COURT OF APPEALS DECISION DATED AND RELEASED

May 7, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0046-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD KASIAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

NETTESHEIM, J. Gerald Kasian appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI). Kasian was convicted and sentenced as a repeat offender. The issue in this case is whether Kasian's prior convictions were adequately established pursuant to the recent decisions by the Wisconsin Supreme Court in ***State v. Wideman***, 206 Wis.2d 90, 556 N.W.2d 737 (1996), and ***State v. Spaeth***, 206 Wis.2d 134, 556 N.W.2d 728

(1996).[1] We conclude that the State satisfied its evidentiary burden when Kasian's counsel tacitly admitted to the prior OWI convictions alleged in the complaint. We therefore affirm the judgment.

The controlling facts are undisputed. On July 8, 1993, the State filed an amended criminal complaint alleging that on May 14, 1990, Kasian operated a motor vehicle while under the influence of an intoxicant. The complaint also charged Kasian as a repeat offender, alleging prior OWI convictions against Kasian on October 6, 1992, and January 25, 1993. A jury convicted Kasian and the trial court imposed an enhanced repeater sentence pursuant to § 346.65(2), STATS., 1993-94.

At Kasian's sentencing hearing, the State related to the trial court the details of Kasian's prior contacts with the law, including the OWI convictions recited in the criminal complaint. Specifically, the State informed the court that Kasian had been convicted of OWI on October 6, 1992, and December 7, 1992.[2] In response, Kasian's counsel stated:

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[1] This is our second consideration of Kasian's appeal. In ***State v. Kasian,*** No. 96-0046-CR, unpublished slip op. (Wis. Ct. App. June 12, 1996), we held that the State must establish prior suspensions, convictions and revocations under § 346.65, STATS., in accordance with § 973.12(1), STATS. Our decision was vacated by the supreme court following its decisions in ***State v. Wideman,*** 206 Wis.2d 90, 556 N.W.2d 737 (1996), and ***State v. Spaeth,*** 206 Wis.2d 134, 556 N.W.2d 728 (1996). These supreme court decisions clarify that § 973.12(1) does not apply to criminal prosecutions under the vehicle code. *See* ***Wideman,*** 206 Wis.2d at 104, 556 N.W.2d at 743; ***Spaeth,*** 206 Wis.2d at 146, 556 N.W.2d at 733. These decisions also adopt more relaxed rules than those prescribed by § 973.12(1) by which an OWI defendant admits to allegations of prior convictions. Unlike § 973.12(1), which requires that the defendant personally admit to the repeater allegation, counsel for the defendant may admit to the allegation in a vehicle code case. *See* ***Wideman,*** 206 Wis.2d at 104, 556 N.W.2d at 744.

[2] We note that the amended criminal complaint refers to a January 25, 1993 conviction date. However, at the sentencing hearing, the State identified the conviction date as December 7, 1992, followed by an implied consent revocation on January 25, 1993. This discrepancy is not relevant to the issue on appeal.

> Mr. Kasian has had so many drinking driving contacts. There's absolutely no doubt about that but he has been arrested on those occasions. It is clear he hasn't been given any breaks by law enforcement on those occasions ….

Kasian also spoke on his own behalf stating, "I think [defense counsel] has covered it …," and additionally offered an explanation for his failure to appear at certain proceedings. After inquiring whether there was any reason the court should not impose sentence, the trial court ordered a nine-month jail sentence, a thirty-six-month license revocation and a fine of $2115.

Kasian appeals from the enhanced sentencing provisions of the judgment and requests that we commute his sentence to the maximum permitted for a first offense OWI.

The State bears the burden of proving prior offenses as the basis for the imposition of enhanced penalties under § 346.65(2), STATS. *See* ***State v. McAllister***, 107 Wis.2d 532, 539, 319 N.W.2d 865, 869 (1982). The State fulfills this burden by presenting "certified copies of the conviction or other competent proof … before sentencing." *See* ***id***. Recently, in ***Wideman*** and ***Spaeth***, the supreme court set forth the evidentiary standards of what constitutes "competent proof" for purposes of proving prior suspensions, convictions or revocations. Because we consider Kasian's appeal in light of the supreme court's holdings in ***Wideman*** and ***Spaeth***, we begin with a brief discussion of these cases.

