COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 22, 1997

No. 96-1292-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH W. RAUSH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded with directions*.

ANDERSON, J. Kenneth W. Raush contends that the circuit court erred by concluding that his prior convictions for operating while intoxicated (OWI) in Illinois and Iowa justify penalty enhancement under § 346.65(2)(b), STATS., 1993-94. He argues that because the State failed to prove that on the date of convictions Illinois and Iowa had statutes with terms substantially the same as Wisconsin's, the trial court was precluded from counting the Illinois and Iowa convictions as prior convictions for sentencing

purposes in Wisconsin. We reverse and remand because we conclude that the State failed to establish the prior offenses in Illinois and Iowa for the imposition of the enhanced penalties.

Raush's challenge to his conviction for operating a motor vehicle while under the influence of an intoxicant, third offense, §§ 346.63(1)(a) and 346.65(2)(b), STATS., 1993-94, is limited to the trial court's finding that this was his third conviction within five years. He offers two criticisms. First, he contends that the State failed to prove he was twice convicted of drunk driving in the past five years; and, second, he maintains that the State failed to prove that his prior convictions in Illinois and Iowa were under statutes that prohibit the use of a motor vehicle while intoxicated or had substantially similar terms.

Raush originally sought to have the criminal traffic charges against him dismissed on the grounds that the complaint failed to establish probable cause to believe that he was properly charged with a crime. Raush contended that there was no information in the complaint that the Illinois and Iowa statutes incorporated by reference into the complaint were valid at the time of his alleged convictions in those two states. The trial court denied the motion. The trial court held that the State presented adequate proof that at the time of Raush's convictions for drunk driving in Iowa and Illinois, both jurisdictions had statutes substantially similar to Wisconsin's.

After a series of motions were denied, Raush entered a no contest plea to the charge of third offense drunk driving. Raush was sentenced and the nine-month jail sentence was stayed pending this appeal.[1]

Raush's first challenge is to the State's failure to properly prove his prior convictions for drunk driving in Iowa and Illinois. He relies upon a number of recent court of appeals decisions which have discussed the proof requirements of the statute covering habitual criminality, § 973.12, STATS. Raush contends that the State failed to meet its burden by relying upon the amended criminal complaint's allegations concerning his convictions in Iowa and Illinois and failing to present certified copies of his prior convictions.[2]

The facts of record in this case are undisputed. Whether the record satisfies the statutory requirement necessary to enhance the penalties provided by chs. 343 and 346, STATS., presents a question of law which this

[1] This appeal has been on hold pending the release of the supreme court's decision in ***State v. Wideman***, No. 95-0852-CR (Wis. Dec. 20, 1996). That decision has now been released and provides the key answers to Raush's first issue.

[2] The State maintains that by entering a no contest plea to the charge, Raush has admitted all of the elements of the charge, including the prior convictions in Illinois and Iowa, and has waived all nonjurisdictional defects and defenses. The State's argument is without any support in the law. It is well settled that a prior violation is not an element of the crime of drunk driving; it does not alter the nature of the substantive conduct. ***State v. McAllister***, 107 Wis.2d 532, 538, 319 N.W.2d 865, 868 (1982). The existence of a prior conviction relates solely to the question of punishment. In addition, Raush made it clear throughout these proceedings that he was contesting the prior convictions and preserved his right to appeal when he pursued a motion to dismiss.

court resolves without deference to the trial court's determination. *See* ***State v. Keith***, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993).

The supreme court has made it clear that "[i]f the accused or defense counsel challenges the existence or applicability of a prior offense, or asserts a lack of information or remains silent about a prior offense, the State must establish the prior offenses for the imposition of the enhanced penalties …." *See* ***State v. Wideman***, No. 95-0852-CR, slip op. at 3-4 (Wis. Dec. 20, 1996). The State must be ready at sentencing to establish a defendant's prior convictions by appropriate official records or other competent proof.

There is now no longer any question that the State does not have to fulfill the formal requirements for establishing prior offenses set forth in the habitual criminality statute. *See* ***id.***, slip op. at 3; and ***State v. Spaeth***, No. 95-1827-CR, slip op. at 10 (Wis. Dec. 20, 1996). However, the State is obligated to establish the prior offenses by presenting a certified copy of the judgment of conviction or other competent proof, *see* ***Wideman***, slip op. at 3-4, 16, that could include (1) a teletype of the defendant's Department of Transportation driving record; (2) an admission by the defendant; or (3) an admission by the defendant's attorney. *See* ***Spaeth***, slip op. at 11.

Following the example of the supreme court in ***Wideman*** and ***Spaeth,*** we will review the record in this case to determine if it is sufficient to establish competent proof of the prior offenses.

The complaint does advise Raush that the State is seeking enhanced penalties because this is his third drunk driving offense. Despite the complaint's recitation of the facts of the prior convictions, it was not accompanied by a teletype of Raush's Department of Transportation driving record or certified copies of the convictions from Iowa and Illinois.[3] Therefore, the complaint is not documentary evidence of Raush's driving record and is of no help in our review of the record.

