COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1398-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GLENN VAN REMMEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

SCHUDSON, J. Glenn Van Remmen appeals from the judgment of conviction, following a jury trial, for operating a motor vehicle while under the influence of an intoxicant (OWI). He argues that the trial court erred in sentencing him as a repeat offender. This court rejects his argument and affirms.

On June 10, 1996, the State charged Van Remmen with OWI in a criminal complaint that alleged that "[a] reliable teletype from the State of

Wisconsin, Department of Transportation, Division of Motor Vehicles shows that within the 5-year period prior to the above-described incident, Defendant had 1 prior conviction[] … for alcohol-related driving offenses, as counted under Wisconsin Statute § 343.307(1)." Without objection, the case proceeded to jury trial as a criminal case. The trial court instructed the jury that in order to find Van Remmen guilty, all twelve jurors would have to agree that the evidence proved guilt beyond a reasonable doubt.

At sentencing, however, when the prosecutor was making his recommendation and referring to Van Remmen's prior conviction, defense counsel interrupted, "Judge, with respect to that assertion, I would object to the Court's reliance upon it." He then elaborated, "My objection is I believe the State has an obligation in a situation such that to prove the prior. It's my position that the State and the situation where they are alleging a prior has an obligation to prove it."

The trial court asked the prosecutor to identify "the source of [his] information … that Mr. Van Remmen has [a] May 1995 municipal conviction for operating under the influence." The prosecutor then referred to the records he had in court — a Department of Transportation "computer printout that was run and provided with the police reports at the time this offense was charged." The prosecutor recited information from the printout regarding Van Remmen's identity and prior OWI offense. The trial court concluded:

> I'm satisfied that that's a sufficient basis for me to proceed on the assumption that there was a prior municipal ordinance conviction which makes this second conviction criminal.
>
> In addition, under section 971.31 the defense knew Mr. Van Remmen was charged with the criminal case and if there was any question about the validity of an

> underlying municipal conviction, that should have been raised by pretrial motions. Since it wasn't, it's waived.

Although defense counsel did not challenge the authenticity or accuracy of the printout, and did not challenge the sufficiency of the proof of the prior offense after the prosecutor recited the printout information, Van Remmen now argues that the State did not satisfy its burden to establish the existence of the prior offense. The very case Van Remmen cites, however, ***State v. Wideman***, 206 Wis.2d 90, 556 N.W.2d 737 (1996), refutes his argument.

In ***Wideman***, the supreme court stated:

> If 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 of § 346.65(2) by presenting "certified copies of conviction or other competent proof … before sentencing."

Id. at 94, 556 N.W.2d at 739 (citation omitted). In this case, although at sentencing defense counsel raised the issue regarding Van Remmen's prior offense, he never "challenge[d] the existence or applicability" of the prior conviction. He never "assert[ed] a lack of information" about it and, after the prosecutor presented the computer printout information, defense counsel never disputed that the printout provided "competent proof." *See* ***id.***

Thus, even if this court were to assume (as it does not) that Van Remmen is not judicially estopped from asserting that his OWI is a civil offense after trying the case as a criminal offense with the criminal law protections provided by the highest burden of proof and jury unanimity, and even if this court were to assume (as it does not) that Van Remmen did not waive objection to the sufficiency of the State's proof, this court would (and does) conclude that the trial

court correctly determined that the State presented a sufficient evidentiary basis to establish the prior OWI offense.

By the Court.—Judgment affirmed.

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