COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP22-CR **Cir. Ct. No. 2015CT62**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KORY V. AMBROZIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Kory Ambroziak appeals a judgment of conviction for second-offense operating a motor vehicle while intoxicated (OWI). Ambroziak argues he was incorrectly sentenced for a second-offense OWI because at

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sentencing the State failed to establish the existence of a prior OWI-related offense beyond a reasonable doubt. We disagree and affirm.

¶2 A jury convicted Ambroziak of OWI. At the sentencing hearing, the State recommended Ambroziak be sentenced to second-offense OWI. The circuit court then discussed with Ambroziak's attorney Ambroziak's apparent prior conviction in Shawano County for refusing to submit to chemical testing, contrary to WIS. STAT. § 343.305(9)(A). Ambroziak's attorney asserted the State "should provide a driving record showing the prior convictions."

¶3 The State presented an uncertified Wisconsin Department of Transportation (DOT) driving record which indicated that on December 19, 2014, Ambroziak had a "Violation Appealed IC (Implied Consent [WIS. STAT. §] 343.305(9)(A))." The State also presented a CCAP[2] record indicating that on December 19, 2014, a judgment of conviction was entered against Ambroziak for the implied consent violation in Shawano County, which judgment this court affirmed upon determining that the refusal was unreasonable. Apparently, because the CCAP record showed the Shawano County conviction had been affirmed on appeal, the circuit court read from an opinion of this court, which the circuit court described as affirming a judgment convicting Ambroziak of a refusal in Shawano County.[3] Ambroziak did not present any counter evidence.

[2] The Consolidated Court Automation Programs (CCAP) is a case management system that "provides public access online to reports of activity in Wisconsin circuit courts." ***State v. Bonds***, 2006 WI 83, ¶6, 292 Wis. 2d 344, 717 N.W.2d 133.

[3] The copy of the court of appeals opinion the circuit court used is not part of the record. However, the circuit court described on record the trial docket number, the circuit judge, the date of decision, and the author of the opinion. Based on this information, it is clear the circuit court had before it ***County of Shawano v. Ambroziak***, No. 2015AP462, unpublished slip op. (WI App Sept. 22, 2015). We take judicial notice of our opinion. WIS. STAT. § 902.01.

¶4 The circuit court determined that Ambroziak's Shawano County conviction, affirmed on appeal, was a countable prior offense pursuant to WIS. STAT. § 343.307(1)(e). The court sentenced Ambroziak to 100 days in jail and a $1900 fine for second-offense OWI. Ambroziak appeals.

¶5 The sole issue before us relates to the evidentiary basis for Ambroziak's second-offense OWI sentence. Penalties for OWI violations are enhanced based upon how many previous OWI convictions a person has received. WIS. STAT. §§ 346.63(1), 346.65(2)(am); *see also* ***State v. Wideman***, 206 Wis. 2d 91, 98, 556 N.W.2d 737 (1996). A refusal to submit to chemical testing, the alleged offense here, is a countable prior offense. WIS. STAT. §§ 343.305(10), 343.307(1)(e).

¶6 Prior OWI-related violations are not elements of the crime of second or greater-offense OWI. *See* ***State v. McAllister***, 107 Wis. 2d 532, 538, 319 N.W.2d 865 (1982). Instead, the existence of any prior OWI-related offenses must be proven at sentencing. *See* ***State v. Matke***, 2005 WI App 4, ¶9, 278 Wis. 2d 403, 692 N.W.2d 265 (2004). Before the circuit court imposes an enhanced penalty, however, "the State must establish the prior [OWI-related] offense," ***Wideman***, 206 Wis. 2d at 104 (citing ***McAllister***, 107 Wis. 2d at 539), and that offense must be proven 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.

¶7 Ambroziak frames the issue on appeal as "whether a CCAP entry is competent proof of a prior countable OWI conviction." Although he concedes an uncertified copy of a DOT driving record may be sufficient proof of a prior

offense, *see* ***State v. Van Riper***, 2003 WI App 237, ¶¶15-17, 267 Wis. 2d 759, 672 N.W.2d 156, Ambroziak argues the DOT driving record here merely showed the conviction for a refusal was "Appealed." Discounting the driving record, Ambroziak then cites ***State v. Risse***, No. 2015AP586, unpublished slip op. (WI App Jan. 12, 2016),[4] for the proposition that a CCAP record is inadequate evidence of a prior OWI-related conviction.