In ***Wideman***, the defendant challenged the repeater portion of his sentence on the basis that he had not admitted, and the State had failed to prove, his prior offenses. *See* ***Wideman***, 206 Wis.2d at 96, 556 N.W.2d at 740. In reviewing the defendant's challenges in ***Wideman***, the supreme court held that defense counsel may, on behalf of the defendant, admit a prior offense for purposes of § 346.65(2), STATS. *See* ***Wideman***, 206 Wis.2d at 104, 556 N.W.2d at

744. Based on the record of the sentencing hearing, the court concluded that:

> Although marginal, the record in this case is sufficient to establish an admission of the prior offenses. The complaint described the prior offenses and advised the defendant and defense counsel that a penalty enhancement was being sought. After the jury returned its verdict, the circuit court advised the defendant and defense counsel that the offense of which the defendant was found guilty was his third OWI offense and described the statutory penalties for a third-time offender. Defense counsel's response to the circuit court's inquiries and acknowledgment that sentence as a repeat offender was appropriate constitute an admission under these circumstances and allay any concerns that defense counsel was in doubt that this was the defendant's third offense. An admission is competent proof of a prior offense.

Id. at 109, 556 N.W.2d at 746 (citation omitted). Because the court concluded that the defendant admitted his prior convictions through counsel, the court did not comment on other methods the State may use to establish prior offenses.

In ***Spaeth***, the defendant was charged with operating after revocation (OAR). The defendant was provided with a citation alleging that the incident was his fifth conviction and a copy of the criminal complaint which alleged that the Department of Transportation (DOT) teletype indictated the defendant had been convicted of OAR on four previous occasions. *See* ***Spaeth***, 206 Wis.2d at 138-39, 556 N.W.2d at 730. At the initial appearance, the defendant acknowledged that he was being charged with a fifth OAR offense within a five-year period and as a habitual traffic offender. *See* ***id***. at 141, 556 N.W.2d at 731. The defendant was found guilty and the trial court proceeded to sentencing.

At sentencing, the State noted that the defendant's conviction was for his fifth offense and that the defendant was a habitual traffic offender. Defense counsel responded to the State, stating that "I understand that there is some jail time that is necessary in this case …." *See* ***id***. at 141-42, 556 N.W.2d at 731. The

court sentenced the defendant as a repeater. The defendant in ***Spaeth*** challenged the repeater portion of his sentence on the basis that he did not admit to, nor did the State prove, the existence of his prior convictions. *See **id***. at 142, 556 N.W.2d at 731.

The State in ***Spaeth*** argued that the defendant admitted the prior convictions when his defense counsel stated at the sentencing hearing: "I understand that there is some jail time that is necessary in this case …." *See **id.*** at 147-48, 556 N.W.2d at 734. The supreme court rejected the State's argument concluding, "It is difficult to equate the statement that jail time is 'necessary' with an admission that the defendant has four previous convictions.". *See **id***. at 148, 556 N.W.2d at 734. The court in ***Spaeth*** concluded that the defendant had not admitted his prior convictions and therefore, the State was required to present other "competent proof." The court then adopted a "bright-line" rule for determining the existence of prior convictions. *See **id***. at 152, 556 N.W.2d at 735.

The "bright-line" rule adopted in ***Spaeth*** is as follows: the State may establish prior convictions either by placing before the court (1) an admission by the defendant or defendant's counsel, *see* ***Wideman***, 206 Wis.2d at 104, 556 N.W.2d at 744; (2) copies of prior judgments of conviction for OWI; or (3) a teletype of the defendant's prior DOT driving record. *See* ***Spaeth***, 206 Wis.2d at 152, 556 N.W.2d at 735.

Kasian argues that the State failed to satisfy the evidentiary standards for proving repeater allegations set forth in ***Wideman*** and ***Spaeth***. Kasian contends that defense counsel's statement, "There's absolutely no doubt about that but he has been arrested on those occasions," is not an admission of his prior OWI convictions. Nevertheless, after reviewing the statement in context and

the record in toto, we conclude that counsel's statement sufficiently establishes an admission of Kasian's previous OWI convictions. Because an admission of prior convictions is sufficient to prove a repeater allegation under § 346.65(2), STATS., it was not necessary for the State to present other "competent proof" of Kasian's prior convictions.[3] *See* ***Wideman***, 206 Wis.2d at 104, 556 N.W.2d at 743 ("If an accused admits to a prior offense that admission is … competent proof of a prior offense and the State is relieved of its burden to further establish the prior conviction.").

In support of his position that the State has not met the "bright-line" rule of ***Spaeth***, Kasian likens his defense counsel's statement to the defense counsel's statement in ***Spaeth***. However, the facts of ***Spaeth*** differ significantly from the facts before us. In ***Spaeth***, defense counsel's comment that "jail time is necessary" was made following a general statement by the State that it was the defendant's "fifth offense and he is alleged to be, and is, a habitual traffic offender." *See* ***Spaeth***, 206 Wis.2d at 141-42, 556 N.W.2d at 731. There is no indication from the facts of ***Spaeth*** that the State offered specific details and dates of the defendant's prior convictions.

