COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP860-CR **Cir. Ct. No. 2005CM951**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL H. VANDENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] Michael H. Vandenberg appeals from a judgment of the circuit court finding him guilty of operating a motor vehicle while under the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as second offenses. Vandenberg contends the circuit court erred by including his prior conviction in Michigan for operating a motor vehicle while impaired for purposes of penalty enhancement. We disagree and affirm.

¶2 In September 2005, the State filed a complaint against Vandenberg charging him with OWI and PAC, both as second offenses. In the complaint, the State alleged that a Wisconsin Department of Transportation teletype revealed that Vandenberg had been convicted in Michigan of the "crime of Operating a Motor Vehicle While Intoxicated."

¶3 In October, Vandenberg filed a motion to dismiss "based on the lack of prior offenses." In his motion, Vandenberg claimed that his Michigan conviction "is not a countable offense under [WIS. STAT. §] 343.307(1) … due to the multi-tiered offense scheme in the State of Michigan for offenses involving drinking and driving." In a later submission, Vandenberg asserted that the State failed to demonstrate the specific subsection in the Michigan statute under which he was charged. According to Vandenberg, Michigan has a two-tiered approach to drinking and driving offenses. In Vandenberg's view, the first tier, MICH. COMP. LAWS ANN. § 257.625(1) (2006), prohibits "operating while intoxicated," which, as is relevant here, is defined as either being "under the influence of alcoholic liquor" or having a blood alcohol concentration of .08 percent or more. Vandenberg equated this first tier with Wisconsin's OWI provisions. The second tier, § 257.625(3), also prohibits operation of a motor vehicle when the person's ability to operate the vehicle is "visibly impaired." Vandenberg asserted that this lesser-included offense of "'operating while impaired' is not substantially similar

to Wisconsin's statutory scheme since Wisconsin does not recognize this lesser form of drunk driving."[2]

¶4 At a December hearing on the motion, Vandenberg's counsel asserted, "I have received information from the Michigan Department of Motor Vehicles, I know that the district attorney's office has as well, and I believe that

[2] MICHIGAN COMP. LAWS ANN. § 257.625 provides in pertinent part:

> **257.625. Offenses involving operation of vehicle while under influence of alcoholic liquor or controlled substance or visibly impaired due to consumption of alcoholic liquor or controlled substance ….**
>
> Sec. 625. (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine ….
>
> ….
>
> (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

Mr. Vandenberg's conviction was under subsection three." The circuit court concluded that, regardless of whether Vandenberg was convicted under subsection one or three of the Michigan statute, the conviction counted.

¶5 At the time of trial, the State filed as an exhibit an "electronically certified" record from the Michigan Bureau of Driver and Vehicle Records. This record states "11/23/2003 operated while impaired." On March 16, 2006, the court filed the judgment convicting Vandenberg of his second offenses of OWI and PAC. He now appeals.

¶6 Vandenberg challenges the inclusion of the Michigan conviction on two grounds. First, he complains that the State failed to offer competent proof of his prior conviction for drunk driving in Michigan. Second, he maintains that Michigan's OWI statute is not "substantially similar" to Wisconsin's OWI statute, as required by WIS. STAT. § 343.307(1)(d). We address each argument in turn.

¶7 The issue of whether the Michigan conviction may be considered for sentencing purposes involves the interpretation and application of statutes to undisputed facts, which are questions of law that we review independently of the circuit court's determinations. *See* ***State v. White***, 177 Wis. 2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993).

¶8 In his first challenge, Vandenberg seems to argue that the electronically certified Michigan driver's record is not competent proof of a prior conviction. He explains that the State offered no evidence on how Michigan records are kept or maintained. He suggests the better rule is to require the State to file a certified judgment of conviction to prove out-of-state convictions. We decline Vandenberg's invitation to explore these questions. He raises them for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980)

(recognizing that this court generally does not consider issues raised for the first time on appeal).

¶9 The record demonstrates that Vandenberg did challenge the consideration of the Michigan conviction on the grounds that if he was convicted under MICH. COMP. LAWS ANN. § 257.625(3), the operating-while-visibly-impaired provision, it could not be counted as a prior conviction because Wisconsin has no comparable statutory provisions. WISCONSIN STAT. § 343.307(1) sets forth the criteria used to determine whether prior conduct may be used to calculate a defendant's prior drunk driving convictions. Section 343.307(1)(d) includes as prior convictions:

> Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

¶10 The final phrase of WIS. STAT. § 343.307(1)(d), "as those or substantially similar terms are used in that jurisdiction's laws," indicates the broad scope of para. (d). ***State v. List***, 2004 WI App 230, ¶8, 277 Wis. 2d 836, 691 N.W.2d 366, *review denied*, 281 Wis. 2d 113, 697 N.W.2d 472. When determining a penalty, Wisconsin even counts prior offenses committed in states with OWI statutes that differ significantly from our own. ***Id.*** (citing ***White***, 127 Wis. 2d at 125, for holding that "though Minnesota's OWI statute required proof of elements not contained in Wisconsin's OWI statute, the statute did not preclude counting a Minnesota conviction when calculating the severity of the penalty").

"Substantially similar" simply emphasizes that the out-of-state statute need only prohibit conduct similar to the list of prohibited conduct in § 343.307(1)(d). This understanding comports with the policy choice of our legislature. Counting offenses committed in other states effectuates the purposes of the drunk driving laws generally. ***List***, 277 Wis. 2d 836, ¶11; ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980) ("Because the clear policy of the statute is to facilitate the identification of drunken drivers and their removal from the highways, the statute must be construed to further the legislative purpose.").

¶11 Applying this broad interpretation and application of the final phrase in WIS. STAT. § 343.307(1)(d) and the public policy supporting our drunk driving laws, we conclude that Vandenberg's Michigan conviction falls under that statute. Michigan's drunk driving law that Vandenberg insists he was convicted under prohibits the operation of a motor vehicle when, due to the consumption of alcohol, the motorist's ability to operate a motor vehicle is visibly impaired. *See* MICH. COMP. LAW ANN. § 257.625(3). This prohibited conduct is similar to the type listed in § 343.307(1)(d) (permitting the consideration of convictions under an out-of-state law that prohibits a person from operating while under the influence of an intoxicant and while under the influence of a any drug to a degree that renders the person incapable of driving safely). Vandenberg's speculative hypotheticals in his brief concerning statutory language and facts that are not before us here do not warrant our ignoring the language of the statutes at hand and their straightforward application to his situation. The circuit court properly counted Vandenberg's Michigan conviction.

By the Court.—Judgment affirmed.

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