COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP1261-CR **Cir. Ct. No. 2016CT412**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN A. BRAUNSCHWEIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] The circuit court convicted Justin Braunschweig of operating a motor vehicle while intoxicated (OWI) and with prohibited alcohol concentration (PAC), each as a second offense, and imposed

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

sentence on the second offense OWI count. Braunschweig appeals, arguing that the circuit court erred in sentencing him for second offense OWI because his previous conviction for OWI while causing injury as a first offense was expunged and, therefore, is a "nullity" that cannot be counted as a prior conviction when determining the penalty for OWI-related offenses. Braunschweig also argues that a certified DOT record reflecting that expunged conviction may not be introduced to prove the existence of a prior OWI-related conviction.[2] For the reasons below, I reject Braunschweig's arguments and affirm.

BACKGROUND

¶2 On September 2, 2016, a Lake Mills police officer arrested Braunschweig for OWI and PAC after the officer observed Braunschweig's vehicle cross over the center line of the road and a preliminary breath test revealed Braunschweig's blood alcohol concentration to be 0.16.

¶3 The State charged Braunschweig with OWI and PAC, each as a second offense. To support the charges as second offenses, the complaint alleged that Braunschweig's "driving record reflects (one) 1 prior conviction as counted under § 343.307(1), Wis. Stats., to wit: Operating While Intoxicated Causing Injury, 1st Offense (02/16/2011 violation; 10/31/2011 conviction)."

[2] Braunschweig also challenges the circuit court's holding that a prior conviction in second offense cases "is not an element that must be proved by the evidence beyond a reasonable doubt." However, on appeal, Braunschweig concedes that ***State v. McAllister***, 107 Wis. 2d 532, 319 N.W.2d 865 (1982) is controlling on that issue. Braunschweig explains that, should this case "make it to the Supreme Court, appellant wishes to preserve a good faith argument for the simplification of the applicable legal analysis by establishing that required predicate(s) should be treated as elemental in any criminal OWI/PAC case where their existence or continued validity is not stipulated to by the defense." Having observed that Braunschweig has preserved the issue, I do not address it further.

¶4 The State submitted to the circuit court a certified copy of Braunschweig's driving record maintained by the Wisconsin Department of Transportation (DOT), which reflected Braunschweig's 2011 OWI conviction. Braunschweig moved the circuit court to rule that: (1) the DOT record reflecting the 2011 conviction was insufficient to serve as the required predicate for a second offense OWI because the 2011 conviction had been expunged;[3] and (2) a prior conviction should be considered a status element in second offense cases that must be proven beyond a reasonable doubt.

¶5 The circuit court denied Braunschweig's motion and held "that under State vs. Vanriper [sic], the State is allowed to use the DOT record which has been submitted in this case to prove the existence of prior OWI or PAC convictions." The court also rejected Braunschweig's argument that a prior conviction was a status element that needed to be proven beyond a reasonable doubt. The case was then tried to the court, which convicted Braunschweig of second offense OWI and PAC and imposed sentence on the second offense OWI count, ordering Braunschweig to pay a fine and serve thirty days in jail.[4] Braunschweig appeals.

DISCUSSION

¶6 Braunschweig argues that the circuit court erred in sentencing Braunschweig for second offense OWI because his previous conviction for OWI while causing injury as a first offense was expunged and, therefore, is a "nullity"

[3] The parties do not dispute that the record of the 2011 conviction had been expunged.

[4] The circuit court stayed the sentence pending this appeal.

that cannot be counted as a prior conviction when determining the penalty for an OWI-related offense. Braunschweig also argues that a certified DOT record reflecting that expunged conviction may not be introduced to prove the existence of a prior OWI-related conviction. As explained below, I conclude that under the plain meaning of the statutes, an expunged conviction is a "conviction" to be counted when determining the penalty for OWI-related offenses, and that the State may present a certified DOT record that reflects an expunged conviction to prove the existence of a prior OWI-related conviction.

