COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP586 **Cir. Ct. No. 2013CT1592**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSEPH C. RISSE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: MARC A. HAMMER, Judge. *Reversed and cause remanded for further proceedings*.

¶1 STARK, P.J.[1] The State of Wisconsin appeals a judgment convicting Joseph Risse of operating while intoxicated (OWI) as a first offense.

[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.

The State argues the circuit court erred by admitting Risse's uncertified and unauthenticated records and by finding those records rebutted the State's proof that this was Risse's second conviction for a countable OWI-related offense. Even if we assume the circuit court properly admitted the records, we conclude its finding that Risse did not have a prior conviction goes against the great weight and clear preponderance of the evidence. The judgment is therefore reversed and the cause remanded for further proceedings.

BACKGROUND

¶2 The State filed a criminal complaint charging Risse with second-offense OWI, second-offense operating with a prohibited alcohol concentration (PAC), and endangering safety by use of a dangerous weapon—possession of a firearm while intoxicated. The State initially alleged Risse previously was convicted of OWI on April 12, 2006. However, the State amended the complaint, alleging Risse instead was convicted of OWI on April 10, 2008, in Connecticut, with an offense date of March 11, 2008. The State later submitted Risse's State of Wisconsin, Department of Transportation (DOT) certified driving record abstract and argued Risse had been convicted of an implied consent violation in Connecticut on April 10, 2008.

¶3 Risse filed a joint motion to suppress and to dismiss, arguing, in part, that he had no prior countable convictions. Risse attached four documents to support his argument: (1) a letter from the State of Connecticut, Department of Motor Vehicles; (2) a printout from the State of Connecticut, Judicial Branch, Criminal/Motor Vehicle Convictions online database, showing no records were found for a search of the name "Risse, J."; (3) a second printout from the same database, showing no records were found for a search of docket number

M09M-MV08-0043289-S; and (4) a letter from the State of Connecticut, Superior Court, Records Center.[2]

¶4 The State, in a brief opposing Risse's motion, argued in part that Risse had a prior implied consent conviction. Risse's State of Wisconsin, DOT certified driving record abstract, which indicated Risse had a previous implied consent conviction in Connecticut, was attached to the brief.

¶5 During the motion hearing, the circuit court concluded the State was allowed to present Risse's certified driving record abstract to establish the prior offense. The court explained:

> To the extent that the defense takes challenge on [sic] the admissibility of the certified public record, that's a foundational question. But I don't think it bars the State from using that form of evidence. And, quite frankly, if the defense believes that the certified record is wrong, the avenue is to attack the certified record, seek some type of reopening, adjustment, correction, amendment, vacation, but I cannot bar the State from presenting that evidence as to a second, and I'm going to allow them to do that.

The court, however, did not make a finding at that time regarding whether Risse had a prior countable conviction. The case proceeded to a bench trial.

¶6 At the continued bench trial, Risse entered a plea of no contest to second-offense OWI, reserving the opportunity to contest the State's evidence of a

[2] The State references the letter from the State of Connecticut, Superior Court, Records Center in its appellate brief. Risse, in his appellate brief, states "there is no indication that this document was either introduced by Risse or relied upon by the trial court at sentencing." However, Risse submitted this document as an attachment to his joint motion to suppress and to dismiss. The circuit court also referenced the parties' briefing before finding Risse did not have a prior conviction. *See infra* ¶7.

prior countable conviction. The court dismissed the PAC count, and dismissed and read in the endangering safety count.

¶7 The court then heard arguments on whether the conviction should be treated as a second offense, after noting it had "passing familiarity with the arguments based on the briefing." The State again submitted Risse's certified driving record abstract as proof that Risse had a prior countable conviction, and argued Risse's previously submitted documents did not rebut this proof. To rebut the presumption of a prior offense, Risse again submitted the printout from the online database with the name search results and the letter from the State of Connecticut, Department of Motor Vehicles. Risse also submitted a letter from the United States Department of Transportation, National Highway Traffic Safety Administration (NHTSA) indicating Risse's "privilege to drive in Wisconsin is *valid*"; a printout from the NHTSA website describing its mission; and a Michigan Department of State, Bureau of Branch Office Services Request Report indicating Risse had "no prior ... alcohol related convictions within the time frames requiring plate confiscation." (Formatting changed.) The State objected to the admissibility of these documents.

¶8 The circuit court excluded the Michigan document, but it found the remaining documents "create[d] a question" as to whether the 2008 implied consent conviction should be counted. The court concluded it could not find beyond a reasonable doubt that the current charge was a second-offense OWI. The court explained:

> The website that the counsel directed me to is helpful. I have no reason to believe it's any less accurate than Wisconsin CCAP system. I don't immediately assume it's more accurate, but, clearly, it gives me more information that leads me to question whether or not this is a conviction that should be counted.

> ... Certainly, I could count this conviction for purposes of counting an OWI second. The law allows me to do that. And the [S]tate of Wisconsin isn't bound by a deferred judgment agreement or deferred prosecution agreement that was entered into by the defendant in the [S]tate of Connecticut.
>
> What I don't know is the basis for him entering into that consent decree. I don't know the strength or weakness of the case in Connecticut. I don't know why he entered into that deferred judgment agreement. I don't know if there was a question about whether or not the State could have met all of the elements in the case. I can't retry that Connecticut case. If the result of the deferred judgment agreement being successfully completed, if the effect is there is no conviction, I have a hard time in simply ignoring that.

