COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1415-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONNA J. PRILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

¶1 ROGGENSACK, J.[1] Donna Prill pled no contest to the charge of operating a motor vehicle while intoxicated, third offense, contrary to WIS. STAT. § 346.63(1)(a). The circuit court sentenced Prill as a third-time offender under

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

WIS. STAT. § 346.65(2)(c),[2] which establishes the repeater penalties for violations of § 346.63(1). The sole issue on appeal is whether the State adequately proved the prior convictions that triggered application of the enhanced penalties. We conclude that the record in this case is sufficient to establish competent proof of Prill's two prior convictions, and therefore, we affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

¶2 In November of 1999, Prill was charged with operating a motor vehicle while intoxicated (OMVWI) and operating a motor vehicle with a prohibited alcohol content (PAC), in violation of WIS. STAT. § 346.63(1)(a) and (b). At her plea and sentencing hearing, she and the State submitted a negotiated plea agreement to the circuit court as a joint recommendation, with the understanding that Prill would be seeking a departure from the State's recommended sentence with respect to jail time. Prill stated that she understood the terms of the joint recommendation and that she had reviewed her written Plea Questionnaire/Waiver of Rights form with her attorney and understood it. The form set forth the penalty applicable to third-time offenders as the maximum sentence she faced. Additionally, the criminal complaint, which was in the form of a statement under oath, specified the penalty provisions applicable to a third offense and set forth the dates of the prior violations and the dates of the corresponding convictions.[3] The complaint was admitted to establish the factual

[2] WISCONSIN STAT. § 346.65(2)(c) was amended by 1999 Wis. Act 109, § 44. However, those amendments are not relevant to the issue raised on this appeal.

[3] The complainant avered that the record of the prior convictions was obtained by a review of a teletype from the Wisconsin Department of Transportation of Prill's driving record.

background for the crime to which she pled, with defense counsel's specific consent. Furthermore, in response to the court's question, "What would your client be pleading to one count of OWI third?" Prill's counsel responded, "No contest."

¶3 On the basis of Prill's plea and the factual background set forth in the complaint, the court found Prill guilty, entered a judgment of conviction and proceeded to sentencing. She was sentenced to forty-five days in jail; fine and costs of $1,286.00; drug and alcohol assessments; revocation of her license for twenty-seven months; and the requirement that she use an ignition interlock device for twenty-four months after her license was reinstated.

¶4 On February 6, 2001, Prill filed a motion for postconviction relief. In her motion, she argued that the State failed to prove her two prior convictions and that she did not admit to the convictions for purposes of sentencing. On this basis, she asked the circuit court to vacate her conviction and to re-sentence her as a first-time offender.[4] The circuit court denied Prill's motion, and she appeals.

DISCUSSION

Standard of Review.

¶5 Whether the record is sufficient to sustain the penalty enhancer Prill received is a question of law that we review *de novo*. *See* ***State v. Spaeth***, 206 Wis. 2d 135, 148, 556 N.W.2d 728, 733-34 (1996).

[4] Prill's motion for postconviction relief also requested that the terms of her sentence be modified to allow her to attend to certain caregiving responsibilities. Prill has not pursued this issue on appeal.

Proof of Prior Convictions.

¶6 Before a court may impose enhanced penalties under WIS. STAT. § 346.65(2)(c), the State must establish a defendant's prior offenses by competent proof. ***State v. Wideman***, 206 Wis. 2d 91, 94-95, 104-05, 556 N.W.2d 737, 739, 743 (1996). Competent proof of prior OMVWI convictions may be established by a defendant's admission, certified copies or other reliable proof of each conviction. ***Id.***; ***Spaeth***, 206 Wis. 2d at 148, 556 N.W.2d at 733-34. Additionally, a defendant's admission of prior OMVWI convictions may be made personally or imputed through counsel's statements, as the Wisconsin Supreme Court has explained:

> Allowing the accused's counsel to respond about a prior offense adequately protects an accused's due process right to a sentence based on legitimate considerations.

Wideman, 206 Wis. 2d at 106, 556 N.W.2d at 744 (citations omitted). And finally, evidence of repeater status may be received by agreement of the State and the defendant. ***Id.*** at 108, 556 N.W.2d at 745.

¶7 Prill contends that neither she nor defense counsel admitted her prior offenses. Accordingly, Prill argues, her conviction must be vacated and she should be re-sentenced as a first-time offender. We disagree because we conclude that the overall record is sufficient to establish competent proof of Prill's prior offenses. We note in particular: (1) the colloquy at Prill's plea and sentencing hearing, (2) Prill's signed plea questionnaire acknowledging that the maximum applicable penalty was that provided for a third-time offender, and (3) the statements regarding Prill's prior convictions found in the criminal complaint which was received by agreement to establish the factual background for the charge to which Prill pled**.**

¶8 The colloquy at the plea and sentencing hearing relates:

> THE COURT: All right. Ms. O'Rourke [counsel for defendant], you heard [the assistant district attorney] state to this court a recommendation that's being made; is *represented as a joint recommendation*, for resolving the three files that are pending before this court. That is, in return for a plea of no contest or guilty to operating a motor vehicle while intoxicated *third offense* the state would be dismissing a pending felony battery and bail jumping charge, would be asking for 60 days jail time with Huber privileges, fine and costs of $1,286, alcohol and drug assessment, 27 months license revocation, 24 months interlock on any motor vehicle Ms. Prill may be subject to driving. Is that your understanding?
>
> MS. O'ROURKE: Yes, although the state does understand we'll be asking the court to simply order 45 days jail. … [W]e're asking to vary from the guidelines a slight bit.[5]
>
> THE COURT: Ms. Prill, you heard the recommendation with the understanding that your attorney is going to argue for some variation from the guidelines. Do you understand that to be the recommendation to this court?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You do understand I'm not bound by any recommendation made by your attorney ….
>
> THE DEFENDANT: Yes, but I would like to say that I would like to ask for leniency because I haven't had any tickets within six years. …
>
> THE COURT: … I have in front of me a plea questionnaire-waiver of rights. Have you had the opportunity to review this with Ms. O'Rourke?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you believe [you] understand it?
>
> THE DEFENDANT: Yes.

