STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1549

State of Minnesota,
Respondent,

vs.

Marshaun Deeandre Brown,
Appellant.

Filed August 7, 2023
Affirmed
Reyes, Judge

St. Louis County District Court
File No. 69DU-CR-19-3276

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

Kimberly Jean Maki Hromatka, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Daniel P. Repka, Repka Law, L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this direct appeal from a conviction of felony driving while intoxicated (DWI), appellant argues that his prior license revocation following an operating-while-intoxicated

(OWI) conviction in Wisconsin should not have been used to enhance his current DWI. We affirm.[1]

FACTS

During a traffic stop[2] of appellant Marshaun Deeandre Brown on September 5, 2019, a police officer asked appellant to comply with a chemical test. Appellant refused. Appellant's driving record showed three prior impaired-driving-related losses of license within the past ten years, specifically, a license revocation for DWI on January 23, 2011, from Minnesota; a license revocation for OWI from Douglas County, Wisconsin, effective December 4, 2018; and a license revocation for DWI on July 1, 2019, from Minnesota. Based on these prior incidents, respondent State of Minnesota charged appellant with an enhanced first-degree felony DWI refusal to submit to chemical test in violation of Minn. Stat. §§ 169A.20, subd. 2(1), .24, subd. 1(1) (2018).

Appellant moved to reduce his felony DWI offense to a gross misdemeanor. At a contested omnibus hearing on April 2, 2021, appellant testified that he did not know that Wisconsin charged him with OWI, that he never appeared in circuit court in Wisconsin, that no attorney represented him, and that Wisconsin never informed him of his constitutional rights before convicting him of OWI. Appellant further claimed that he learned about the Wisconsin OWI and the subsequent license revocation only when the

[1] Because respondent State of Minnesota filed an untimely brief and did not file a motion for late acceptance, we decide the appeal on the merits of the case. *See* Minn. R. Civ. App. P. 142.03 (providing that when a respondent defaults on appeal, the "case shall be determined on the merits").

[2] Appellant concedes for purposes of this appeal that probable cause supported the arrest.

state listed them in the complaint for the instant case. The district court did not find appellant's testimony credible when he claimed that he only learned about his Wisconsin OWI from the complaint in this present case.

The parties filed a certified copy of a judgment of conviction from Douglas County Circuit Court which showed that appellant pleaded no contest to an OWI charge. The district court noted that nothing in the judgment of conviction indicated whether appellant was represented when he made that plea or if he waived his right to counsel.[3] Appellant argued that the state cannot use his uncounseled OWI conviction from Wisconsin or the resulting license revocation to enhance his DWI charge in this case because they were obtained in violation of his constitutional rights. The state countered that its charge only relied on the prior license revocation rather than the related OWI conviction. The state further argued that appellant's Wisconsin license revocation was not a criminal matter and did not invoke a risk of incarceration, and therefore it was not obtained in violation of his constitutional rights. The district court determined that, because the enhancement was based only on a license revocation, which is a civil matter, "the question of whether [appellant] had advice from an attorney [was] moot." Accordingly, in a June 1, 2021 omnibus order, the district court denied appellant's motion to reduce the level of the offense and entered a provisional not-guilty plea on appellant's behalf.

Appellant moved the district court to reconsider its June 1, 2021 order twice and submitted an affidavit from a clerk of the Douglas County Circuit Court in Wisconsin. The

[3] The record is unclear whether appellant received assistance of counsel in Wisconsin, even after appellant submitted the affidavit from the Douglas County Circuit Court clerk.

affidavit states that appellant did not appear at the OWI hearing in Wisconsin, so the circuit court entered a no-contest plea on his behalf and entered a default-judgment conviction against him for operating a motor vehicle with a restricted controlled substance (first offense) in appellant's absence. Wis. Stat. § 346.63, subd. 1(am) (2018). As a result of this default judgment of conviction and pursuant to Wis. Stat. § 343.30 (1q)(b)2 (2018), the circuit court revoked appellant's driving privilege, also in appellant's absence. After viewing the clerk's affidavit, the district court denied appellant's motions to reconsider the June 1, 2021 order. Following a five-day court trial based on stipulated evidence, the district court found appellant guilty of first-degree felony DWI refusal to submit to a chemical test. The district court sentenced appellant to 66 months in prison. This appeal follows.

