COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1014-CR **Cir. Ct. No. 2014CT24**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RONALD MARSHALL JEWETT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions*.

¶1 HRUZ, J.[1] The State appeals a judgment convicting Ronald Jewett of first-offense operating a motor vehicle while intoxicated (OWI). While the

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

State successfully prosecuted the underlying OWI offense to a finding of guilt, the circuit court declined to convict and sentence Jewett for a third-offense OWI, as charged. Instead, the circuit court concluded Jewett had submitted sufficient "exculpatory" evidence regarding his two prior OWI convictions, both of which occurred in Minnesota in 1992 and for which the State of Minnesota no longer retains documents. The State argues the court erred in refusing to consider an unrebutted, certified driving record from the Wisconsin Department of Transportation (DOT) as sufficient proof of Jewett's two prior OWI convictions. We agree with the State, reverse Jewett's conviction for first-offense OWI, and remand for the circuit court to enter a judgment of conviction for third-offense OWI and to conduct a new sentencing hearing as well as any other necessary proceedings.

BACKGROUND

¶2 In February 2014, Jewett was arrested and ultimately charged with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as third offenses. The facts surrounding the underlying offense and arrest are largely immaterial to this appeal and we therefore do not set them forth in detail. Following a bench trial, the circuit court found Jewett guilty of OWI, but it convicted and sentenced him only for a first, not a third, OWI offense.

¶3 During the trial, the State offered a certified driving record from the Wisconsin DOT as evidence of Jewett's OWI repeater status. The driving record indicates that Jewett has two previous Minnesota OWI convictions, both occurring in 1992. Jewett objected to the exhibit's admission, arguing Wisconsin "has no authority, no duty, no jurisdiction, over the State of Minnesota so that it can't certify anything relative to accuracy or anything else," and the record was "not a

record that was in fact compiled in the State of Wisconsin under some duty thereby making it some certified record or public record."

¶4 Jewett also offered a letter from the Ramsey County (Minnesota) Clerk of Court, which stated: "After a search of our records, we have determined that no documents remain on these cases as they are past retention. Ramsey District Court has no further information regarding this matter." Jewett argued that because Minnesota no longer kept records of the cases, his two Minnesota OWI convictions should not be counted for OWI repeater purposes. The circuit court asked Jewett's attorney, "Is this a collateral attack motion or something?" to which counsel responded, "Right." The State objected to Jewett's exhibit on relevance grounds. It also argued Wisconsin case law establishes that a Wisconsin DOT certified driving record is admissible and sufficient for the State to meet its burden of proving a defendant's OWI repeater status, including for prior offenses in another state.

¶5 The circuit court admitted into evidence both the State's proffered certified Wisconsin DOT driving record for Jewett and the Ramsey County letter. It then concluded that, without the original court records from the prior OWI cases, defendants such as Jewett do not have a means of collaterally challenging allegations of such prior convictions. The court indicated it would have preferred to have heard this issue as a motion before trial,[2] but it ultimately concluded that

[2] Seven months before the trial (and four months before the originally scheduled trial date), Jewett moved to reduce the charged offense to a first-offense OWI, arguing only "that the original [1992] records – whatever they are – are destroyed in that the State of Minnesota destroys records after 10 years." The State filed a written objection to that motion, arguing it was both undeveloped and untimely. The record does not indicate the circuit court ever addressed Jewett's motion prior to trial.

"under the collateral attack cases and rules I have to throw out … the two old 1992 Minnesota convictions because there's no way this defendant can adequately challenge those because there's no records left." The court did not mention particular cases or rules involving collateral attacks in reaching this conclusion.

¶6 The State further argued that if Jewett was bringing a collateral-attack motion, the State was entitled to an ***Ernst***[3] evidentiary hearing upon a finding that Jewett made a prima facie showing. The circuit court stated, "I agree. I can't disagree …. But this … beyond a reasonable doubt is your burden. And they have submitted exculpatory evidence to me. I am exercising my discretion to eliminate the two Minnesota convictions." The court then convicted Jewett of OWI as a first offense. The State now appeals the circuit court's ruling that Jewett should be convicted and sentenced only for a first-offense OWI, instead of a third-offense OWI.

DISCUSSION

¶7 The State argues the circuit court erred as a matter of law in refusing to consider Jewett's certified Wisconsin DOT driving records as sufficient evidence of his two prior OWI convictions. While contesting the State's argument in this regard, Jewett also argues the Double Jeopardy Clauses in both the Wisconsin and federal constitutions foreclose the State from obtaining the relief it seeks in this appeal. Because we typically reach questions of a constitutional dimension only when necessary, *see* ***Labor & Farm Party v. Elections Bd., State***

[3] ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92.

of Wis., 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984), we first address the State's argument of error.