A. Standard of Review

¶7 Braunschweig's argument turns on the interpretation of various interrelated statutes, which presents questions of law that this court decides de novo. ***State v. Arberry***, 2018 WI 7, ¶14, ___ Wis. 2d ___, ___ N.W.2d ___. The purpose of statutory interpretation is to discern the intent of the legislature. ***Juneau Cnty. v. Associated Bank, N.A.***, 2013 WI App 29, ¶16, 346 Wis. 2d 264, 828 N.W.2d 262. When we interpret a statute, we begin with the statute's plain language, because we assume that the legislature's intent is expressed in the words it used. ***Id.*** "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, in relation to the language of surrounding or closely related statutes, and in a reasonable manner, to avoid absurd or unreasonable results. ***Id.***, ¶46. If, when employing these principles, the meaning of the statute is plain, then we apply that plain meaning. ***Id.***, ¶45.

B. Braunschweig's Expunged Conviction is a Prior "Conviction" That is Required to be Counted When Determining the Penalty for Drunk Driving

¶8 Braunschweig argues that when a conviction is expunged under WIS. STAT. § 973.015, it "is a nullity that can't be considered to enhance sentence" and, therefore, cannot be counted as a "conviction" under WIS. STAT. § 343.307(1). The plain meaning of the statutory language indicates to the contrary. I conclude that under the plain meaning of the pertinent statutes, a conviction expunged under WIS. STAT. § 973.015 is a "conviction" within the meaning of WIS. STAT. § 340.01(9r), which must be counted as a prior conviction under WIS. STAT. § 343.307(1), to determine the penalty for sentencing under WIS. STAT. § 346.65(2)(am).

¶9 I first summarize the analysis that follows. Following an OWI-related conviction, a circuit court shall count prior "convictions" under WIS. STAT. § 343.307(1) to determine the penalty for sentencing under WIS. STAT. § 346.65(2)(am); "[c]onviction" is defined in WIS. STAT. § 340.01(9r) as "an unvacated adjudication of guilt"; a circuit court is authorized to expunge the court record of a conviction under WIS. STAT. § 973.015. Reading these statutes together, I conclude that because the expunction statute does not authorize a court to vacate the conviction, the expunged conviction remains "an unvacated adjudication of guilt," and is therefore a conviction that must be counted to determine the penalty for sentencing following an OWI-related conviction.[5]

¶10 I now proceed with the analysis.

[5] I follow our Supreme Court's recent decision using "expunction" rather than "expungement." ***State v. Arberry***, 2018 WI 7, ¶1 n.2, ___ Wis. 2d ___, ___ N.W.2d ___.

¶11 Relevant here, individuals are prohibited from operating a motor vehicle while under the influence of an intoxicant rendering the driver incapable of safely driving and/or with a prohibited alcohol concentration. WIS. STAT. § 346.63(1)(a) and (b).

¶12 Under Wisconsin's penalty scheme for OWI-related convictions, the first violation of WIS. STAT. § 346.63(1) results in a forfeiture; second and subsequent violations are crimes, and are subject to penalties that increase based on the number of prior OWI-related violations. WIS. STAT. § 346.65(2)(am)1.-7.; ***State v. Verhagen***, 2013 WI App 16, ¶18, 346 Wis. 2d 196, 827 N.W.2d 891.

¶13 The penalty for a second offense is described as follows: "if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other *convictions counted under s. 343.307(1)* within a 10-year period[ ] equals 2," the individual shall be fined between $350 and $1,100, and imprisoned between five days and six months. WIS. STAT. § 346.65(2)(am)2. (emphasis added).

¶14 WISCONSIN STAT. § 343.307(1)(a), in pertinent part, provides that a court "shall count ... *[c]onvictions* for violations under s. 346.63(1)." (Emphasis added.)

¶15 Thus, a circuit court shall count the number of convictions for OWI-related offenses in order to determine the appropriate penalty at sentencing. WIS. STAT. § 343.307(1); *see also* WIS. STAT. § 346.65(2)(am).

¶16 WISCONSIN STAT. § 340.01 defines words and phrases that appear in WIS. STAT. chs. 340 to 349 and 351, "unless a different meaning is expressly

provided or the context clearly indicates a different meaning." Under WIS. STAT. § 340.01(9r),

> "Conviction" or "convicted" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of property deposited to secure the person's appearance in court, a plea of guilty or no contest accepted by the court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction.

¶17 This statute defines "conviction" broadly to include any unvacated adjudication of guilt or violation of the law. Notably, expungements are not exempted or excluded from this definition. WIS. STAT. § 340.01(9r). Nor does Braunschweig point to any statute that expressly provides a different meaning of the word "conviction" to be used in WIS. STAT. § 343.307, or that by its context "clearly indicates a different meaning." WIS. STAT. § 340.01.

