COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1335-CR **Cir. Ct. No. 2013CT856**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MENDELL STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Mendell Stokes appeals from a judgment of conviction for operating after revocation (OAR), arguing that his fine for the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

offense must be commuted to a forfeiture because "the record does not include 'competent proof' that his license was revoked as a result of a prior OWI." For the following reasons, we affirm.

Background

¶2 The sworn criminal complaint in this case charged Stokes with (1) operating a motor vehicle on a highway while his driver's license was revoked, which Stokes knew or had reason to believe was revoked, and that "the revocation resulted from an offense that may be counted under [WIS. STAT. §] 343.307(2) [an alcohol-related driving conviction], contrary to [WIS. STAT. §] 343.44(1)(b), 343.44(2)(ar)2…, a Misdemeanor, and upon conviction shall be fined not more than $2,500 or imprisoned for not more than one year in the county jail or both" and (2) "fail[ing] to have an ignition interlock device installed as ordered by the court." The complaint details that Kenosha county sheriff's department dispatch informed the deputy who stopped Stokes that a check of Stokes' driving status, along with a warrant check, showed that Stokes was revoked as a result of an alcohol-related offense. It further states that "[a] teletype provided by the Wisconsin Department of Transportation reveals that the defendant's driver's license was revoked on November 21, 2011, and had not been reinstated as of the [October 17, 2013] date of this offense." The complaint states that the deputy determined that Stokes was required to have an ignition interlock device installed on his vehicle but did not have one.

¶3 Stokes eventually pled to both offenses. At the plea hearing, Stokes acknowledged having reviewed a copy of the complaint. In addition to addressing other matters, the court asked Stokes, "Do you understand that I will use that Criminal Complaint as a factual basis for a finding of guilt?" Stokes responded,

"Yes, sir." Stokes indicated he understood the penalties associated with both the ignition interlock and the OAR charge and what the State would have to prove on those offenses in order to convict him. Stokes pled no contest to the two charges. The court asked, "Do you understand that a 'no contest' plea means that you do not contest the State's ability to prove the facts necessary to constitute the crime?" Stokes responded, "Yes, sir." Among other things, the court found a factual basis for Stokes' pleas and that he freely, knowingly and voluntarily entered his pleas. The court found Stokes guilty of both offenses and immediately proceeded to sentencing.

¶4 At sentencing the prosecutor's only comments were: "[T]he defendant's OWI conviction was from November of 2011 and the revocation of his license from that conviction was still in effect at the time of this incident. Thank you." The court turned to Stokes' counsel next. Counsel asked the court to impose only a monetary penalty. Stokes declined to comment. The following exchange then took place:

> Court: Well, you were convicted of Operating While Intoxicated and then after that—
>
> Counsel: Not intoxicated.
>
> Court: What's that?
>
> Counsel: Oh, I thought you meant on this offense.
>
> Court: No. Not on this offense. And then after that you're given your revocation. You're supposed to have an ignition interlock device in your vehicle. You don't have one. You're driving while you're revoked….

The court ordered a fine of $300 against Stokes on each count.

¶5 Stokes subsequently filed a postconviction motion, arguing, as he does on appeal, that the State failed to provide the court with "competent proof" at

the plea and sentencing hearing that Stokes' driver's license had been revoked due to a prior OWI conviction. He asked, and asks on appeal, that his OAR charge be commuted to a civil forfeiture. The circuit court denied Stokes' motion[2] and this appeal followed.

Discussion

¶6 The relevant facts in this case are undisputed. We must determine whether the record demonstrates that prior to sentencing Stokes there was "competent proof" before the circuit court that Stokes' OAR conviction was based upon the revocation of his license for a prior alcohol-related driving offense. *See* ***State v. Spaeth***, 206 Wis. 2d 135, 148, 150, 151, 556 N.W.2d 728 (1996); *see also* WIS. STAT. § 343.44(2)(ar)2. This requires us to apply statutory language and constitutional principles to the undisputed facts, which we do independently. ***Spaeth***, 206 Wis. 2d at 139. We conclude there was sufficient proof before the court.

¶7 Stokes relies most heavily on ***Spaeth***, but ***Spaeth*** does not carry the day for him. In ***Spaeth***, a case in which the defendant had been sentenced for a fifth OAR conviction within a five-year period, our supreme court stated that "[*g*]*enerally*, competent proof of prior *OAR convictions* may emanate from either" an admission by defendant or his/her counsel or through "reliable documentary proof." ***Id.*** at 138-39, 148 (emphasis added). In that case, "competent proof" was established through a combination of comments by Spaeth, his counsel, and the overall record.

[2] The circuit court granted that portion of Stokes' motion seeking to vacate the ordered DNA surcharges and that issue is not before us.

¶8 The ***Spaeth*** court stated, "Arguably, a sworn and subscribed complaint is of sufficient reliability that a circuit court may rely *solely* upon it in determining the existence of prior *OAR* convictions." ***Id.*** at 151 (emphasis added). Despite making this statement, the court went on to state a more stringent standard of proof required of prior OAR convictions, for penalty enhancement purposes. ***Id.*** The court specifically explained that it was establishing a more stringent standard in OAR cases due to their uniqueness.

> An officer swearing out a complaint is faced with the task of setting forth accurate information in the complaint. Given the large number of revocations and the potential for confusion caused by the complexity of the OAR statute, this court concludes that, hereafter, when the State chooses to rely solely on the complaint to establish *serial OAR convictions*, the complaint must be accompanied by reliable documentary corroboration of the asserted convictions.

Id. at 152-53 (emphasis added). It continued that in such cases, the State

> establishes the existence of a defendant's *prior OAR convictions* by competent proof when, at a minimum, it introduces into the record at any time prior to the imposition of sentence, either: (1) an admission; (2) copies of prior judgments of conviction of OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record.