Here, defense counsel's statement followed a specific detailing by the State of Kasian's prior contacts with the law,—including the dates of Kasian's prior OWI offenses and convictions cited in the amended criminal complaint—the defense strategies employed by Kasian at previous trials and the current status of Kasian's appeals for prior OWI convictions. Defense counsel responded to this

[3] In light of our holding that Kasian admitted the existence of his prior OWI convictions, we do not reach the State's argument that the "bright-line" rule adopted in ***Spaeth*** applies only to OAR convictions.

detailed account of Kasian's prior offenses with the statement, "There's absolutely no doubt … but he has been arrested on those occasions." Defense counsel's statement, and the context in which it was made, are much less vague than in ***Spaeth***. Viewed in context, Kasian's counsel admitted the accuracy of the information presented to the court by the State and thus admitted Kasian's prior OWI convictions.

We acknowledge that counsel's statement is not an express admission of the convictions recited in the complaint. However, ***Wideman*** and ***Spaeth*** do not specifically address how direct an admission—by either the defendant or defendant's counsel—must be. We believe it significant that in rejecting counsel's statement that "jail time is necessary" as an admission of four prior convictions, the court in ***Spaeth*** observed:

> [W]hile imprisonment may be appropriate for a given repeat OAR offense, it is not "necessary" in the sense of a statutory mandate. … While this is perhaps only a semantic distinction, defense counsel's statement that jail time is "necessary" nevertheless *raises questions about the nature of the purported admission*.

Spaeth, 206 Wis.2d at 148, 556 N.W.2d at 734 (emphasis added).

Defense counsel's statement in this case does not "raise[] questions about the nature of the purported admission." *See* ***id.*** The State presented an oral recitation of Kasian's prior offenses and convictions to the court, including two police contacts following domestic altercations between Kasian and his wife. Defense counsel responded to this statement first with a reference to Kasian's drinking and driving stating, "Mr. Kasian has had so many drinking driving contacts. There's absolutely no doubt … he has been arrested on those occasions." Defense counsel then made reference to the other contacts Kasian had with the police—"there are apparently two *other* contacts he made at his residence

when obviously he wasn't driving when they state that he was intoxicated." The sequence of defense counsel's statements indicates that he recognized the State's recitation of Kasian's two prior OWI convictions. Nothing about counsel's statement undermines our confidence in the basis of the repeater portion of Kasian's sentence. In light of the entire sentencing record, defense counsel's response to the State's allegations and acknowledgment of Kasian's prior arrests is sufficient to constitute an admission and to "allay any concerns" regarding counsel's knowledge of Kasian's prior arrests. *See* ***Wideman***, 206 Wis.2d at 109, 556 N.W.2d at 746.

Although we affirm, we candidly state that this is a very close case and that the manner in which Kasian's prior convictions were established was less than precise. We reiterate the supreme court's sentiment in ***Spaeth*** and ***Wideman*** that while prosecutors face many onerous tasks, "properly pleading and proving repeater allegations are not among them." *See* ***Wideman***, 206 Wis.2d at 106 n.24 (quoting ***State v. Wideman***, No. 95-0852-CR, unpublished slip op. at 6 n.2 (Wis. Ct. App. Aug. 30, 1995)); ***Spaeth***, 206 Wis.2d at 153-54, 556 N.W.2d at 736 ("This court is mindful of the heavy prosecutorial burden placed upon the State by the sheer number of OAR cases. However, establishing prior OAR convictions by competent proof is not an onerous task."). We recommend that the procedures for proving prior offenses, as suggested by the supreme court in ***Wideman***[4] and

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[4] In ***Wideman***, 206 Wis.2d 106-07, 556 N.W.2d at 745, the supreme court made the following suggestion for proving prior offenses:

> The State and defense counsel should, prior to sentencing, investigate the accused's prior driving record. The State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof. Defense counsel should be prepared at sentencing to put the State to its proof when the State's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior

(continued)

Spaeth,[5] be adopted and followed by the State and *trial courts in future cases.*

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

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offenses. The State and defense counsel should, whenever appropriate, stipulate to the prior offenses ….

In addition … we recommend that before imposing sentence the circuit court make findings based on the record about the exact dates and nature of prior offenses.

[5] In ***Spaeth***, 206 Wis.2d at 154, 556 N.W.2d at 736, the supreme court suggested that, in addition to proving prior OAR convictions through reliable documentary proof, an admission of prior convictions may be secured through "[a] direct question from either the prosecutor or the circuit court asking whether the defendant admits to the existence of each prior OAR conviction …." The court additionally urged the circuit court to "include such a question in its colloquy with the defendant at the plea hearing or at sentencing." ***Id***.