Wisconsin court previously had ordered the revocation of his driver's license. The district court dismissed the four third-degree DWI charges on the ground that Jones was not represented by counsel in the prior Wisconsin court proceeding. We conclude that the Wisconsin court's revocation order is a proper basis for enhancement, regardless of whether Jones was represented by counsel in Wisconsin. Therefore, we reverse and remand.

FACTS

This appeal arises from two separate incidents in which Jones was arrested for DWI in Minnesota. The first occurred on June 5, 2019. A state trooper was patrolling interstate highway 94 in Minneapolis when he observed Jones's vehicle twice drift over the fog line while driving 80 miles per hour in a 55-miles-per-hour zone. The trooper stopped Jones's vehicle, conducted field sobriety tests, and arrested Jones for driving while impaired. Jones agreed to a breath test, which indicated an alcohol concentration of 0.09. The state charged Jones with (1) gross-misdemeanor third-degree driving while impaired (operating a motor vehicle under influence of alcohol), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2018); (2) gross-misdemeanor third-degree driving while impaired (operating a motor vehicle with an alcohol concentration of 0.08 or higher), in violation of Minn. Stat. § 169A.20, subd. 1(5); (3) careless driving, in violation of Minn. Stat. § 169.13, subd. 2

(2018); and (4) speeding in excess of 55 miles per hour, in violation of Minn. Stat. § 169.14, subd. 2(a)(3) (2018). The complaint alleged, in part, "Defendant was convicted in Wisconsin of DWI occurring on September 10, 2010." The state later amended the complaint by adding the following sentence: "Defendant also received a Wisconsin civil driver's license revocation in 2010 that stems from the same facts as his 2010 OWI" (*i.e.*, operating while intoxicated).

The second incident occurred on October 3, 2019, while Jones's first set of DWI charges were pending. A Minneapolis police officer was patrolling in north Minneapolis when he observed Jones's vehicle driving 52 miles per hour in a 30-miles-per-hour zone. The officer stopped Jones's vehicle, conducted field sobriety tests, and arrested Jones for driving while impaired. Jones agreed to a breath test, which indicated an alcohol concentration of 0.12. The state charged Jones with (1) gross-misdemeanor third-degree driving while impaired (operating a motor vehicle under influence of alcohol), in violation of Minn. Stat. § 169A.20, subd. 1(1); (2) gross-misdemeanor third-degree driving while impaired (operating a motor vehicle with an alcohol concentration of 0.08 or higher), in violation of Minn. Stat. § 169A.20, subd. 1(5); and (3) misdemeanor driving after revocation, in violation of Minn. Stat. § 171.24, subd. 2. The complaint alleged, in part, "Defendant was convicted of operating a motor vehicle under the influence of alcohol in Wisconsin on December 7, 2010, which is an aggravating factor that enhances these DWI charges to third-degree gross misdemeanors." The state later amended the complaint by deleting that sentence and instead alleging, "Defendant was also convicted in Wisconsin in

2010 of OWI and received a Wisconsin civil driver's license revocation in 2010 stemming from the same facts as his 2010 OWI."

The record includes a few exhibits concerning the prior Wisconsin court proceeding. It appears that Jones was stopped and cited in Trempealeau County, Wisconsin, on September 10, 2010, for first-degree operating while intoxicated, in violation of Wis. Stat. § 346.63(1)(a) (2010). Jones did not appear for a December 2010 hearing, and no attorney appeared on his behalf. After the hearing, the Wisconsin trial court entered a disposition of "guilty due to no contest plea." The Wisconsin court ordered the revocation of Jones's driver's license for six months and imposed a fine.

In December 2019, Jones moved to dismiss the third-degree DWI charges in each case. He argued that his DWI charges may not be enhanced from misdemeanor charges to gross-misdemeanor charges based on a prior uncounseled conviction. The state opposed the motions, arguing that enhancement may be based on the prior revocation of Jones's driver's license, not the prior OWI conviction. After a consolidated omnibus hearing, the district court granted Jones's motions and dismissed the third-degree DWI charges. The district court reasoned that a prior criminal conviction may not be used to enhance a subsequent DWI offense if the defendant was not represented by counsel in the prior proceeding, unless the defendant had properly waived his right to counsel. In support of this reasoning, the district court cited *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983), and *State v. Friedrich*, 436 N.W.2d 475 (Minn. App. 1989). The state appeals.

D E C I S I O N

The state argues that the district court erred by granting Jones's motion to dismiss the four charges of third-degree DWI.

A.

