COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1588-CR **Cir. Ct. No. 01-CT-0696**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAYTON T. VELDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Clayton Veldt appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense. He contends the trial court erroneously denied his collateral attack on his second offense. Specifically, he claims that the State had to prove, as an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

element of the second offense, that he had a prior offense and that the State did not and could not do so. Therefore, he reasons his second offense was void. We disagree and affirm the conviction.

BACKGROUND

¶2 This case involves three separate OWI offenses. Veldt's first arrest occurred on September 13, 1997. Before he was convicted for that offense, he was again arrested for OWI on October 18, 1997. On January 15, 1998, Veldt pled no contest and was convicted of the October 18 offense. Later that same day he was convicted of the September 13 offense. For sentencing purposes, the September 13 conviction was treated as a first offense. The October 18 violation was treated as a second offense.

¶3 Veldt was again arrested for OWI on July 14, 2001. He was charged with both OWI and driving with a prohibited alcohol concentration (PAC). He pled no contest to the OWI charge and was convicted on March 22, 2002. The PAC charge was dismissed. Sentence was imposed as a third offense.

¶4 Before pleading to the last OWI charge, Veldt filed an objection to consideration of the second conviction. He argued that a prior conviction is an element of criminal OWI. Because he had not yet been convicted of the first offense when he was convicted of the second offense, he claims an element of the second offense was missing. Therefore, he argued the second conviction was void and could not be considered in the present case.

¶5 The court overruled Veldt's objection. It determined that whether Veldt had two first offenses or a first and a second, the fact remained that he had a

total of two prior convictions, making his present case a third offense. Veldt appeals.

DISCUSSION

¶6 Veldt argues that in order to be convicted of OWI as a repeat offender, the State must prove prior convictions as an element of the offense. The fact of a prior conviction is what makes the offense a crime. He maintains that because he did not have a prior conviction when he was convicted of his second offense, the second offense is void and he cannot be convicted of a third offense.[2]

---

[2] Veldt alleged in his motion that his collateral attack is not barred by ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, *clarification upon reconsideration*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902. The sentence on the second offense has been served so Veldt reasons he has no means to directly challenge the conviction. The State did not contend otherwise in the trial court, nor does it challenge Veldt's argument on appeal, effectively conceding the point. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) ("When a respondent does not refute an appellant's argument, we may assume it is conceded.").

We note that ***Hahn*** stated it was establishing a bright-line rule:

> [A] circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction.

Hahn, 238 Wis. 2d 889, ¶28. However, the court also stated:

> If the offender has no means available under state law to challenge the prior conviction on the merits, because, for example, the courts never reached the merits of this challenge … or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence.

(continued)

¶7 The short answer to Veldt's argument is that it has already been rejected by our supreme court. The fact of a prior conviction is not an element of the criminal charge. ***State v. McAllister***, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses …." ***State v. Banks***, 105 Wis. 2d 32, 48, 313 N.W.2d 67 (1981).

¶8 Veldt asserts ***McAllister*** and ***Banks*** are based on "circular reasoning." Regardless of his criticism, we are bound by prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶9 Veldt further argues that changes in the statute since ***McAllister*** and ***Banks*** have undermined the rationale of those cases. He mentions the creation of the PAC offense. In particular, he identifies third and subsequent PAC offenses, which require proof of prior convictions as an element of the offense. Next, citing ***State v. Bohacheff,*** 114 Wis. 2d 402, 338 N.W.2d 466 (1983), he contends that PAC and OWI charges are the same offense. Therefore, he concludes that if prior convictions must be proved for PAC charges, they must also be proved for OWI charges.

Hahn, 241 Wis. 2d 85, ¶2 (citation omitted). Veldt does not claim his constitutional right to a lawyer was violated in the second offense proceedings. If Veldt's interpretation is correct, the exception will nearly swallow the rule. When a repeater provision is invoked, prior sentences have almost always been served. If that is a basis for an exception to ***Hahn's*** bright-line rule, the rule is essentially meaningless.

¶10 Veldt's syllogism contains a number of fallacies. First, PAC and OWI are not the same offense. ***Bohacheff*** held that there can only be one conviction when both PAC and OWI are charged. However, nowhere did the case call the two charges the same offense. In fact, the court recognized that PAC and OWI can be charged as separate counts and that each requires proof of a fact the other does not require. ***Id.*** at 410-11.

¶11 Furthermore, we are dealing here with a collateral attack on a second offense OWI. Even if OWI and PAC were the same offense, prior convictions are not an element of second offense PAC. Therefore, the same offense argument would not lead to the conclusion that prior convictions must be proved as an element of second offense OWI.

¶12 Veldt attempts to shore up his argument by relying on developments in the United States Supreme Court. Most particularly he relies on ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), in which the defendant was convicted of unlawful possession of a firearm. ***Id.*** at 469-70. After the conviction, the State requested to have the offense treated under a hate crime penalty enhancer. ***Id.*** at 470. The court found that the crime was motivated by hate and increased the defendant's sentence. ***Id.*** at 471. The Supreme Court reversed, holding that the hate factor should have been decided by a jury. ***Id.*** at 490-97. "A fact that increases a penalty beyond the maximum, other than the fact of a prior conviction, must be submitted to the jury." ***Id.*** at 490.

¶13 However, here we are dealing with precisely the exception recognized in ***Apprendi***: a prior conviction. According to ***Apprendi***, the fact of a prior conviction does not have to be submitted to the jury. Veldt responds by saying the exception does not apply because here the prior offense is the sole basis

on which criminal liability attaches. Without a prior offense, he contends, OWI is not criminal. Therefore, in order to be able to prosecute him as a criminal, the State must prove the prior offense as an element.

¶14 The problem is that ***Apprendi*** does not say that the State must prove the prior offense as an element. Veldt is arguing an extension of the ***Apprendi*** holding. In light of the explicit holdings in ***McAllister*** and ***Banks,*** we are not in a position to consider his argument.

¶15 Finally, Veldt claims that his second offense violated the ex post facto clause of the United States Constitution. He asserts that the offense was not criminal when it occurred because, at that time, he had not been convicted of the first offense.

¶16 There are two problems with Veldt's argument. First, it is premised on his previous argument that the prior offense is an element. Because the element did not exist at the time of the second conviction, he claims the second offense cannot be criminalized after the time of the violation. However, we have already rejected his premise—the prior offense is not an element.

¶17 Second, the supreme court has rejected a similar argument. In ***Banks***, 105 Wis. 2d at 51, the court held that these circumstances do not amount to an ex post facto violation.

By the Court.—Judgment affirmed.

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