

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 21, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 02-0037  
02-0038**

**Cir. Ct. Nos. 01-TR-7705  
01-TR-7707**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**WINNEBAGO COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK S. LISIECKI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Winnebago County: T. J. GRITTON, Judge. *Affirmed in part and reversed in part.*

¶1 ANDERSON, J.<sup>1</sup> Mark S. Lisiecki appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI) and operating after suspension (OAS). He argues that there was insufficient evidence

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<sup>1</sup> This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

for either of the convictions. The evidence does not support Lisiecki's OAS conviction; it does, however, support his conviction for OWI. We therefore affirm in part and reverse in part.

¶2 The relevant facts are not in dispute. Lisiecki was charged with OAS, OWI and operating with a prohibited alcohol concentration. A trial to the bench was held on November 1, 2001. Two witnesses testified on behalf of Winnebago County. David Helgeson testified that on July 7, 2001, at approximately 2:15 a.m., he was driving west on Highway 10 in the town of Clayton and observed a vehicle in front of him "swerving back and forth between two lanes." He then saw the vehicle pull off the road. He stated that he passed the vehicle and at some point, the vehicle pulled up behind him. Helgeson proceeded to step out of his vehicle; he put his hands up and offered to give the other driver a ride home. He said he did this "because my girlfriend lost her brother in drunk driving."

¶3 Helgeson said that after he offered the ride, the other driver "hit the gas and went around" him heading south on U.S. Highway 45. At that point, Helgeson went back to his car, phoned 911 and reported the license plate number of the vehicle. Helgeson testified that although he could not describe the physical characteristics of the driver, he could see that it was a man because "[w]hen he drove past me he was only a foot and a half, two feet away from me."

¶4 Officer Mark Habeck testified that on July 7, 2001, at approximately 2:30 a.m., he received a call from dispatch. Dispatch informed him of a 911 call reporting that a possible drunk driver was on the road. He was given a license plate number and location and arrived at the location about seven minutes after being dispatched to it. When he arrived, he saw a vehicle parked on the west

shoulder of U.S. Highway 45 southbound, just south of Fairview Road; its license plate matched the license plate that was given to him in the dispatch. He walked over to the car and did not see anyone in the vehicle. He then looked to see if he could see anyone walking along the shoulder of the road. Eventually, he saw a man lying down in the west ditch in some tall grass. Habeck asked the man what he was doing, and the man replied that he was “just resting.”

¶5 Habeck asked the man to come up onto the shoulder of the road and observed the man stagger to maintain his balance as he did so. Habeck then asked the man if he had a driver’s license on him and the man produced a Wisconsin photo driver’s license, which identified him as Lisiecki. In response to Habeck’s questioning, Lisiecki said that he was by himself, that the car on the side of the road was his, and that he had parked it there. Habeck said that he could smell an odor of intoxicants on Lisiecki’s breath and that Lisiecki admitted that he had “been drinking at times” that evening. Habeck said that when he asked Lisiecki to produce his driver’s license, Lisiecki opened his wallet and although Habeck could see the driver’s license right away, it took Lisiecki “a while of looking through his wallet to produce his license.”

¶6 Habeck then advised Lisiecki that he wanted to administer standard field sobriety tests. Lisiecki cooperated and Habeck proceeded to give him three standardized tests: the horizontal gaze nystagmus (HGN), the walk and turn, and the one-legged stand. Habeck testified that Lisiecki failed the walk-and-turn test and the one-legged stand test. He said that Lisiecki was one clue short of failing the HGN test and that “[a]s a whole I believe [Lisiecki] failed the tests.” Habeck placed Lisiecki under arrest for OWI and took him to the police station.

¶7 Habeck testified that at the station they went into the intoximeter room where Habeck began a twenty-minute observation period making sure that Lisiecki did not eat, drink, smoke or anything of the sort. Habeck said that during this twenty minutes he started filling out the paperwork. He issued a citation for OWI. He read verbatim the Informing the Accused form and Lisiecki agreed to submit to an evidentiary chemical test of his breath. Habeck filled out the Notice of Intent to Suspend form and provided Lisiecki with his copy of the administrative review request.

¶8 Habeck testified that he also ran Lisiecki's name through the Wisconsin Department of Transportation (DOT) records and that Lisiecki's license returned suspended. Habeck then issued a citation for OAS. After twenty minutes of observation, Habeck administered the intoximeter test to Lisiecki. The intoximeter results showed that Lisiecki had a prohibited blood alcohol concentration of 0.18%; Habeck issued a citation to that effect.