Id. at 153 (emphasis added). The ***Spaeth*** court noted that the State "has essentially chosen to rely solely upon the complaint to establish the defendant's status as a fifth-time OAR offender." ***Id.*** The court stressed that the complaint was not unreliable due to a questioning of the veracity of the officers involved with its drafting, but that

> its reliability is diminished for two reasons. First, the complexity of the OAR penalty provisions creates the potential for error when, as here, information from a source document must pass through two layers of interpretation and transcription. Second, without supplemental

> corroborating documentation, a sentencing court has no means of verifying the assertions in the complaint.

Id. at 154.

¶9 This case differs from ***Spaeth*** in two critical ways. First, here we are dealing with one prior OWI conviction, not serial OAR convictions coupled with the complexity of the OAR statutes, which the ***Spaeth*** court so heavily emphasized as the foundation for its decision. Second, the circuit court in this case had more to rely upon than solely the complaint.

¶10 The sworn criminal complaint that was before the circuit court in this case charged Stokes with failing to install an ignition interlock device as ordered by the court and operating with a driver's license that was revoked based upon a prior alcohol-related conviction, a "[m]isdemeanor" with a potential fine of $2500 and a potential jail term of one year. The probable cause section of the complaint detailed that a check of Stokes' driving status showed he was revoked as a result of an alcohol-related offense, and that it "was revoked on November 21, 2011, and had not been reinstated as of the date of this offense." The complaint further stated that Stokes was required to have an ignition interlock device installed on his vehicle but he did not have one.

¶11 If a complaint alone was "[a]rguably" of sufficient reliability in ***Spaeth*** for a circuit court to "rely solely upon in determining the existence of prior OAR convictions," ***id.*** at 151, which the ***Spaeth*** court heavily emphasized were unique due to the complexity of the OAR statutes, it is certainly arguably of sufficient reliability to establish one prior OWI conviction.

¶12 However, the record shows that the circuit court had more to rely upon than the criminal complaint alone. At the plea hearing, Stokes

acknowledged reviewing the complaint. When the court asked him, "Do you understand that I will use that Criminal Complaint as a factual basis for a finding of guilt," Stokes responded, "Yes, sir." While this is not an admission to the accuracy of everything in the complaint, most specifically that a prior OWI charge was the basis for the revocation of his license, it certainly was a ready-made opportunity for Stokes or his counsel to clarify if there were any significant inaccuracies in the complaint. They did not do so. Stokes also indicated his awareness that he was charged with failing to install an ignition interlock device, the installation of which had been required based upon an offense which occurred prior to his arrest on these charges. Stokes pled no contest to both charges and when the court asked him if he understood "that a 'no contest' plea means that you do not contest the State's ability to prove the facts necessary to constitute the crime," Stokes responded, "Yes, sir." This provided another obvious opportunity during which neither Stokes nor counsel spoke up to suggest any inaccuracies in the complaint or any deficiencies in the State's ability to show what it needed to show for the crime or penalty enhancement.

¶13 At the sentencing, which immediately followed the plea, Stokes' November 2011 OWI conviction—which provided the foundation for the revocation of Stokes' license—was front and center before the parties and the court. The prosecutor's first and only comments at sentencing were: "[T]he defendant's OWI conviction was from November of 2011 and the revocation of his license from that conviction was still in effect at the time of this incident. Thank you." The court turned to Stokes' counsel next. Although this was the most obvious time and opportunity for counsel to bring to the court's attention any error in the complaint or the prosecutor's comments regarding the prior OWI conviction being the basis for Stokes' revocation, counsel gave no hint of any

inaccuracies. Instead, during the following colloquy, counsel tacitly confirmed that the revocation was based upon Stokes' prior OWI conviction *that had just been referenced by the prosecutor*:

> Court: Well, you were convicted of Operating While Intoxicated *and then after that*—
>
> Counsel: Not intoxicated.
>
> Court: What's that?
>
> Counsel: Oh, I thought you meant *on this offense*.
>
> Court: No. Not on this offense. And then *after that you're given your revocation*. You're supposed to have an ignition interlock device in your vehicle. You don't have one. You're driving while you're revoked…. (Emphasis added.)

Following right on the heels of the prosecutor's comment, we view this exchange as being essentially an implicit admission by Stokes' counsel that Stokes' November 2011 OWI conviction, again which the prosecutor just finished stating was the basis for Stokes' revocation, was in fact the basis for the revocation of Stokes' license. *See* ***State v. Wideman***, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996) ("[D]efense counsel may, on behalf of the defendant, admit a prior offense …").

¶14 Once a defendant has been convicted and the matter is at sentencing, "'[t]here is no presumption of innocence accruing to the defendant regarding the previous conviction,' but the accused must have an opportunity to challenge the existence of the prior offense." ***Id.*** at 105 (quoting ***State v. McAllister***, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982)). Stokes and his counsel certainly had every opportunity to indicate if there was any potential question about the accuracy of a November 2011 OWI conviction serving as the basis for Stokes' license revocation. They did not do so. More than that, counsel's exchange with

the court amounted to an acknowledgement that Stokes had a prior OWI conviction that resulted in the revocation of his license and was essentially a reference back to and tacit affirmation of the prosecutor's comments. Counsel's implicit admission and the entirety of the record demonstrate that neither counsel nor Stokes were in doubt that Stokes' OAR violation was properly charged as a criminal offense due to the revocation being one that was based upon Stokes' November 2011 OWI conviction. As a result, we conclude that the court had before it the competent proof necessary for it to sentence Stokes on this offense as it was charged.

By the Court.—Judgment and order affirmed.

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