As a threshold matter, we note the general rule that the state is not entitled to appellate review of a district court's pre-trial order as a matter of right. *See* Minn. R. Crim. P. 28.04, subd. 2; *see also* Minn. R. Crim. P. 28.04, subd. 1. Instead, the state may obtain appellate review of a pre-trial order only if the order, if not reversed, would have a "critical impact on the outcome of the trial." *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977). A challenged ruling has a critical impact if it "'completely destroys' the state's case" or "'significantly reduces the likelihood of a successful prosecution.'" *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987)). Here, the state has asserted that the district court's dismissal of the four gross-misdemeanor DWI charges satisfies the critical-impact test. Jones has not challenged that assertion. We agree that the district court's order, if not reversed, would have the requisite critical impact.

B.

The state argues that the district court erred by reasoning that a prior uncounseled conviction may not be used to enhance a subsequent DWI offense. The state contends that Jones's pending DWI charges may be enhanced based on the prior Wisconsin court proceeding because the Wisconsin trial court ordered the revocation of his driver's license, not because Jones was convicted of a crime.

The issue on appeal is governed by statute. In Minnesota, a person is guilty of DWI if, for example, he or she drives a motor vehicle while "under the influence of alcohol" or while his or her "alcohol concentration . . . is 0.08 or more." Minn. Stat. § 169A.20, subd. 1(1), (5). Such an offense ordinarily is a fourth-degree offense, which is a misdemeanor. Minn. Stat. § 169A.27 (2018). But the offense is a third-degree offense, a gross misdemeanor, "if one aggravating factor was present when the violation was committed." Minn. Stat. § 169A.26, subds. 1(a), 2 (2018).

For these purposes, the term "aggravating factor" is defined by statute to mean "a qualified prior impaired driving incident within the ten years immediately preceding the current offense." Minn. Stat. § 169A.03, subd. 3(1). The term "qualified prior impaired driving incident" is defined by statute to mean either "prior impaired driving convictions" or "prior impaired driving-related losses of license." *Id.*, subd. 22. Both of those terms also are defined by statute. *Id.*, subds. 20, 21. The latter term, "prior impaired driving-related losses of license," which is the provision invoked by the state in this case, is defined to mean "a driver's license suspension, revocation, cancellation, denial, or disqualification under" any one of numerous specified Minnesota statutes or "a statute or ordinance from another state, in conformity with any" of the Minnesota statutes. *Id.*, subd. 21(a)(1)-(6).

A straightforward application of these statutory provisions leads to the conclusion that an aggravating factor was present at the time of both Jones's June 5, 2019 alleged offense and his October 3, 2019 alleged offense. In 2010, the Wisconsin trial court ordered the revocation of his driver's license. That order is encompassed by the statutory definition of "prior impaired driving-related loss[] of license," which is "a driver's license

suspension, revocation, cancellation, denial, or disqualification."[1] *Id*., subd. 21. A "prior impaired driving-related loss[] of license" is a sufficient basis for finding a "qualified prior impaired driving incident," regardless of whether the incident giving rise to the loss of license also resulted in a "prior impaired driving conviction[]." *Id.,* subd. 22. Because Jones had a "qualified prior impaired driving incident," there was "one aggravating factor" present when the alleged violations were committed. Minn. Stat. § 169A.26, subd. 1(a).

C.

The district court relied on *State v. Nordstrom,* 331 N.W.2d 901 (Minn. 1983), and *State v. Friedrich*, 436 N.W.2d 475 (Minn. App. 1989), in granting Jones's motion to dismiss. Those opinions recognize that a person has a right to the assistance of counsel in any criminal prosecution that may lead to incarceration, including a misdemeanor prosecution. *See* Minn. Const. art. 1, § 6; *State v. Borst,* 154 N.W.2d 888, 894 (Minn.

[1]Under Minnesota law, Jones's Minnesota driver's license was subject to automatic revocation by the Minnesota Commissioner of Public Safety upon the order of the Wisconsin trial court. *See* Minn. Stat. § 171.17, subd. 1(9) (2010). Jones's 2010 Wisconsin OWI conviction appears on his Minnesota driving record. But the district court record does not reflect that Jones's Minnesota driver's license was actually revoked based on the Wisconsin court's order. In any event, Jones does not argue that the absence of such a revocation precludes a finding of a "prior impaired driving-related loss[] of license," which is defined broadly to include a "suspension, revocation, cancellation, denial, or disqualification." *See* Minn. Stat. § 169A.03, subd. 21. He argues only that the absence of a revocation prevented him from challenging the Wisconsin court proceeding in a Minnesota court. But he does not explain the factual or legal basis of such a challenge, except to disclaim any argument that he was denied the limited constitutional right to counsel that applies when a driver is deciding whether to submit to chemical testing. *See Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991). Jones also does not argue that the Wisconsin OWI statute is not "a statute . . . from another state, in conformity with any" of the enumerated Minnesota statutes. *See* Minn. Stat. § 169A.03, subd. 21(a)(6).