I. The circuit court erred in refusing to accept the State's unrebutted evidence of Jewett's prior OWI convictions as provided in the certified Wisconsin DOT records.

¶8 The basis upon which the circuit court refused to convict and sentence Jewett for third-offense OWI is somewhat unclear. It appears the court, as a matter of law, either deemed Jewett's Wisconsin DOT certified driving record insufficient proof of his prior OWIs for purposes of WIS. STAT. § 343.307(1), or it determined that such prior convictions cannot be counted when the original record documents of those convictions no longer exist—ostensibly because the absence of those documents either inhibits or forecloses a defendant from collaterally attacking those convictions. In reaching either conclusion, the circuit court believed it was acting within the scope of its discretion.[4] We agree with the State that either conclusion ignores established case law and is otherwise erroneous.

[4] We do not believe that either rationale is subject to review for an erroneous exercise of discretion. This case does not turn on the admissibility of evidence, which is a matter within the circuit court's discretion. *See* ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. Rather, it appears that the circuit court's determination was based on either its interpretation and application of WIS. STAT. § 343.307(1), or its perceptions of judicial policy derived from an unidentified legal source. In either case, we review the matter de novo. *See* ***Konneker v. Romano***, 2010 WI 65, ¶24, 326 Wis. 2d 268, 785 N.W.2d 432 (interpretation and application of statutes reviewed de novo); ***State v. Barman***, 183 Wis. 2d 180, 188, 515 N.W.2d 493 (Ct. App. 1994) (whether circuit court applied proper legal standard presents a question of law). However, given the murky nature of the circuit court's rationale, we feel compelled to add that, to the extent the court was exercising its discretion and/or making a finding of fact, it erroneously exercised its discretion by misapplying the law and/or made a clearly erroneous finding of fact in concluding the State failed to meet its burden of proof. *See* ***State v. Kucharski***, 2015 WI 64, ¶¶9, 23, 363 Wis. 2d 658, 866 N.W.2d 697 (clearly erroneous standard applies to review of a court's findings of fact; circuit court's misapplication of the law constitutes an erroneous exercise of discretion).

¶9 Under Wisconsin's OWI penalty scheme, second and subsequent OWI offenses are crimes, subject to penalties that increase based on the number of a defendant's prior OWI-related violations. *See* WIS. STAT. § 346.65(2)(am)2.–7.; ***State v. Verhagen***, 2013 WI App 16, ¶18, 346 Wis. 2d 196, 827 N.W.2d 891. A defendant's number of prior violations generally includes the number of convictions under WIS. STAT. §§ 940.09(1) and 940.25 during the defendant's lifetime, plus the total number of suspensions, revocations, and other convictions counted under WIS. STAT. § 343.307(1). *See* § 346.65(2)(am). In turn, § 343.307(1)(d), as relevant here, provides a court "shall count" convictions under the law of another jurisdiction that prohibit a person from "using a motor vehicle while intoxicated."

¶10 The fact of a prior OWI violation is not an element of the crime of second- or greater-offense OWI. ***State v. McAllister***, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). Nonetheless, for the circuit court to impose an enhanced penalty under WIS. STAT. § 346.65(2), "the State must establish the prior offense," ***State v. Wideman***, 206 Wis. 2d 91, 104, 556 N.W.2d 737 (1996) (citing ***McAllister***, 107 Wis. 2d at 539), and that offense must be proven to the court beyond a reasonable doubt, *see* ***State v. Saunders***, 2002 WI 107, ¶3, 255 Wis. 2d 589, 649 N.W.2d 263. The State can establish a prior offense through "appropriate official records or other competent proof." ***Wideman***, 206 Wis. 2d at 108. Finally, the fact of prior OWI convictions is to be proven at sentencing. *See* ***State v. Matke***, 2005 WI App 4, ¶9, 278 Wis. 2d 403, 692 N.W.2d 265.

¶11 The most-relevant decision regarding repeat OWI offenses for purposes of this case is ***State v. Van Riper***, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156. There, we held, without qualification, that a certified driving record from the Wisconsin DOT is "admissible and sufficient" to prove a

defendant's OWI repeater status beyond a reasonable doubt. ***Id.***, ¶16; *see also* ***id.***, ¶21.

