COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2408-CR **Cir. Ct. No. 2015CM510**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN R. TIBBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: ROBERT J. SHANNON, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Benjamin Tibbs appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

as a second offense. Tibbs argues that the circuit court erred by counting a prior California offense for penalty enhancement purposes. I reject Tibbs' argument and affirm.

Background

¶2 It is undisputed that Tibbs was previously convicted of an intoxicated driving offense in California. Tibbs moved to bar consideration of that California offense in the instant case.

¶3 As support for his motion, Tibbs relied on a California court order that granted Tibbs relief from his California conviction. That order, addressed further below, stated that it was made under "[California] Penal Code § 1203.4 [and] § 1203.4a." I refer to this order as the "1203.4 order."

¶4 The circuit court denied Tibbs' motion. The court concluded that, under California law, the 1203.4 order did not "nullify" the California conviction and, therefore, the California offense remains countable under the applicable Wisconsin statutory provisions.

Discussion

¶5 As noted, Tibbs argues that the circuit court erred in counting the California offense for penalty enhancement purposes. I reject this argument for the reasons that follow.

¶6 Broadly speaking, the parties agree on the issue: whether Tibbs' California offense is a "conviction" within the meaning of the applicable Wisconsin statutory scheme. The applicable Wisconsin statutory language comes from several statutes and, as most pertinent here, provides that a "'[c]onviction' …

means an unvacated adjudication of guilt." *See* WIS. STAT. § 340.01(9r). The parties dispute whether Tibbs' California offense meets this Wisconsin definition. Whether Tibbs' California offense meets this statutory definition of "conviction" is a question of law for de novo review. *See* ***State v. Carter***, 2010 WI 132, ¶19, 330 Wis. 2d 1, 794 N.W.2d 213.

¶7 Tibbs argues that the 1203.4 order "vacated" Tibbs' California conviction so that it was no longer an "unvacated adjudication of guilt" within the meaning of WIS. STAT. § 340.01(9r). I disagree.

¶8 The 1203.4 order appears to be a standard form order. The order references several sections of the California code including, as noted, sections 1203.4 and 1203.4a of the California Penal Code.

¶9 Tibbs points to language in the 1203.4 order expressly stating that the order "vacated" his California conviction and negated any guilt finding. Specifically, the 1203.4 order states: "It is hereby ordered that the plea, verdict, or finding of guilt in the above-entitled action be set aside and vacated and a plea of not guilty be entered, and that the accusatory filing is dismissed." Tibbs argues that there could not be a clearer indication that his California conviction was "vacated" and that any guilt finding was set aside. Therefore, according to Tibbs, his California offense is no longer an "unvacated adjudication of guilt" and is not a "conviction" within the meaning of the applicable Wisconsin statutory provisions.

¶10 The State argues that the "vacated" language in the 1203.4 order is not, by itself, controlling. The State points out that the 1203.4 order also expressly states that the order is subject to several California code provisions and, according

to the State, under those provisions the 1203.4 order does not "vacate" a conviction in the ordinary sense that this term is used in Wisconsin.[2] The State asserts that, under the pertinent California code provisions, the 1203.4 order left in place many consequences of a conviction, including consideration of the conviction in subsequent charging. Similarly, the circuit court concluded that, under the applicable California code and case law interpreting that code, a 1203.4 order does not "nullify" a conviction.

¶11 Notably, Tibbs does *not* argue that the State or the circuit court is wrong as to the definition of "vacate" in Wisconsin, or wrong as to the effect of the 1203.4 order under California law. Rather, best I can tell, Tibbs maintains that any discussion of California law is beside the point because California law has no place in determining what constitutes a "conviction" within the meaning of the applicable Wisconsin provisions. For the reasons that follow, I disagree.

¶12 Tibbs relies on ***State v. List***, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366. Tibbs seemingly reads ***List*** as standing for the broad proposition that Wisconsin courts never consider another state's laws in determining whether a prior offense in the other state counts as a "conviction" under the applicable Wisconsin statutory provisions.

¶13 Tibbs' reliance on ***List*** is not persuasive for two reasons.

¶14 First, assuming that ***List*** can be read for this broad proposition, then the supreme court in ***Carter***, 330 Wis. 2d 1, implicitly modified or overruled that

[2] "To vacate means '[t]o nullify or cancel; make void; invalidate.'" *See* ***State v. Lamar***, 2011 WI 50, ¶39, 334 Wis. 2d 536, 799 N.W.2d 758 (quoting BLACK'S LAW DICTIONARY 1435 (9th ed. 2009)).

broad ***List*** proposition. In ***Carter***, the supreme court looked to Illinois law to determine that an Illinois "'zero tolerance' suspension[]" was a "determination[] by an authorized administrative tribunal that [the defendant] has violated or failed to comply with the law" and, therefore, that a prior Illinois "'zero tolerance'" suspension was a "conviction[]" under the same Wisconsin statutory provisions that apply here. *See* ***Carter***, 330 Wis. 2d 1, ¶53; ***id.***, *generally* at ¶¶51-56; *see also* ***State v. Jackson***, 2014 WI App 50, ¶14, 354 Wis. 2d 99, 851 N.W.2d 465 ("***Carter*** instructs that we are to determine whether *the out-of-state law* … 'prohibits conduct specified in [the applicable Wisconsin statute].'" (quoting ***Carter***, 330 Wis. 2d 1, ¶45) (emphasis added)).[3]

¶15 Second, there is no indication in ***List*** that the court in ***List*** was addressing what Wisconsin courts should do when faced with an out-of-state order that expressly provides that the order is subject to specified code provisions, such as the 1203.4 order here. Tibbs' argument fails to come to grips with the unavoidable fact that, because the 1203.4 order expressly provides that it is subject to California code provisions, there is no way to determine the order's meaning without looking to those provisions.

¶16 In a separate argument, Tibbs asserts that the Full Faith and Credit Clause of the United States Constitution requires a conclusion that the 1203.4 order bars consideration of his California offense in Wisconsin. However, this argument suffers from a similar flaw as Tibbs' previous argument did. Tibbs does

[3] The parties do not discuss ***State v. Carter***, 2010 WI 132, 330 Wis. 2d 1, 794 N.W.2d 213, although the State cites ***Carter*** in passing as support for an undisputed proposition. Both the State's citation to ***Carter*** and Tibbs' reliance on ***State v. List***, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366, drew this court's attention to ***Carter***. ***Carter*** cites to limited parts of ***List***. *See* ***Carter***, 330 Wis. 2d 1, ¶43 n.16, ¶44 n.17.

not explain how a Wisconsin court could go about giving full faith and credit to the 1203.4 order without considering the pertinent California code provisions and, thus, the meaning of such an order under California law.

¶17 Finally, I note that Tibbs correctly points out that the State carries the burden "of establishing prior offenses as the basis for the imposition of enhanced penalties." *See* ***State v. Wideman***, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996); *see also* ***Carter***, 330 Wis. 2d 1, ¶25 (same). But I disagree with Tibbs that the State's burden matters in my analysis. The dispositive issue here, as noted, is a purely legal question of whether the 1203.4 order "vacated" Tibbs' California conviction so that Tibbs' California conviction is no longer an "unvacated adjudication of guilt" (a "conviction") within the meaning of the applicable Wisconsin statutory provisions. On that purely legal question, Tibbs as the appellant needed to show that the circuit court erred. Tibbs has not made this showing because he has not persuaded me that the circuit court was wrong to rely on California law to conclude that Tibbs' California offense is still a "conviction" within the meaning of the applicable Wisconsin law.

Conclusion

¶18 For the reasons above, 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.