The State, apparently believing the court had addressed only a prior OWI conviction, asked the court to make a record as to why it was not counting the 2008 implied consent conviction. The following discussion ensued:

> [Court:] I mean, that's what's showing on the abstract that [the State] provided me, the certified record. I certainly would make a finding that as relates to the certified record, the certified record indicates a conviction in 2008 for an implied consent violation.
>
> And I'm assuming that the State is using that conviction as the basis to present a charge of operating motor vehicle while intoxicated, second offense. Is that what you're asking me to find because that's true?
>
> [State:] That's correct. Your Honor, you had ruled on the Connecticut documents, and they addressed the OWI because they had a different file number and different dates. Part of the State's argument had also been premised, rather, that it was the implied consent conviction that was the basis for [sic] the Connecticut documents submitted by [Risse] did not address the implied consent conviction.
>
> [Court:] I couldn't find any conviction in the Connecticut documents. It's not just implied consent. I don't know how Connecticut treats that. I'm assuming if he was convicted of it, it would show because that's, that's what the Department of Transportation Wisconsin is showing.

> ....
>
> [Defense:] What [the State] is referring to is a document—one of the two Connecticut documents, one from the Department of Motor Vehicles, that did reference an OWI conviction. However, the court is absolutely right. All the other documents, including the second document, the court searched the online computer search. That presents all criminal and traffic offenses which would certainly include implied consent violation. That form as well as all the other documents include no reference to an implied consent. So I understand [the] Court's position.
>
> [Court:] Okay. With that being said, what's the State's position on sentencing for OWI first?

The court sentenced Risse for first-offense OWI, a civil forfeiture. The State now appeals.

DISCUSSION

¶9 The State argues the circuit court erred by admitting Risse's uncertified and unauthenticated documents and by determining those documents rebutted the State's proof of Risse's prior conviction. Even if we assume the court properly admitted Risse's documents, we nonetheless conclude the court erroneously found Risse had no prior convictions.

¶10 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 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 § 343.307(1). *See* sec. 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 refusing chemical testing (i.e., an implied consent violation, *see* WIS. STAT. § 343.305(10)).

¶11 The fact of a prior violation is not an element of the crime of 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. Here, the State submitted a Wisconsin certified driving record abstract as proof of Risse's prior conviction. The certified record indicates Risse had an implied consent violation in Connecticut, with an offense date of March 11, 2008, and a conviction date of April 10, 2008. This certified record was sufficient to provide proof beyond a reasonable doubt that Risse had a prior countable conviction. *See* ***State v. Spaeth***, 206 Wis. 2d 135, 153, 556 N.W.2d 728 (1996).

¶12 A defendant nonetheless is permitted to challenge the existence of penalty-enhancing 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, Risse submitted six documents to rebut the State's proof. The court excluded one of the documents Risse submitted, but it relied upon the other

documents to determine the existence of the prior implied consent violation could not be verified.

¶13 "It is within the purview of the fact finder to say what facts the evidence supports ...." ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶38, 319 Wis. 2d 1, 768 N.W.2d 615. We uphold a circuit court's findings of fact unless those findings are clearly erroneous. ***Id.***, ¶34. A circuit court's findings of fact are clearly erroneous if they go against the "the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting ***State v. Sykes***, 2005 WI 48, ¶21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277). Contrary to the circuit court's finding, however, none of the documents Risse submitted directly address the implied consent conviction.

¶14 First, Risse submitted a letter from the State of Connecticut, Superior Court, Records Center, which references docket number M09M-MV08-432892-S with a disposition date of March 27, 2009. The letter states, "In regards to the above-captioned matter, under Section 54-142a of the Connecticut General Statutes there is no public record. Please be advised that this case has been physically destroyed in accordance with Section 7-13 of the Connecticut Practice Book."[3] According to the Wisconsin certified driving record abstract, Risse was

[3] The information in this letter is consistent with information Risse submitted to the circuit court during the period of time when he appeared pro se, prior to his no-contest plea. In particular, Risse submitted a letter to the circuit court in which he explained, "In 2008, there was a criminal proceeding, in which I was charged with a DUI under [CONN. GEN. STAT.] § 14-227a as well as had the DMV administrative process." According to Risse, his license was suspended as a result of an administrative finding, but he completed an alcohol education program in Connecticut, which resulted in a dismissal of the criminal charges. In his letter, Risse provided a copy of what appears to be a screen print of a database showing Risse was charged with illegal operation of a motor vehicle while under the influence of alcohol or drugs in a Connecticut case, docket number M09M-MV08-0432892-S, and that the case was disposed of as a "Non-Disclosable Nolle" on March 27, 2009, based on his participation in an alcohol education program. CONNECTICUT GEN. STAT. § 54-142a (2015), in relevant part, states:

(continued)

convicted of an implied consent violation on April 10, 2008, not March 27, 2009. While this letter from the Records Center suggests Risse had another case with a disposition date of March 27, 2009, in which the records were destroyed, it states nothing regarding the April 10, 2008 implied consent conviction. Moreover, that the records were destroyed does not demonstrate the certified driving record abstract was incorrect.