We cannot hold that either defendant or counsel made any admissions or concessions that would constitute competent evidence of Raush's two prior convictions. It is obvious that Raush has vigorously contested the State's allegations that he had two prior drunk driving convictions. At the plea and sentencing hearing, defense counsel made it abundantly apparent that Raush was continuing his objection to the use of the Iowa and Illinois convictions to enhance the penalty. A defendant's entry of a plea and defense

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[3] It is not enough that there is a statement in the complaint that an officer has reviewed a teletype of the defendant's driving record. A copy of that teletype from the Department of Transportation must be attached. In ***Wideman***, the supreme court held that the complaint, when coupled with the record of the sentencing hearing, was sufficient to fulfill the State's burden of proving the prior convictions. *See* ***Wideman***, slip op. at 18. There is a tangible difference between the complaint in ***Wideman*** and the complaint in this case. In ***Wideman***, the complaint alleged that the officer "inspected a teletype of the defendant's driving record received from the State of Wisconsin, Department of Transportation, Division of Motor Vehicles ***…"*** giving an indication that there did exist the type of competent evidence needed to prove the prior convictions. ***Id.***, slip op. at 4. In this case, the complaint alleged that all that was inspected was a "teletyped report of the defendant's driving record, received from the T.I.M.E. inter-police agency reporting system." There is no indication of whether this report constituted an official teletype from the Department of Transportation; consequently, we cannot conclude that it was competent evidence of Raush's prior convictions.

counsel's argument for the minimum sentence for a third offense cannot be construed to be an admission of the prior offenses. Nor can it be construed as a waiver of the procedure suggested in ***Wideman*** that the State establish the prior offenses whenever the defendant or defense counsel challenges the existence or validity of the alleged prior offenses. *See* ***Wideman***, slip op. at 17.

It would be unfair to hold that a defendant who has vigorously challenged the State's representation that he or she has prior drunk driving convictions has admitted those prior convictions by the entry of a plea. It would be unjust to establish a rule that arguing at sentencing for the minimum sentence for the crime a defendant was convicted of constitutes an admission of prior convictions.

Raush also asserts that the State failed to prove that the Illinois and Iowa statutes were substantially similar to Wisconsin's drunk driving law. The issue of whether the Illinois and Iowa convictions may be considered for sentencing purposes involves the application of statutes to undisputed facts, a question of law that we review independently of the trial court's determinations. ***State v. White***, 177 Wis.2d 121, 124, 501 N.W.2d 463, 464 (Ct. App. 1993).

Wisconsin's legislative scheme for enhancing drunk driving penalties because of prior conduct is contained in § 343.307, STATS.; part of that scheme permits the consideration of convictions from foreign jurisdictions:

> **343.307 Prior convictions, suspensions or revocations to be counted as offenses. (1)** The court shall count the following to determine the length of a revocation or

> suspension under s. 343.30 (1q) (b) and to determine the penalty under s. 346.65 (2):
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> ….
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> (d) Convictions under the law of another jurisdiction that prohibits … use of a motor vehicle while intoxicated … as those or substantially similar terms are used in that jurisdiction's laws.

Raush does not dispute that the Iowa and Illinois statutes prohibit the use of a motor vehicle while intoxicated and can be counted for the purpose of imposing penalty enhancements, *see* ***White***, 177 Wis.2d at 126, 501 N.W.2d at 464; rather, he maintains that the State must also prove that the statutes from Illinois and Iowa were in existence on the date he was convicted. The State's response is somewhat enigmatic; it argues that once it has "proven to the satisfaction of the judge the existence of prior convictions, the burden is on the defendant to mitigate the weight of those factors."

The State's argument is wide of the mark because it assumes that it has proven the existence of the prior convictions. As we have previously held, the State failed to meet even the minimal standards suggested by ***Wideman*** and ***Spaeth***. In addition to those elements of proof, the State has additional elements when it relies upon out-of-state drunk driving convictions: the State must prove that statutes from other states meet the requirements of § 343.307, STATS., and were in existence on the date of the defendant's conviction. Contrary to the State's argument, it is not Raush's burden to disprove that the statutes submitted by the State were in existence on the dates of his conviction.

In this case the State alleges in the complaint that Raush was convicted in Illinois on June 22, 1989, and in Iowa on July 26, 1990. The copies of the Illinois and Iowa statutes submitted by the State fail to prove that on the date of conviction the statutes had terms substantially similar to Wisconsin's drunk driving law. It is not enough that the State submit copies of statutes with the same numbering as that alleged in the complaint. The easiest method of proof would be a certified copy of the other jurisdiction's statute under which Raush was convicted; as an alternative, the legislative history of the statute could be submitted. Either method of proof must satisfy the circuit court that on the day of conviction the other jurisdiction's statute prohibited the operation of a motor vehicle while intoxicated.

Accordingly, we conclude that the State failed to establish the existence of any prior convictions and the circuit court erred in imposing an enhanced penalty after Raush's plea and conviction.

Because the State failed to prove the existence of Raush's two prior drunk driving convictions, the record before us supports only a sentence for a first offense. Therefore, we reverse and remand to the circuit court, commuting Raush's sentence to the maximum permitted by law. On remand, the circuit court is directed to enter an amended judgment of conviction consistent with this opinion. *See* ***Spaeth***, slip op. at 19-20.

By the Court.—Judgment reversed and cause remanded with directions.

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