¶18 It is undisputed that Braunschweig's previously expunged first offense OWI conviction is the sole foundation for the State's second offense OWI charge. Expunction of a prior conviction is governed largely by WIS. STAT. § 973.015. Under that statute, if an individual satisfies the statutory criteria, "the court may *order at the time of sentencing that the record be expunged* upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition." WIS. STAT. § 973.015(1m)(a)1. (emphasis added). If a record of conviction is expunged, the court records for that case are destroyed by the clerk of court. ***State v. Allen***, 2017

WI 7, ¶41, 373 Wis. 2d 98, 890 N.W.2d 245 ("expunction requires the destruction of the court record of conviction").[6]

¶19 While the expunction statute provides for the expunction of the court record of conviction, Braunschweig points to no language stating that the conviction may be vacated so as not to fall within the above-quoted definition of conviction in WIS. STAT. § 340.01(9r).

¶20 Braunschweig's argument, that when a conviction is expunged it becomes a nullity that cannot be later counted to enhance a penalty at sentencing for an OWI-related violation, conflates the meaning of "vacate" and "expunge." As stated, a "conviction" means an "unvacated adjudication of guilt." WIS. STAT. § 340.01(9r). WISCONSIN STAT. § 340.01 does not define the term "unvacated" or "vacate." The relevant dictionary definition of "vacate" is "[t]o nullify or cancel; make void; invalidate." *Vacate*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see* ***Lemmer v. Schunk***, 2008 WI App 157, ¶10, 314 Wis. 2d 483, 760 N.W.2d 446 ("We may use a dictionary to establish the common meaning of a word.")

¶21 The expunction statute does not authorize a court to nullify, cancel, make void, or invalidate a conviction; rather, it authorizes a court to order "that the record be expunged." WIS. STAT. § 973.015(1m)(a)1. The relevant dictionary definition of "expunge" means "[t]o remove from a record, list, or book." *Expunge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[6] SCR 72.06 provides: When required by statute or court order to expunge a court record, the clerk of the court shall do all of the following: (1) remove any paper index and nonfinancial court record and place them in the case file; (2) electronically remove any automated nonfinancial record, except the case number; (3) seal the entire case file; (4) destroy expunged court records in accordance with the provisions of this chapter.

¶22 There are meaningful differences between these two terms: the term "vacate" concerns validity, an intrinsic characteristic of the conviction, whereas the term "expunge" concerns record visibility, an extrinsic characteristic of the conviction. Courts "presume that the legislature '[chose] its terms carefully and precisely to express its meaning.'" ***County of Dodge v. Michael J.K.***, 209 Wis. 2d 499, 504, 564 N.W.2d 350 (Ct. App. 1997) (quoted source omitted). The terms that the legislature chose here—to use "unvacated adjudications of guilt" in the definition of convictions to be counted under the OWI penalty statute, and to authorize a court to "expunge" the record of conviction in the expunction statute—express the plain meaning that unvacated expunged convictions are "convictions" to be counted under WIS. STAT. § 343.307(1).

¶23 Here, the record does not indicate that Braunschweig's expunged conviction was ever vacated. Accordingly, Braunschweig's previously expunged conviction is a "conviction" within the meaning of WIS. STAT. § 340.01(9r) because it is an unvacated adjudication of guilt, and that conviction may be counted under WIS. STAT. § 343.307(1) to determine the appropriate penalty at sentencing pursuant to WIS. STAT. § 346.65(2)(am).

C. The State may Present a Certified DOT Record That Reflects an Expunged Conviction to Prove the Existence of a Prior Drunk Driving Conviction

¶24 Braunschweig presents two arguments in support of his contention that the circuit court erred when it allowed the State to prove the existence of a prior conviction by submitting a certified DOT record that reflected his prior expunged conviction. I address and reject each argument in turn.