1967). If a person was not represented by counsel in a prior criminal case that resulted in a conviction, and if there is no record of a waiver of counsel, the conviction may not be used in a subsequent case to enhance the penalty of a criminal charge. *Nordstrom*, 331 N.W.2d at 904 (citing *Baldasar v. Illinois*, 446 U.S. 222, 223-24, 100 S. Ct. 1585, 1585-86 (1980)); *cf. Nichols v. United States*, 511 U.S. 738, 746-49, 114 S. Ct. 1921, 1927-28 (1994) (overruling *Baldasar*). Accordingly, the supreme court concluded in *Nordstrom* that "there must be a valid waiver of the right to counsel on the record when the plea of guilty is entered or that conviction cannot be used to enhance the term of incarceration for a subsequent offense." 331 N.W.2d at 905. In *Friedrich*, this court applied *Nordstrom* and concluded that a DWI charge could not be enhanced based on the defendant's prior Wisconsin OWI conviction because the conviction was obtained by an uncounseled guilty plea. 436 N.W.2d at 477-78.

At the time of the *Nordstrom* case, the state could enhance a misdemeanor DWI charge to a gross-misdemeanor DWI charge based only on a prior impaired-driving criminal conviction. Minn. Stat. § 169.121, subd. 3 (1982). After the legislature and the governor amended the impaired-driving statutes in 1997, the state could enhance a misdemeanor DWI charge to a gross-misdemeanor DWI charge based on either a "prior impaired driving conviction" or a "prior license revocation." Minn. Stat. § 169.121, subd. 3(c)(2) (1996 & Supp. 1997). At that time, the term "prior license revocation" was defined to mean "a driver's license suspension, revocation, cancellation, denial, or disqualification." *Id.*, subd. 3(a)(2).

In *State v. Dumas*, 587 N.W.2d 299 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999), this court considered a *Nordstrom* argument in light of the 1997 amendments. *See id.* at 300. Dumas's driver's license previously had been revoked pursuant to the Minnesota Implied Consent Law. *Id.* at 300-01 (citing Minn. Stat. § 169.123 (1994)). The state sought to enhance a subsequent misdemeanor DWI charge to a gross-misdemeanor DWI charge based on the prior revocation. *Id.* We concluded that *Nordstrom* did not apply because it prohibits only "the use of a prior *unconstitutionally* obtained conviction to enhance a subsequent charge." *Id.* at 302 (emphasis in original). We further concluded that, because there was no denial of a constitutional right to counsel for purposes of the prior revocation of Dumas's driver's license, the revocation could be used to enhance Dumas's DWI charge. *Id*. at 303-04.

Five years later, in *State v. McLellan*, 655 N.W.2d 669 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003), this court considered a case with underlying facts that are quite similar to the present case. McLellan previously had pleaded guilty to petty-misdemeanor OWI in Wisconsin "without appearance and without advice of counsel." *Id.* at 670. The Minnesota Commissioner of Public Safety revoked her Minnesota driver's license. *Id.*; *see also* Minn. Stat. § 171.17, subd. 1(9) (2002). After a subsequent arrest for DWI in Minnesota, the state charged McLellan with DWI and sought to enhance the DWI charge based on her prior revocation. *Id.* at 670. McLellan challenged the enhancement, arguing that the state "was, in effect, using the Wisconsin conviction to enhance the offense in violation of Minnesota case law." *Id*. We rejected the argument, reasoning that McLellan's prior revocation was a "prior impaired driving-related loss of license." *Id.* at

671; *see* Minn. Stat. §§ 169A.03, subd. 21(1) (2002). Thus, we concluded that McLellan's DWI was properly enhanced based on her prior license revocation. 655 N.W.2d at 671.

In this case, Jones filed a memorandum of law in the district court that relied primarily on *Nordstrom* and *Friedrich* but also cited *McLellan*. In its order and memorandum, the district court discussed *Nordstrom* and *Friedrich* but omitted any mention of *McLellan*. The district court erred by relying on *Nordstrom* and *Friedrich* because the enhancements in those cases were based solely on prior criminal convictions. *Nordstrom*, 331 N.W.2d at 905; *Friedrich*, 436 N.W.2d at 476. At the time of the *Nordstrom* opinion, a prior criminal conviction was the only proper basis for enhancing a DWI charge. *See* Minn. Stat. § 169.121, subd. 3 (1982). The district court erred by not applying *McLellan*, which is applicable because the enhancement in that case—like the enhancement in this case—was based on a prior loss of license. 655 N.W.2d at 670-71.

In sum, the district court erred by granting Jones's motions to dismiss. Therefore, we reverse and remand for further proceedings.

Reversed and remanded.