[5] References to the "guidelines" in the colloquy appear to be references to the State's recommended jail sentence.

> THE COURT: Ms. O'Rourke, you have had the opportunity to review this with Ms. Prill; is that correct?
>
> MS. O'ROURKE: That's correct.
>
> THE COURT: Do you believe that she understands it?
>
> MS. O'ROURKE: Yes, I do.
>
> …
>
> THE COURT: What would your client be pleading to *one count of OWI third*?
>
> MS. O'ROURKE: *No contest*.
>
> THE COURT: Ms. Prill, do you understand that if you plead no contest you are not contesting the charge so I must find you guilty?
>
> THE DEFENDANT: Correct.
>
> THE COURT: All right. Well, I'll find the plea of no contest is made knowingly, willingly, freely, and voluntarily.
>
> Factual background.
>
> [ASSISTANT DISTRICT ATTORNEY]: State offers the criminal complaint.
>
> MS. O'ROURKE: *No objection to that*.
>
> THE COURT: All right. This court will state in the record it has read the criminal complaint, is referred to the criminal complaint by both the state and by the defense, and within the criminal complaint this court finds a factual basis for proceeding today. Therefore, on the basis of your plea of no contest I will find you guilty and order a judgment of conviction.

Hearing Tr. at 3-7 (Aug. 23, 2000) (emphasis added).

¶9 In the colloquy among the court, Prill and defense counsel, the court referred to a third offense OMVWI on two separate occasions. The court also explained the State's recommended sentence and the fact that the court need not

adhere to the recommendation. Defense counsel said Prill would be pleading no contest to OMVWI third, and Prill personally acknowledged that she knew the court would find her guilty of that charge if it accepted her no contest plea. Prill heard defense counsel ask the court to deviate from the State's recommended sentence and order only forty-five days in jail. And lastly, she, herself, asked for leniency, claiming she had not had any tickets in six years and thereby implying she had had OMVWI convictions previously.

¶10 Prill's signed Plea Questionnaire/Waiver of Rights form, although it did not refer to her prior convictions, expressly acknowledged that the maximum penalty she faced was, "one year jail, [$]2000 fine, revocation drivers license," which corresponds to the maximum penalty set forth in WIS. STAT. § 346.65(2)(c) for a third-time offender. At the plea and sentencing hearing, Prill stated that she had reviewed the waiver of rights form with her attorney and that she understood the terms of the plea and the rights she was relinquishing by pleading no contest. We conclude that the colloquy when taken together with the wavier form is sufficient to establish an admission.

¶11 Additionally, the criminal complaint, which was in the form of a statement given under oath, was admitted by agreement between Prill and the State to establish the factual background for the crime to which she pled. It set forth the dates of Prill's prior offenses and the dates of her prior convictions. It showed that the State sought the enhanced penalties applicable to a third offense

OMVWI under WIS. STAT. § 346.65(2)(c).[6] This document provided further competent proof by agreement.

¶12 Prill contends that the record here falls below the line of "competent proof" drawn in ***Wideman*** and ***Spaeth***, and also that ***Wideman*** does not apply because it makes no mention of the mental state of the defendant. However, Prill's plea of no contest to "one count of OWI third" distinguishes the statements made at her plea and sentencing hearing from the statements found insufficient to support an admission in ***Spaeth***, 206 Wis. 2d at 148-49, 556 N.W.2d at 734 (holding that defense counsel's statement that "some jail time … is necessary in this case" was not sufficient to establish an admission of four prior convictions). And, as we explained above, the sworn complaint against Prill was received by agreement and the record as a whole supports an admission by Prill.

¶13 In regard to her mental state, Prill argues that the court took no notice of it and that greater care was required at sentencing because she was suffering from anxiety and depression and was taking medication for those conditions. Prill does not contend, however, that she lacked an understanding of the questions that she and her attorney were asked. Nor does she contend that the circuit court erred in concluding that her plea was entered "knowingly, willingly, freely, and voluntarily." Under these circumstances, we conclude that Prill's mental status provides no basis for deviating from the standard of competent proof

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[6] The complaint stated:

> **PENALTY FOR COUNTS 1 & 2:** THIRD OFFENSE, A fine of not less than $600 nor more than $2,000, and imprisonment of not less than 30 days nor more than 1 year in the county jail; and in addition shall have his [sic] operating privileges revoked.

established in ***Wideman***. Therefore, based on the record as a whole, we conclude that the State provided competent proof of Prill's prior offenses under the standards set in ***Wideman*** and ***Spaeth***.[7] Accordingly, we affirm the judgment and order of the circuit court.

CONCLUSION

¶14 The record in this case is sufficient to establish competent proof of Prill's two prior convictions. Therefore, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

[7] Because we conclude that the record establishes competent proof of Prill's prior convictions, we need not address the State's argument that Prill, by failing to raise the issue at the time of her sentencing, waived her right to challenge the sufficiency of the evidence.