COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3010-CR **Cir. Ct. No. 2007CT752**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLIE N. BURTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Charlie N. Burton appeals from a judgment finding him guilty of operating a motor vehicle while under the influence of an intoxicant (OWI), fourth violation, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)4. He also appeals from an order denying his motion for sentence modification. Burton contends that he should not have been subjected to the enhanced penalties for a fourth offense because only one of three prior Colorado convictions qualified as a prior offense under Wisconsin law.

¶2 The State charged Burton with a fourth offense, alleging that he had prior countable offenses on April 22, 1990, February 19, 1994, and January 28, 2003. The complaint contained the following information concerning Burton's OWI charge being a fourth offense:

> Upon conviction, this would be a FOURTH OFFENSE of the type charged herein, as defined by 346.65(2)(d) and (2)(g), Wisconsin Statutes ….
>
> . . . .
>
> Complainant has reviewed a teletype report of the defendant's driving record, received from the T.I.M.E. interpolice agency reporting system, which teletypes he/she has referred to in the past and found to be accurate and reliable. According to said teletype, a copy of which is attached to and incorporated in this complaint, the defendant has been previously convicted **3** TIMES for VIOLATIONS of the type charged herein and is considered a prior offense under 346.65(2)(c) and 343.307, Wisconsin Statutes, the VIOLATION dates being: **04/22/1990, 02/19/1994 & 01/28/2003**.

¶3 On November 29, 2007, Burton filed a motion challenging the April 1990 and January 2003 citations, both from Colorado, and argued that they did not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

qualify as prior violations for enhancement purposes under Wisconsin OWI law. Specifically, Burton averred, "That upon information and belief, the State has offered no proof as to two of the three alleged prior drunk driving convictions." Burton did concede that the February 19, 1994 incident qualifies as a prior violation.

¶4 The State produced a certified copy of Burton's Colorado driver history at the motion hearing on February 4, 2008, and cited to holdings in ***State v. White***, 177 Wis. 2d 121, 501 N.W.2d 463 (Ct. App. 1993) (addressing prior Minnesota violation) and ***State v. List***, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366 (addressing prior Illinois violation), to support treating this conviction as a fourth offense. The trial court denied Burton's motion to amend the charge to a second offense.

¶5 Burton pled guilty to the OWI charge, but reserved his right to argue against the penalty enhancement. At the sentencing hearing, Burton produced a certified Wisconsin driving record that listed only one prior offense. He argued that the two disputed Colorado offenses were for driving while impaired by alcohol, an offense that has no counterpart in Wisconsin law. The Colorado statute cited for the two disputed prior offenses does not invoke a specific blood alcohol concentration; rather, it links consumption of alcohol to the effect on the person "to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in

the safe operation of a vehicle."[2] *See* COLO. REV. STAT. § 42-4-1301(g) (2008). The State responded that the offense is "certainly under the influence" and that the court had already accepted the Colorado driving record as proof of three prior convictions. The circuit court held that:

> [I]n just looking at the definition of driving while ability impaired that's [been] submitted by defense counsel … that sounds to me like operating under the influence.
>
> I am not exactly sure what it is Colorado is attempting to accomplish with this … variance here. If this is some sort of middle ground to resolve other matters … I don't have any idea. That would be speculation on my part, but it's clear that it's a conviction for operating while impaired by alcohol…. [G]oing through the gymnastics of trying to figure out that that's not really a drunk driving [offense] and so it shouldn't be counted I don't think is in any way what was intended by … our legislature in dealing with situations like this….
>
> The fact of the matter is [Burton's] been arrested and convicted three prior times in the State of Colorado for operating to the point where he was … unable to exercise clear judgment, sufficient physical control, or due care in the safe operation of a motor vehicle because of his alcohol use, and I think … that's still what is meant under [WIS. STAT. §] 343.307.… I think that these are substantially similar.

The circuit court then sentenced Burton, imposing enhanced penalties for a fourth OWI offense. Burton appeals.

¶6 Burton first contends that the circuit court erred by sentencing him for a fourth OWI offense without sufficient proof of prior convictions. The State bears the burden of establishing prior offenses as the basis for the imposition of

[2] The statute was quoted into the record by Burton's attorney. The circuit court referenced the language from the Colorado statute during its holding. A copy of the statute, obtained from an online legal resource site, is attached to the plea questionnaire.

enhanced penalties under WIS. STAT. § 346.65(2). ***State v. Wideman***, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996). If the existence or applicability of a prior offense is challenged, or there is an assertion of lack of information or the defendant is silent about a prior offense, the State must establish the prior offense for the imposition of the enhanced penalties of § 346.65(2) by presenting "certified copies of conviction or other competent proof … before sentencing." ***Wideman***, 206 Wis. 2d at 95 (citation omitted). Burton contends that the State's proof is insufficient when measured against the certified Wisconsin DOT driving record confirming the 2007 OWI as his second offense. The State counters that the record contains a Colorado arrest history report, and also contains a certified driver history from Colorado. The State asserts that it has met its burden of proof.

¶7 At sentencing, Burton acknowledged that the State had filed a certified copy of Burton's Colorado driving record. On appeal, he contends the State was required to do more to offset the impact of the DOT record. He asserts that the State should have offered certified copies of each individual judgment of conviction and copies of the statutes violated. Burton did not make this argument to the circuit court and cannot now pursue it on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶8 The central question presented by Burton's appeal is whether the Colorado convictions were properly counted for sentencing purposes, consistent with WIS. STAT. § 343.307. This involves the interpretation and application of statutes to undisputed facts, which are questions of law that we review independently of the trial court's determinations. *See* ***White***, 177 Wis. 2d at 124.

¶9 In Wisconsin, prior OWI offenses are counted pursuant to WIS. STAT. § 343.307. The relevant portion of the counting statute is as follows:

> The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under s. 114.09(2) and s. 346.65(2):
>
> ....
>
> **(d)** Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated ... with an excess or specified range of alcohol concentration ... as those or substantially similar terms are used in that jurisdiction's laws.

Sec. 343.307(1).

¶10 Here, Burton was convicted of driving while impaired, which is defined in COLO. REV. STAT. § 42-4-1301(g) (2008).[3] The final phrase of WIS. STAT. § 343.307(1)(d), which directs the court to count convictions for driving under the influence "as those or substantially similar terms are used in that jurisdiction's laws," indicates the broad scope of this statute. *See* ***List***, 277 Wis. 2d 836, ¶8. When determining whether to impose an enhanced penalty, Wisconsin counts prior offenses committed in states with OWI statutes that differ significantly from our own. ***Id.*** We have rejected the proposition that another state's law must be "in conformity" with Wisconsin law in order to be counted as a prior offense for penalty enhancement purposes. ***White***, 177 Wis. 2d at 125-26.

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[3] COLO. REV. STAT. § 42-4-1301(g) (2008) states:

> "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

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

¶12 Applying this broad interpretation and application of the final phrase in WIS. STAT. § 343.307(1)(d), and placing it in the context of the public policy supporting our drunk driving laws, we conclude that Burton's Colorado convictions were properly counted. Colorado's driving while impaired statute indicates that he was convicted for the operation of a motor vehicle when, due to the consumption of alcohol, his ability to operate the motor vehicle was impaired. *See* COLO. REV. STAT. § 42-4-1301(g) (2008). 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 "to a degree that renders the person incapable of safely driving").

¶13 Because the State met its evidentiary burden of presenting competent proof of the three Colorado violations, and because the circuit court properly counted the Colorado offenses of driving while impaired, the sentence enhancement for a fourth OWI offense was appropriate. We affirm.

By the Court.—Judgment and order affirmed.

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