DECISION

Appellant argues that his prior license revocation in Wisconsin, which followed an uncounseled OWI conviction, is not a "qualified prior driving incident" within the meaning of Minn. Stat. § 169A.24, subd. 1(1). We disagree.

Whether an out-of-state license revocation is a qualified prior-impaired-driving incident is a question of law, which this court reviews de novo. *State v. Bergh*, 679 N.W.2d 734, 737 (Minn. App. 2004) (reviewing district court's denial of motion to prohibit use of Colorado license revocation for enhancement purposes de novo).

Refusing to submit to a chemical test is a felony-level offense if the person commits the violation within ten years of the first of three or more qualified prior-impaired-driving incidents. *Id.*; Minn. Stat. § 169A.20, subd. 2(1). "Qualified prior impaired driving

incident includes prior impaired driving convictions and prior impaired driving-related *losses of license*." Minn. Stat. § 169A.03, subd. 22 (2018) (quotation omitted) (emphasis added). "In order for an out-of-state conviction or license revocation to be qualified, the statute or ordinance that the conviction [or license revocation] was based on must be in conformity with one of the enumerated Minnesota impaired driving-related statutes." *State v. Schmidt*, 712 N.W.2d 530, 533 (Minn. 2006) (quotation omitted).

Appellant concedes that the state relied only on his Wisconsin *license revocation* and not his OWI conviction to enhance his current DWI charge. However, appellant argues, for the first time on appeal, that his Wisconsin license revocation was not in conformity with any provision listed in Minnesota's DWI laws because, unlike Wisconsin, "Minnesota does not have a statute that authorizes the judiciary to revoke a defendant's driver's license upon conviction for DWI." Claims raised for the first time on appeal are generally considered forfeited. *Smith v. State*, 974 N.W.2d 576, 582 (Minn. 2022). Even if we were to consider appellant's argument, it also fails on the merits.

Wisconsin law provides that a person is guilty of OWI if the person "has a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 346.63 (1)(am). Following a first OWI conviction, "the court shall revoke the person's operating privilege for not less than [six] months nor more than [nine] months." Wis. Stat. § 343.30 (1q)(b)(2). Similarly, Minnesota law states that a person is guilty of DWI if "the person's body contains any amount of a controlled substance . . . ." Minn. Stat. § 169A.20, subd. 1(7). After receiving a record of a person's conviction of DWI, the Department of Public Safety "shall immediately revoke" the person's driver's license. Minn. Stat. § 171.17,

subd. 1(2) (2018). Both states prohibit driving while having any amount of a controlled substance in a person's body. *See* Wis. Stat. § 346.63 (1)(am); Minn. Stat. § 169A.20, subd. 1(7). And a violation leads to the same consequence of license revocation in both states. *See* Wis. Stat. § 343.30 (1q)(b)(2); Minn. Stat. § 171.17, subd. 1(2). Appellant's Wisconsin license revocation therefore conforms with Minnesota's DWI laws and qualifies as a prior driving incident to enhance appellant's current DWI charge under Minn. Stat. § 169A.24, subd. 1(1).

Finally, appellant asserts that, because the license revocation was a direct consequence from the Wisconsin OWI conviction following an allegedly uncounseled guilty plea, the license revocation was also obtained in violation of his constitutional right to the assistance of counsel. However, a first violation of Wis. Stat. § 346.63, subd. 1 (2018), is not considered a criminal act under Wisconsin law. *Recker v. Dept. of Pub. Safety*, 375 N.W.2d 554, 555 (Minn. App. 1985) (citing *State v. Albright*, 298 N.W.2d 196, 202 (Wis. App. 1980)). Here, appellant's Wisconsin OWI conviction was his first violation of Wis. Stat. § 346.63, subd. 1. As a result, neither the conviction nor the subsequent license revocation violated appellant's constitutional rights, and we conclude that the district court correctly determined that appellant's Wisconsin license revocation is a qualified prior driving incident.

Affirmed.