¶25 Braunschweig's first argument turns on language in WIS. STAT. § 343.23(2)(b) that, according to Braunschweig, limits how DOT may use the

record of convictions that it is required to maintain under WIS. STAT. § 343.23(2)(a). Braunschweig acknowledges that the expunction statute, WIS. STAT. § 973.015, by its own language "does not apply to information maintained by the department of transportation regarding a conviction that is required to be included in a record kept under s. 343.23(2)(a)." WIS. STAT. § 973.015. And, Braunschweig acknowledges that DOT is authorized to maintain a permanent record of Braunschweig's previously expunged conviction under WIS. STAT. § 343.23(2)(a), which provides that "[t]he department shall maintain a file for each licensee or other person containing … [an] abstract of convictions." However, Braunschweig argues that DOT's permissible use of that record is limited by WIS. STAT. § 343.23(2)(b), which provides that the information specified in § 343.23(2)(a) "must be filed by the department so that the complete operator's record is available for the use of the secretary in determining whether operating privileges of such person shall be suspended, revoked, canceled, or withheld, or the person disqualified, in the interest of public safety."

¶26 Braunschweig focuses on the phrase, "for use of the secretary," and reasons that "[i]f the legislature had intended those records to be used by anyone other than the DOT secretary for any purpose other than the one delineated in that statute, they would presumably have said so." However, such an interpretation is inconsistent with the plain language of the surrounding statutes, namely, WIS. STAT. § 343.24(1), which provides that "[DOT] shall upon request furnish any person an abstract of the operating record of any person. The abstract shall be certified if certification is requested." *See also* ***State v. Van Riper***, 2003 WI App 237, ¶17, 267 Wis. 2d 759, 672 N.W.2d 156 ("a defendant's driving record is a public record and is admissible as an exception to the hearsay rule pursuant to WIS. STAT. § 908.03(8)"). Accordingly, I reject Braunschweig's argument that

WIS. STAT. § 343.23(2)(b) contains limiting language preventing the State from introducing a certified DOT record as proof of Braunschweig's prior conviction.

¶27 Second, Braunschweig challenges "the [circuit] court's extension of ***Van Riper*** to conclude an expunged conviction remains sufficient to serve as a predicate offense merely because it still shows up on appellant's driving record." In ***Van Riper***, this court held that the circuit court properly admitted a certified DOT record to prove the defendant's prior OWI-related convictions. 267 Wis. 2d 759, ¶¶2, 21. Braunschweig argues that the circuit court's application of ***Van Riper*** to allow use of the certified DOT record to prove his prior conviction here, where that conviction had been expunged, "would preclude admission or consideration of any equally competent evidence that would rebut the continued existence of a conviction reflected on a DOT abstract." However, Braunschweig does not develop this argument or explain how the circuit court's application of ***Van Riper***'s holding would "preclude admission or consideration" of other competent evidence. Accordingly, I decline to consider it further. ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.")

D. The Circuit Court Did Not Run Afoul of ***State v. Leitner***

¶28 Braunschweig argues that under ***State v. Leitner***, 2002 WI 77, ¶¶43-44, 253 Wis. 2d 449, 646 N.W.2d 341, a "sentencing court cannot consider an offender's prior expunged record of conviction." However, ***Leitner*** did not involve predicate offenses. Rather, at issue in ***Leitner*** was whether "the circuit court erred in the sentencing proceeding when it considered information about the facts underlying the [defendant's expunged] records." ***Id.***, ¶42. Our supreme court held that

> the record referred to in WIS. STAT. § 973.015 is a court record and that § 973.015 does not direct district attorneys or law enforcement agencies to expunge their records documenting the facts underlying an expunged record of a conviction. We further conclude that the circuit court may consider, when sentencing an offender, the facts underlying a record of conviction expunged under § 973.015.

Id., ¶48. The ***Leitner*** court reasoned that "[a]lthough *court* records of expunged convictions cannot be considered by sentencing courts … a circuit court may consider the facts underlying a record of a conviction … because the facts of his prior behavior elucidate his character." ***Id.***, ¶44. (Emphasis added.)

¶29 Here, the circuit court did not run afoul of ***Leitner*** because it did not consider the court records of Braunschweig's expunged record of conviction, nor did it obtain the fact of Braunschweig's previous conviction from expunged court records. *See also* ***Allen***, 373 Wis. 2d 98, ¶43 ("Under ***Leitner***, a circuit court is permitted to consider not only those facts underlying the crime itself but also all of the facts underlying an expunged record of conviction provided those facts are not obtained from expunged court records."). Rather, the circuit court permissibly considered the fact of Braunschweig's prior conviction from a certified DOT record that DOT was statutorily authorized to maintain and to provide to the State upon its request, and to which the expunction statute does not apply. *See* WIS. STAT. §§ 343.23(a); 343.24(1); 973.015.

CONCLUSION

¶30 For the foregoing reasons, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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