¶12 In ***Van Riper***, the defendant had two prior OWI convictions, one from Minnesota and the other from Wisconsin. ***Id.***, ¶5. The State offered Van Riper's certified Wisconsin DOT driving record, which showed these convictions, as proof of his prior OWIs. ***Id.*** This court held that the circuit court properly admitted this evidence and that "such evidence established Van Riper's repeater status as an element of the offense beyond a reasonable doubt." ***Id.***, ¶21. We further stated that "certainly a certified DOT driving record is admissible and sufficient to prove the status of an alleged repeat offender in a PAC prosecution." ***Id.***, ¶16 (citing and discussing ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996)). Specifically, we stated, "[h]ere, a certificate bearing the State of Wisconsin DOT seal and the signature of the [Department of Motor Vehicles] administrator accompanies Van Riper's DOT driving record. Both Wisconsin case law and statutes support the admission of this certified document as proof of Van Riper's prior convictions at trial." ***Id.***, ¶18. Moreover, we concluded the fact "[t]hat one of Van Riper's convictions occurred in Minnesota does not change our decision." ***Id.***, ¶19 (noting that the Wisconsin DOT is statutorily required to maintain a record of all matters that affect the counting of prior convictions for PAC purposes).

¶13 ***Van Riper*** controls the sufficiency of the State's proof of Jewett's prior OWI convictions. The State offered, and the circuit court accepted into evidence, Jewett's certified Wisconsin DOT driving record. As in ***Van Riper***, the record contains the official seal of the Wisconsin DOT and the signature of the administrator. The certified record indicates Jewett had two OWI violations in Minnesota, with offense dates of July 1, 1992, and September 26, 1992, and

conviction dates of July 14, 1992, and December 29, 1992, respectively. It is irrelevant that these convictions are from Minnesota. *See* ***id.***, ¶19.

¶14 To be sure, a defendant is permitted to challenge the existence of penalty-enhancing prior convictions. ***McAllister***, 107 Wis. 2d at 539; *see also* ***Wideman***, 206 Wis. 2d at 108 ("Defense counsel should be prepared at sentencing to put the State to its proof when the [S]tate's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses."). Here, Jewett offered no evidence rebutting the fact of the prior OWI convictions. If anything, the Ramsey County letter is indicative that such convictions exist, at least in the sense it supports the existence of cases from 1992 corresponding to those listed in Jewett's driving record. Furthermore, it is irrelevant for the State's burden that the Minnesota records were destroyed; this fact alone does not demonstrate the Wisconsin certified driving record was incorrect.

¶15 The circuit court deemed the Ramsey County letter as "exculpatory" and purported to exercise its discretion "to eliminate the two Minnesota convictions." If so, such an exercise of discretion is plainly contrary to the law and against the great weight and clear preponderance of the evidence, and thus clearly erroneous. In this regard, it is important to keep in mind the procedural posture of this case at the time of the court's ruling. The State had already successfully proved its case against Jewett as to the underlying, current OWI offense. The issue, then, was Jewett's repeater status for purposes of how he should be convicted and sentenced for the present OWI violation. Pursuant to ***Spaeth***, ***Van Riper*** and their progeny, the State's unrebutted, certified Wisconsin DOT driving record was sufficient to prove beyond a reasonable doubt that Jewett had two prior, countable OWI convictions. *See* ***Van Riper***, 267 Wis. 2d 759, ¶16; ***Spaeth***, 206 Wis. 2d at 153.

¶16 It is possible to construe the circuit court's ruling not as a sufficiency of the evidence issue, but rather as the court purporting to exercise its discretion not to permit the use of a certified driving record for penalty-enhancement purposes when there are demonstrated concerns regarding a defendant's right to collaterally attack prior OWI convictions. Indeed, Jewett's attempt to distinguish ***Van Riper*** in his brief is based only on this second possible interpretation of the circuit court's ruling. Namely, Jewett argues the circuit court correctly concluded, albeit implicitly, that the holding in ***Van Riper*** does not apply—or at least a circuit court can apparently exercise its discretion so as not to apply it—when the original record documents of prior OWI convictions no longer exist. In Jewett's view, the absence of those documents affects a defendant's ability to successfully attack those convictions.

¶17 This argument fails for two related reasons. First, on a collateral attack, the burden initially falls on the defendant to successfully make a prima facie showing that his or her constitutional right to counsel was violated in the course of the prior conviction. *See* ***State v. Ernst***, 2005 WI 107, ¶¶25-27, 283 Wis. 2d 300, 699 N.W.2d 92. That the records in Jewett's prior OWI cases are not retained, and that their absence may make Jewett's proof more difficult, are not compelling reasons to ignore ***Van Riper*** and other established case law. We are aware of no authority in support of a circuit court exercising its discretion in this manner, and Jewett cites none. Jewett was still permitted to testify and to call other witnesses (including his prior counsel), to the extent they are available, to testify at the hearing in an attempt to successfully make a prima facie case collaterally attacking either or both of his two prior OWI convictions. The right to collaterally attack a prior OWI conviction does not entail a corresponding right to access all, or even most, of the evidence that would best facilitate such an attack.