¶8 In ***Risse***, we determined that the defendant failed to rebut the State's evidence of a prior OWI-related offense in another jurisdiction by merely submitting a database entry printout from the other jurisdiction for criminal and motor vehicle convictions showing no such offense under his name. ***Id.***, ¶¶16-17. Citing ***State v. Bonds***, 2006 WI 83, ¶49, 292 Wis. 2d 344, 717 N.W.2d 133, we explained that this database entry did not rebut the prior OWI-related offense "[j]ust as the State could not rely on the information in Wisconsin's CCAP database to prove a prior conviction." ***Risse***, No. 2015AP586, unpublished slip op., ¶17.

¶9 The State does not dispute Ambroziak's assertion that the CCAP record, standing alone, is not "competent proof" of an OWI offense. Rather, it asserts under "the totality of the evidence" at sentencing, the State proved Ambroziak had a prior countable offense under WIS. STAT. § 343.307(1). The State argues the uncertified DOT driving record, the court of appeals opinion, ***County of Shawano v. Ambroziak***, No. 2015AP462, unpublished slip op. (WI

[4] Unpublished one-judge opinions issued on or after July 1, 2009, may be cited for persuasive value. WIS. STAT. RULE 809.23(3)(b). However, both Ambroziak and the State cite and discuss ***State v. Risse***, No. 2015AP586, unpublished slip op. (WI App Jan. 12, 2016), without appending a copy of it to their appendices, which violates WIS. STAT. RULE 809.19(2)(a).

App Sept. 22, 2015), and the CCAP record presented at the sentencing hearing provided sufficient evidence of the prior countable offense. We agree with the State.

¶10 Ambroziak selectively focuses on the CCAP record. Unlike ***Risse***, No. 2015AP586, unpublished slip op., ¶17, the CCAP record was not admitted here solely to prove or disprove a prior OWI-related charge. Rather, viewing the sentencing documents collectively indicates three items of proof. First, according to the DOT driving record, Ambroziak had a judgment of conviction for an "Implied Consent" violation that was at some point pending on appeal. Second, that appeal had been resolved, and this court affirmed a judgment convicting Ambroziak of a refusal. ***County of Shawano***, No. 2015AP462, unpublished slip op., ¶1. Third, the judgment of conviction , as indicated on CCAP, stemmed from the proceedings reflected in both the DOT driving record and ***County of Shawano***. We conclude all of those documents, together, constitute "other competent proof" establishing that Ambroziak had been convicted of the prior implied consent violation beyond reasonable doubt.

¶11 In addition to the documentary evidence, we agree with the State that, at sentencing, Ambroziak acknowledged he had a prior conviction for refusing chemical testing for alleged OWI that was both appealed and affirmed. *Cf.* ***Wideman***, 206 Wis. 2d at 105 (defense counsel's admission on behalf of client is "competent proof" of a prior OWI-related offense under WIS. STAT. § 346.65(2)). Before the circuit court, Ambroziak's attorney stated he represented Ambroziak in the prior conviction in Shawano County. The attorney acknowledged the following in response to the circuit court's questions on the Shawano County case: (1) an OWI charge related to the arrest for the refusal was amended to reckless driving; (2) Ambroziak was found guilty of a refusal; (3) the

case was appealed to this court; (4) the appeal had been resolved and the refusal conviction upheld; and (5) the attorney signed a stipulation on behalf of Ambroziak with a Shawano County assistant district attorney acknowledging that a judgment of conviction was amended after being upheld on appeal. However, Ambroziak's attorney stated he was "not conceding or stipulating to anything" without his client's approval, and he requested the State put forth official records instead. While it is true that Ambroziak did not formally stipulate to the prior offense, his attorney's statements on record support the State's position.

¶12 We conclude the evidence at sentencing proved beyond a reasonable doubt that Ambroziak had a prior countable OWI-related offense. For that reason, the circuit court correctly sentenced Ambroziak consistent with second-offense OWI penalties.

By the Court.—Judgment affirmed.

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