COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2120-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN MISOVY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

FINE, J. Brian J. Misovy appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant as a third-offender. *See* §§ 346.63(1)(a) & 346.65(2), STATS. Misovy, who pled guilty, asserts two claims of trial-court error. First, he contends that the trial court should not have sentenced him as a third-offender because his two earlier convictions for drunk driving were for violations that were more than five, albeit less than ten,

years old. Second, he claims that the State did not adequately prove one of the convictions—a 1988 conviction from Tennessee. We affirm.

1. The criminal complaint in this case charged Misovy with driving his car on August 24, 1996, while under the influence of an intoxicant. The complaint alleged that as of that date Misovy had two prior convictions within the preceding five years. Misovy pled guilty to the August 24 drunk driving, but contested the State's ability to prove the two prior convictions. The matter was adjourned for sentencing.

Section 346.65(2)(b), STATS., provides, with an exception that is not relevant here, that a person convicted of drunk driving in Wisconsin is subject to a period of incarceration ranging from five days to six months "if the total number of ... convictions counted under s. 343.307(1) equals 2 in a 5-year period." On the other hand, § 346.65(2)(c), STATS., provides, with an exception that is not relevant here, that a person convicted of drunk driving in Wisconsin is subject to a period of incarceration ranging from thirty days to one year "if the total number of ... convictions counted under s. 343.307(1) equals 3 in a 10-year period." Section 346.65(2c), STATS., requires that the five- or ten-year period referenced in §§ 346.65(2)(b) & (c), STATS., "be measured from the dates of the ... violations that resulted in the ... convictions."

As we have seen, the criminal complaint here charged that Misovy was a third-offender because, according to the complaint, when arrested on August 24 he had two prior convictions within the preceding five years. This reference to a five-year period rather than a ten-year period was a mistake, however, because the section that uses five years as the measurement period, § 346.65(2)(b), STATS., only requires one prior conviction within that time as a

predicate for the enhanced penalty imposed by that section. Misovy understood this when he pled guilty. First, his lawyer (who also represents Misovy on this appeal) told the trial court that he recognized that the two prior drunk-driving convictions resulted from violations that predated the five-year period preceding the August 24 arrest. Second, Misovy's lawyer also told the trial court that he understood that the complaint's reference to a five-year period "[m]ust be" a mistake. Misovy, who was in court when his lawyer said these things, admitted in his pre-plea colloquy with the trial court that he knew all this as well:

> Now, Mr. Misovy, if the state is able to prove to me on the sentencing date that this offense on August 24th of 1996 is the third offense from January 1 of 1988 until August 24th of 1996, then the penalty that you face is the penalty that I have described to you.[1]
>
> Do you understand what I am saying?
>
> THE DEFENDANT: Yes, I do.

Misovy then pled guilty to driving on August 24 while under the influence of an intoxicant. Under these circumstances, Misovy's claim at his sentencing and on this appeal that the trial court was limited to what his lawyer acknowledged was a mistake in the complaint is without merit. *See* § 971.26, STATS. ("No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."); ***State v. Gerard***, 189 Wis.2d 505, 514, 525 N.W.2d 718, 721 (1995) (no error if, when defendant pleads guilty, he or she knows of potential penalty enhancement).

[1] The trial court previously described accurately the penalties imposed by § 346.65(2)(c), STATS. Misovy does not contend otherwise.

2. Misovy also claims that proof of the 1988 Tennessee conviction was inadequate. We disagree. The State presented to the trial court at the sentencing hearing certified copies of the following documents relating to the Tennessee conviction: a January 6, 1988, report of Misovy's blood-alcohol breath test, which showed a blood-alcohol content of .21%; his March 16, 1988, conviction for drunk driving on a form used by the Davidson County Metropolitan General Sessions Court; and Misovy's post-conviction application for an occupational-license permit, which referenced § 55-10-401 of the Tennessee Statutes as the provision applicable to convictions in that state for driving while intoxicated. Additionally, the State provided to the trial court a copy of the relevant Tennessee statutes, including § 55-10-401.[2] These documents taken together are sufficient under § 343.307(1)(d), STATS., to prove the 1988 Tennessee conviction, as the trial court found.[3] Misovy's argument that the documents were not formally received into evidence is without merit. They were considered by the

[2] These documents were made a part of the record, on the State's motion and without Misovy's objection, by this court's January 15, 1998, order.

[3] Section 343.307(1), STATS., provides:

> The court shall count the following … to determine the penalty under s. 346.65 (2):
>
> ….
>
> (d) Convictions under the law of another jurisdiction that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof, or with an excess or specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws.

As relevant here, § 55-10-401 of Tennessee Statutes makes it "unlawful for any person ... to drive ... any automobile ... while under the influence of any intoxicant."

trial court without Misovy's objection on that ground. Had he objected, the documents could have been formally received into evidence. By not objecting when an objection could have cured what Misovy now asserts is a defect, Misovy waived his right to claim on this appeal that the documents should have been received formally into evidence. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (Ordinarily, we will not consider arguments raised for the first time on appeal.).

By the Court.—Judgment affirmed.

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