¶18 Second, a collateral attack only arises *if* the State has first successfully proved the fact of the prior OWI convictions. As established above, the State did so here, but Jewett's submissions failed to establish a prima facie case supporting any purported collateral attack. The circuit court seemingly conflated these two concepts so as to superimpose on the State a dual burden. It appears the court determined the State was required not only to prove the fact of the prior convictions, but it also needed to address a presumptive and hypothetical collateral attack by Jewett on some heretofore unarticulated factual basis, in which the prior convictions were unconstitutionally obtained because Jewett's right to counsel was violated. This approach will not do. The time to determine the merit of a collateral attack against proven prior OWI convictions is if and when such an attack is put forth, which never actually occurred in this case.

II. The State's appeal does not violate constitutional protections against double jeopardy.

¶19 Alternatively, Jewett argues the State's appeal, if successful, would violate his constitutional protections against double jeopardy.[5] He contends the State cannot argue on appeal that it presented "sufficient evidence" of Jewett's prior OWI convictions after the circuit court has already convicted and sentenced Jewett of "a lesser offense." We disagree.

¶20 "Whether an individual has been twice placed in jeopardy for the same offense in violation of the Fifth Amendment to the United States

[5] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Similarly, the Wisconsin Constitution provides, "no person for the same offense may be put twice in jeopardy of punishment …." WIS. CONST. art. 1, § 8.

Constitution and art. I, § 8 of the Wisconsin Constitution is a question of law." ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998) (citations omitted). Under both the federal and Wisconsin constitutions, "[t]he double jeopardy clause embodies three protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." ***Id.*** at 401 (quotations and citations omitted); *see also* ***Monge v. California***, 524 U.S. 721, 727-28 (1998) (citing ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969)). Jewett does not clearly specify which of these protections he believes are implicated by the State's appeal, but they appear to be one or both of the first two protections.[6] His argument is more generally stated. Namely, he asserts the State is making a "sufficiency of the evidence" argument in this appeal, and a prosecutor cannot challenge the sufficiency of the evidence after an acquittal without violating constitutional protections against double jeopardy. *See* ***Sanabria v. United States***, 437 U.S. 54, 68-69 (1978). While such an argument may be powerful in certain, if not many, circumstances, it is inapt to the context of this case.

¶21 We first note that Jewett does not cite any authority directly supporting his argument, particularly cases involving the germane contexts of either subsequent OWI offenses or the application of repeat-offender penalty enhancers more generally. We may decline to review arguments unsupported by

[6] Because Jewett does not develop any argument for how a remand would result in "multiple punishments" and thereby violate the Double Jeopardy Clauses, we do not address that issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review inadequately briefed issues).

citations to legal authorities. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶22 In any event, his argument fails on the merits for two reasons. First, Jewett *was* convicted of OWI; there was no acquittal in this case. The underlying OWI offense, and Jewett's guilt in that regard, will not change. Second, and related, the State does not seek a second prosecution for the same OWI offense. Rather, it seeks proper sentencing and punishment of *this* OWI offense. While Jewett concedes that prior convictions necessary to establish an OWI defendant's repeater status are "not an element of the offense," *see* ***McAllister***, 107 Wis. 2d at 538, he refuses to acknowledge that those prior convictions relate only to the punishment available for a successive OWI conviction, ***Matke***, 278 Wis. 2d 403, ¶9, and that double jeopardy does not apply to sentencing decisions, *see* ***United States v. Rosales***, 516 F.3d 749, 757-58 (9th Cir. 2008) (citing ***United States v. Booker***, 543 U.S. 220, 267 (2005)) ("The Double Jeopardy Clause does not prohibit the government from appealing a sentencing ruling that does not result in acquittal."). Here, the "sufficient evidence" to which the State points—i.e., Jewett's certified Wisconsin DOT driving record—is only relevant to the enhanced penalty and sentence for this particular OWI violation of which Jewett is—and remains—guilty.

¶23 All the State seeks on remand is that Jewett's OWI offense be adjudged and sentenced as a third-offense OWI, because the State met its burden, as a matter of law, of proving Jewett's two prior OWI convictions. Because the State met this burden, enhancement of Jewett's penalties is statutorily mandated. *See* WIS. STAT. §§ 346.65(2)(am), 343.307(1). As explained earlier, the circuit court erred as a matter of law by not convicting and sentencing Jewett for OWI as

a third offense. Correcting this error does no violence to Jewett's constitutional protections against double jeopardy.

By the Court.—Judgment reversed and cause remanded with directions.

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