COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3350-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL H. STORMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Daniel Stormer was convicted of operating a motor vehicle while intoxicated, third offense, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

§ 346.63(1)(a) (OWI). He received a sentence of sixty days in jail with Huber privileges, license revocation for thirty months, and a forfeiture of $1,346.50. The sole issue on appeal is whether the State proved at sentencing the prior convictions requisite to the imposition of a sentence under WIS. STAT. § 346.65(2)(c),[2] which increases the penalty for a person with a total of three convictions.[3] We conclude the State did, and therefore we affirm.

¶2 WISCONSIN STAT. § 343.307(1) prescribes which convictions may be counted for purposes of sentencing under WIS. STAT. § 346.65(2). These include convictions for violations of WIS. STAT. § 346.63(1) or a local ordinance in conformity with that paragraph. Section 343.307(1)(a). In addition, § 343.307(1)(d) provides:

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[2] WISCONSIN STAT. § 346.65(2)(a)-(c) provides:

> (2) Any person violating s. 346.63 (1):
>
> (a) Shall forfeit not less than $150 nor more than $300, except as provided in pars. (b) to (f).
>
> (b) Except as provided in par. (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the … [total] number of suspensions, revocations and convictions counted under s. 343.307 (1) within a 10-year period, equals 2. Except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.
>
> (c) Except as provided in pars. (f) and (g), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of … suspensions, revocations and other convictions counted under s. 343.307 (1), equals 3, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

[3] Stormer spends most of his brief discussing proof of prior convictions as it relates to proving third offense OWI, but concludes that discussion by saying that the issue on this appeal concerns only proof of prior convictions as it relates to sentencing for the offense. Therefore, we address only the sentencing issue.

> (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.

¶3 At sentencing Stormer appeared with counsel. The State presented two exhibits to show Stormer's two prior convictions. One was a certified copy of a document of a judgment of conviction in Dane County, case number 98 CT 1964, which showed that on June 29, 1995, the court accepted Stormer's plea of no contest to charges of OWI and operating with a prohibited alcohol concentration (a violation of WIS. STAT. § 346.63(1)(b)) and adjudged Stormer guilty. There is no issue on this appeal concerning this prior conviction. The second exhibit, the subject of Stormer's appeal, contained a copy of a complaint in San Diego, California, municipal court charging Stormer with driving on February 2, 1991, "while under the influence of an alcoholic beverage or a drug or under their combined influence, in violation of Vehicle Code section 23152(a)" and "while having 0.08 per cent or more, by weight, of alcohol in his blood, in violation of Vehicle Code section 23152(b)." Attached to the complaint was a certified copy of a document containing the same case number as the complaint entitled (at the bottom) "Misdemeanor Docket—Judgment/Traffic." This document indicated that on May 17 1991, Stormer, represented by counsel but not himself appearing, was sentenced for a violation of Vehicle Code 23152(b).

¶4 When the State presented these two exhibits, the court asked Stormer's counsel whether he had an issue with the exhibits, and this interchange followed:

MR. PETERSON: Okay. I do have one concern, and that is in this 1991 case there were two counts, one was operating while under the influence of alcoholic beverages, the second was operating with a prohibited alcohol concentration, which I don't know if it was a first or a second offense for California, , but their BAC level is .08 whereas –

THE COURT: It says it on there?

MR. PETERSON: Yes. Yes. – whereas Wisconsin is .10.

THE COURT: And which was he convicted of?

MR. PETERSON: This is not always clear. All I can see on the judgment of conviction is that the operating while intoxicated is crossed out, while the operating with prohibited alcohol concentration is not. This is the only indication that I have as to which count he was convicted of that at least as I can see. Is that the only thing you see?

MS. CATTANACH: That's all I could tell too.

THE COURT: Well, we can do one of two things, we can set the whole matter over for you all to get further documentation on this and make whatever legal argument you want. The fact it is .08, I have written one decision on this issue of how closely the other state statute has to be aligned, and I don't know off the top of my head if that would disqualify it or not.

MS. CATTANACH: If you look under 343.307 right now it says it has to have an alcohol concentration within a set limit. It doesn't have to coinside [sic] with our limit. I just wrote a paper on this.

MR. PETERSON: Which number?

MS. CATTANACH: 343.307. 346.307, does that make more sense?

THE COURT: It's not 346.

MS. CATTANACH: 343.306. If you look at what falls under – if it has a set range or prohibited concentration amount, it does not have to be an element test of the .08 versus the .10, it is just a set range.