¶15 Second, Risse submitted a letter from the State of Connecticut, Department of Motor Vehicles. That letter also references docket number M09M-MV08-0432892 and states: "Your file has been retrieved and reviewed as discussed 06/09/2014. No information is found on record for the above case, either in court records or in DMV records/files. There are no outstanding issues concerning your motor vehicle operating privilege in the State of Connecticut." (Formatting changed.) As with the letter from the Records Center, *see supra* ¶14, this letter addresses docket number M09M-MV08-0432892, which has a different disposition date than the implied consent conviction.

¶16 Third, Risse submitted a printout from the State of Connecticut, Judicial Branch online database, titled Criminal/Motor Vehicle Convictions—Search by Docket Number, showing no records were found for a search of docket number M09M-MV08-0043289-S. We note, this search query appears to contain a typographical error in that the docket number in the letters from the Records

---

> (c)(1) Whenever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased ....

Center and the Connecticut Department of Motor Vehicles ends in 432892. However, even if the docket number ending in 432892 had been entered, because that docket number involves a different disposition date than the implied consent conviction, any information regarding docket number M09M-MV08-0432892-S does not rebut the State's proof of the prior implied consent conviction.

¶17 Fourth, Risse submitted a printout from the same Criminal/Motor Vehicle Convictions online database, showing no records were found for a search of the name "Risse, J." At Risse's prompting, the court also viewed a notice on the same website, which states:

> **Notice:** Conviction information is generally shown on this website for no more than 10 years after the date of sentencing unless Section 7-13 of the Connecticut Practice Book provides for a shorter period of time in which case this information will be shown for the shorter period of time. ... Also:
>
> - Each criminal and motor vehicle charge which resulted in a conviction within the past 10 years is shown, including convictions resulting from unvacated forfeitures of bail or collateral deposited to secure a person's appearance in court in motor vehicle cases; unvacated forfeitures of bail or collateral deposited to secure a person's appearance in court in non-motor vehicle cases are ***not*** shown.
>
> - Youthful Offender cases; Juvenile Cases; and Infractions and Violation convictions are not shown.
>
> - Criminal history record information shown on this site may change daily due to erasures, corrections, pardons, and other modifications to individual criminal history record information. The Judicial Branch cannot guarantee the accuracy of the information except with respect to this date.

Criminal/Motor Vehicle Case Look-up, CONN. JUD. BRANCH, http://www.jud.ct.gov/crim.htm (last visited Nov. 27, 2015). While Risse argued,

during the hearing, that this online database contains "all criminal and traffic offenses which would certainly include implied consent violation[s]," it is not clear from the printout or this notice that convictions for implied consent violations would appear in the database and, if so, how long those records would remain there. Moreover, the notice indicates that "[t]he Judicial Branch cannot guarantee the accuracy of the information except with respect to this date." ***Id.*** In ***State v. Bonds***, 2006 WI 83, 292 Wis. 2d 344, 717 N.W.2d 133, the State attempted to satisfy the requirements of WIS. STAT. § 973.12 through the use of records from Wisconsin's online case management system, CCAP. ***Bonds***, 292 Wis. 2d 344, ¶¶33, 35. Our supreme court concluded a CCAP report containing a comparable disclaimer regarding the accuracy of the contents could not constitute prima facia proof that the defendant was a habitual criminal. *See* ***id.***, ¶49. Just as the State could not rely on the information in Wisconsin's CCAP database to prove a prior conviction, *see* ***id.***, the Connecticut database with a comparable lack of reliability was not properly used by the circuit court to question whether a conviction exists.

¶18 Finally, Risse submitted a letter from NHTSA, along with a printout from the NHTSA website describing the NHTSA's mission. The letter from NHTSA indicates, regarding Risse's driver's license number, "Wisconsin driver licensing officials have listed the *status as LICENSED*, which means the individual holds a Wisconsin license and the privilege to drive in Wisconsin is *valid*." The letter further states, "[I]t is the responsibility of the [s]tates to maintain the accuracy of the data submitted[,]" and "[t]he [s]tates maintain the sole responsibility for the issuance and renewal of all driver licenses; which includes suspension/revocation actions that have been taken against your driver privilege." This letter does not state whether Risse did or did not have a prior

countable conviction; it merely states his driver's license is valid. Additionally, the letter indicates each state is responsible for maintaining information about prior suspensions and revocations. In this case, the State of Wisconsin DOT reports Risse had a prior countable conviction.

¶19 The State presented sufficient proof that Risse had a prior implied consent conviction, and the documents submitted by Risse failed to rebut this conviction. The circuit court's finding that Risse should be convicted and sentenced for first-offense OWI goes against the great weight and clear preponderance of the evidence, and therefore is clearly erroneous. *See* ***Arias***, 311 Wis. 2d 358, ¶12. We therefore reverse the judgment of conviction and remand to the circuit court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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