¶9 The trial court found Lisiecki guilty of OWI, operating with a prohibited alcohol level, and operating while suspended. Upon Lisiecki's motion, the court dismissed the operating with a prohibited alcohol level conviction and a sentencing date of December 6, 2001, was set. Lisiecki appeals the remaining convictions.

¶10 On appeal, Lisiecki challenges the legal sufficiency of the evidence establishing that he operated the vehicle on the highway while intoxicated and that he did so after suspension. These determinations are findings of fact which we will only set aside if clearly erroneous, that is, if contrary to the great weight and clear preponderance of the evidence. WIS. STAT. § 805.17(2); *see also Siker v. Siker*, 225 Wis. 2d 522, 527-28, 593 N.W.2d 830 (Ct. App. 1999).

¶11 We begin with whether there was sufficient evidence for Lisiecki's OAS conviction pursuant to WIS. STAT. § 343.44(1)(a). This statute states in relevant part:

**Operating while suspended, revoked, ordered out-of-service or disqualified.** (1) OPERATING OFFENSES.  
(a) *Operating while suspended.* No person whose operating privilege has been duly suspended under the laws of this state may operate a motor vehicle upon any highway in this state during the period of suspension .... A person's knowledge that his or her operating privilege is suspended is not an element of the offense under this paragraph.

In short, a person violates § 343.44(1)(a) if: (1) his or her operating privilege is suspended, and (2) he or she operates a motor vehicle upon any highways in this state during the period of suspension.

¶12 In *State v. Spaeth*, 206 Wis. 2d 135, 138, 556 N.W.2d 728 (1996), our supreme court, on certification from this court, addressed a comparable issue. There, the defendant was sentenced for his fifth offense operating a motor vehicle after revocation (OAR). *Id.* He appealed, asserting that he did not admit to, and the State did not prove, the four prior OAR convictions necessary to impose the statutorily enhanced penalties prescribed for fifth-time OAR offenders under WIS. STAT. § 343.44(2). *Spaeth*, 206 Wis. 2d at 139.

¶13 The supreme court noted that although WIS. STAT. § 343.44(2) provides a framework of escalating penalties for successive OAR convictions, it does not provide procedural rules for establishing the existence of the prior OAR convictions necessary to invoke its penalty enhancements. *Spaeth*, 206 Wis. 2d at 145. The court stated that the State bears the burden of proving prior OAR convictions under § 343.44(2) and explained:

Contrary to the State's assertion, the enhanced penalties prescribed under § 343.44(2) are not "self-executing" in the

sense that a court may base a repeater sentence solely upon the State's assertion of prior OAR convictions. *It is difficult to discern the substance of a burden that the State may discharge with a mere assertion.* Rather, the State discharges its burden of proving prior OAR convictions under § 343.44(2) when it presents to the court competent proof of each prior conviction.

*Spaeth*, 206 Wis. 2d at 150 (emphasis added). The court then developed the appropriate standard for establishing prior OAR convictions for purposes of § 343.44(2). *Spaeth*, 206 Wis. 2d at 148. The State must establish prior convictions by placing before the circuit court “competent proof” of prior convictions. *Id.* “Competent proof” of prior OAR convictions is established by the State when, “at a minimum,” the State introduces into the record at any time prior to the imposition of sentence either: (1) an admission, (2) copies of prior judgments of convictions for OAR, or (3) a teletype of the defendant's DOT driving record. *Id.* at 153.

¶14 Applying this standard, the supreme court concluded that the State had failed to discharge its burden. *Id.* It noted that the State had essentially chosen to rely solely upon the complaint to establish Spaeth's status as a fifth-time OAR offender. *Id.* It held that the complaint failed to meet the standard because it was not accompanied, “at a minimum,” by one of the described sources of prior OAR convictions. *Id.* It held that it was not enough to rely on the complaining officer's allegations, which were based upon a reading of a report of the officer issuing the citation, who in turn relied upon a DOT record check. *Id.* at 154.

¶15 The supreme court then explained that the complaint’s reliability was diminished for two reasons.<sup>2</sup> *Id.* First, it pointed out that the complexity of the OAR penalty provisions creates the potential for error when information from a source document must pass through layers of interpretation and transcription. *Id.* Second, it explained, “*without supplemental corroborating documentation, a sentencing court has no means of verifying the assertions in the complaint.*” *Id.* (emphasis added). The court determined that the complaint fell below the “quantum of reliability embodied in the term ‘competent proof.’” *Id.* It concluded that “the record is devoid of reliable documentary proof” of the defendant’s prior OAR convictions. *Id.*

¶16 Like the *Spaeth* case, this case involves the penalty provisions of WIS. STAT. § 343.44(2) because OAS as well as OAR penalties are covered under this statute. We recognize that the “competent proof” standard in *Spaeth* was discussed in terms of what is needed to establish *prior OAR convictions* for purposes of § 343.44(2). *Spaeth*, 206 Wis. 2d at 148. However, we consider it instructive. Given our supreme court’s rationale in *Spaeth*, logic dictates that “competent proof” is necessary to establish that a defendant’s license was suspended at the time he or she was operating a motor vehicle on the highways of this state in order to convict him or her of OAS. *See Spaeth*, 206 Wis. 2d at 145.