THE COURT: Conviction under the law, another jurisdiction that prohibits refusal of chemical testing for use of a motor vehicle while intoxicated or under the influence of a controlled substance, or within excess or specified range of alcohol concentration as those are substantially similar terms are used in those jurisdictions. I don't know if you want to respond to that, Mr. Peterson, but I guess if you wanted to, I could conclude this is a third offense, go

> ahead with the sentencing and give you leave to reopen it in 10 days if you determine we wrongly determined it was a third offense.
>
> MR. PETERSON: That's fine.
>
> THE COURT: Okay. All right. So, I will conclude in the absence of any evidence to the contrary that this is a third offense. The prior convictions and the evidence that has been submitted to the court appears to satisfy the prerequisites of 343.307, however, should Mr. Peterson determine in the next 10 days if he has an argument that it isn't a third offense, I will reopen the sentencing phase. Ms. Cattanach.

The court then proceeded to sentence Stormer.

¶5 After sentencing, Stormer retained different counsel—the firm representing him on this appeal. Within ten days of sentencing, an attorney of the firm wrote the court concerning the ten-day time period for raising issues on the California conviction. He asked that the court "modify the schedule it had articulated to, instead, simply allow this matter to be addressed in the course of the normal post-conviction procedure, as opposed to being filed within the ten day period." The court denied the request, stating that "Mr. Stormer and his attorney agreed to go ahead with the sentencing hearing with the understanding that if they successfully raised an issue about the validity of the California conviction as a prior conviction under Wisconsin law within 10 days, Mr. Stormer would be re-sentenced." Stormer did not raise any issue concerning the validity of the California conviction within ten days from sentencing, but, instead, filed a notice of intent to pursue postconviction relief twenty days from the date of sentencing.

¶6 On appeal, Stormer contends that (1) the exhibit presented did not establish that a plea was entered to either of the charges in the complaint or that the court found Stormer guilty of either charge, and it is not a judgment of conviction; (2) the exhibit indicates Stormer was not present and thus the

safeguards required by ***Almendarez-Torres v. United States***, 523 U.S. 224 (1998), and ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), are not present; and (3) WIS. STAT. § 343.307(1)(d) does not allow the California conviction to be counted because para. (d) uses the term "while intoxicated," and, according to the California complaint, the California statute uses the term "under the influence of an alcoholic beverage."

¶7 We conclude that Stormer waived the right to raise any of these arguments. We generally do not consider issues on appeal that were not raised in the trial court. ***Wengerd v. Rinehart***, 114 Wis. 2d 575, 579-80, 338 N.W.2d 861 (Ct. App. 1983). The only one of these three objections Stormer arguably raised before the trial court is the third.[4] However, after doing so, his attorney agreed that sentencing could continue subject to the opportunity to pursue that issue within ten days, which he did not do. That agreement by counsel was, in effect, a conditional admission that the State's proof was adequate—that is, it was adequate unless the defendant pursued the objection concerning the lack of "substantially similar terms" in the Wisconsin and the California statutes under WIS. STAT. § 343.307(1)(d). Since counsel may, on behalf a defendant, admit prior offenses for purposes of WIS. STAT. § 346.65(2) and that admission constitutes competent proof of prior convictions, ***State v. Wideman***, 206 Wis. 2d 91, 105-06, 556 N.W.2d 737 (1996), it follows that counsel may, on behalf of the defendant, make the type of conditional admission Stormer's counsel did. And, since Stormer did not pursue that issue within ten days, we consider that he abandoned it in the trial court.

[4] Actually, Stormer's objection in the trial court under WIS. STAT. § 343.307(1)(d) had to do with the prohibited alcohol content in the California statute as compared to the Wisconsin statute, not the difference he now points to.

¶8 Although we need not address the substance of Stormer's arguments, we do so briefly, concluding that none have merit. First, while the California exhibit does not expressly state either that Stormer entered a plea or that he was found guilty by a fact finder, the document admits of no construction other than that Stormer was convicted and sentenced for a violation of driving with a .08 percent or more by weight of alcohol in his blood. Second, neither ***Almendarez-Torres*** nor ***Apprendi*** suggests any standards that a prior conviction must meet for purposes of WIS. STAT. § 346.65(2). In ***Almendarez-Torres***, the Court held that a prior conviction did not need to be alleged in an indictment in order to impose a penalty enhancer under a federal law for aliens; in that case the defendant had admitted the prior convictions at sentencing. ***Almendarez-Torres***, 523 U.S. at 247. The Court in ***Apprendi***, after expressing reservations about ***Almendarez-Torres*** and limiting it to its facts, held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. ***Apprendi***, 530 U.S. at 490. ***Apprendi*** concerned a statute that provided an increased penalty for a crime if the judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate because of race. ***Id.*** at 471. Third, the distinction Stormer points out between the terms in WIS. STAT. § 343.307(1)(d) and California Vehicle Code 23152(a) is not relevant because he was convicted and sentenced for a violation of Vehicle Code 23152(b).

By the Court.—Judgment affirmed.

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