¶17 We are mindful of the heavy prosecutorial burden placed upon the state, or in this case the County, due to the sheer number of WIS. STAT. § 343.44(1) cases (i.e., OAR, OAS). However, establishing “competent proof” of

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<sup>2</sup> The court stressed that the complaint was not unreliable for want of veracity of the written allegations of either officer. *State v. Spaeth*, 206 Wis. 2d 135, 154, 556 N.W.2d 728 (1996).

a defendant's license suspension on the date in question is not an onerous task. *See Spaeth*, 206 Wis. 2d at 155.

¶18 This ascertained, we hold that the County, like the state in *Spaeth*, failed to discharge its burden of proving the elements of the violation for which Lisiecki was charged. The record is devoid of "competent proof" to show that Lisiecki's license was suspended on the date he was operating his motor vehicle, July 7, 2001. Habeck's testimony alone does not satisfy any of the possible "competent proofs" that would meet the standard of *Spaeth*.

¶19 We recognize that the second valid way to establish "competent proof" on the record (introducing copies of prior judgments of convictions) was not available to the County because Lisiecki's OAS charge was a first offense. Nonetheless, there were two other reliable avenues in which "competent proof" could have been established. We have come across neither in the record. First, there is no personal admission by Lisiecki or imputed through Lisiecki's counsel that his license was suspended at the time. *See id.* at 148, 153. Second, a teletype of Lisiecki's DOT driving record was not introduced and never became part of the record. *See id.* at 153. The record in this case is insufficient to support a conviction under WIS. STAT. § 343.44(1). Because the County failed to prove that Lisiecki's license was suspended, the trial court erred in convicting him as a first-time OAS offender. That portion of the judgment is reversed.

¶20 We now address whether there was sufficient evidence to convict Lisiecki of OWI. Lisiecki argues that "the only evidence from which the trial court could find [he] was erratically driving was a hearsay statement that should



have been excluded.” He argues that Habeck’s testimony as to what dispatch told him was hearsay under WIS. STAT. § 908.01(3),<sup>3</sup> that it should have been excluded pursuant to WIS. STAT. § 908.02,<sup>4</sup> and that his OWI should be vacated. We need not address the merits of Lisiecki’s hearsay challenge because we hold that if there was any error in the admission of that part of Habeck’s statement about what he heard from dispatch, such error was harmless. Under a harmless error analysis, we will reverse only where there is a reasonable possibility that the error contributed to the final result. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). In making this determination, we weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. *Id.* That is, assuming Habeck’s statement about the erratic driving should have been excluded, is there a reasonable possibility that its admission contributed to Lisiecki’s conviction? See *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶21 There is sufficient, if not overwhelming, evidence that Lisiecki was guilty of OWI, even without the testimony in question. The rest of Habeck’s testimony provided that Habeck observed an abandoned vehicle parked on the side of the highway; after some searching, he found a man lying in a grassy part of the ditch; the man told Habeck that he was “just resting”; the man staggered as he

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<sup>3</sup> WISCONSIN STAT. § 908.01(3) provides the definition of hearsay and states:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

<sup>4</sup> WISCONSIN STAT. § 908.02 explains the hearsay rule:

Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

walked from the grass to the side of the road; the man had trouble finding his driver's license even though it was immediately visible to Habeck when the man opened his wallet; the license identified the man as Lisiecki; Lisiecki admitted to Habeck that he had parked the car where Habeck found it; Habeck smelled the odor of intoxicants on Lisiecki's breath; Lisiecki admitted he had been drinking; and Lisiecki failed field sobriety tests.

¶22 Additionally, the alleged hearsay evidence regarding the erratic driving was cumulative to testimony from an eyewitness. Helgeson's testimony provided that he saw a car "swerving back and forth between two lanes"; he offered to give the driver of the car a ride home because his girlfriend had lost her brother in a drunk driving accident; after he offered the ride, the driver "hit the gas and went around" him heading south on Highway 45; at that time he could see it was a man driving the vehicle; and he then phoned 911 and reported the erratic driving and the license plate number of the vehicle.

¶23 Thus, while the record does not support Lisiecki's OAS conviction, it amply supports his OWI conviction.

*By the Court.*—Judgment affirmed in part and reversed in part.

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