COURT OF APPEALS
DECISION
DATED AND RELEASED

January 23, 1997

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1636-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONYIL ANDERSON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed*.

DEININGER, J.[1] Donyil Anderson appeals from a judgment convicting him of operating a motor vehicle after revocation (OAR), sixth offense, in violation of § 343.44(1) and (2g)(e), STATS., and from an order denying his motion for post-conviction relief. He claims his sentence should be commuted to a first offense penalty because he did not admit and the State did not prove the prior OAR convictions. Because we conclude that Anderson and

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

his counsel admitted the prior convictions at the time of Anderson's no contest plea and sentencing, we affirm.

BACKGROUND

The criminal complaint charged Anderson with OAR and advised him that "for a *sixth* offense [defendant] is subject to a penalty of a fine of not less than $200 [sic] nor more than $2500 and may be imprisoned for not less than 6 months nor more than one year, and driving privileges revoked for 6 months." (Emphasis in original). The complaint also contains the following allegations:

> Your affiant has reviewed a teletype communication from the Division of Motor Vehicles, Wisconsin Department of Transportation, which reflects the driving record of the defendant as contained in the Division's records ....
>
> ...The Motor Vehicle Division revealed that .... [t]he defendant has been convicted 5 time(s) in the past five years for operating after revocation/suspension.

At his initial appearance on the complaint, the prosecutor informed Anderson and the court that "[t]his is for an O-A-R sixth with a habitual traffic offender allegation." His counsel waived a reading of the complaint, and the court entered a not guilty plea on Anderson's behalf. Following denial of a suppression motion,[2] the State dismissed the habitual traffic offender allegation and Anderson pleaded no contest to OAR. The following excerpts are from the plea and sentencing hearing:

> [DEFENSE COUNSEL]: Your Honor, today Mr. Anderson will request that the Court grant him leave to withdraw his previous plea of not guilty and instead enter a plea of no contest to the first allegation in the

[2] Anderson does not appeal the denial of his suppression motion.

Complaint of operating a motor vehicle after revocation or suspension, sixth offense.

....

THE COURT: Mr. Anderson, in a Criminal Complaint that is dated the 7th day of March, 1995, you are charged as follows. The charge is that on the 12th day of February, 1995, at the City of Beloit in Rock County, the defendant ... did, with cause to believe that the defendant's privilege to operate a motor vehicle was revoked or suspended, unlawfully operate a motor vehicle upon a highway while the defendant's operating privilege was revoked or suspended, contrary to Section 343.44 of the Wisconsin Statutes, and upon conviction for a sixth offense is subject to a penalty of a fine of not less than $200 [sic] nor more than $2,500 and may be imprisoned for not less than six months nor more than one year and driving privileges revoked for six months. Do you understand that charge being made against you?

MR. ANDERSON: Yes.

THE COURT: Do you understand the penalty you will face in the event you are convicted of that charge?

MR. ANDERSON: Yes.

....

THE COURT: To that charge today, what is your plea?

MR. ANDERSON: No contest.

....

THE COURT: Did [defense counsel] also explain to you the offense to which you are entering this plea?

MR. ANDERSON: Yes.

THE COURT: Did he explain to you the elements of this offense that would have to be proved beyond a reasonable doubt before you could be convicted of the offense?

MR. ANDERSON: Yes.

THE COURT: Were you able to understand that explanation?

MR. ANDERSON: Yes.

THE COURT: Is there any question you wish to ask the Court in regard to that matter?

MR. ANDERSON: No.

....

THE COURT: [Defense counsel], are you satisfied that the defendant's plea of no contest is both knowingly and voluntarily made?

[DEFENSE COUNSEL]: Yes, Judge.

....

THE COURT: [Prosecutor], had this matter gone to trial, what would the State have been prepared to prove?

....

[PROSECUTOR]: ... The State would have also provided to the Court a certified copy of Donyil Anderson's driving record, and that would have indicated that on August 31, 1991, Donyil Anderson's driving privileges were suspended.... [A]nd that his driving privileges have not yet been reinstated since that date. In addition, they'd indicate that he has been convicted of either operating after the suspension or revocation of his driver's license on five prior occasions.

....

[DEFENSE COUNSEL] [Regarding the appropriate fine and costs]: Your Honor, when we had reached this agreement, [the prosecutor] and I simply went to what we thought was the correct chart and found the numbers that appear to be appropriate.... [T]he agreement ultimately was to plead to the charges which he has pled to and then both sides to recommend the appropriate chart penalty.

In addition to the extensive plea colloquy, Anderson and his counsel signed and filed a "Plea(s) of No Contest to Misdemeanor Charge(s) - Waiver of Rights" form. The trial court accepted the plea, entered conviction for sixth offense OAR, and imposed a six-month jail sentence, a fine of $2,000 plus costs, and a six-month revocation of Anderson's driving privileges.

ANALYSIS

Anderson's principal argument is that the enhanced penalties for repeat violations of § 343.44, STATS., cannot be imposed unless "the prior convictions are admitted by the defendant or proved by the state" as required by § 973.12(1), STATS., for penalty enhancements under the general criminal repeater statute, § 939.62, STATS. He claims that since the State did not submit extrinsic proof of the prior convictions and Anderson did not explicitly admit the fact or the dates of his five prior convictions, the "enhanced portions of [Anderson's] sentence as a repeat offender under Sections 343.44(2), STATS., are void for lack of adequate proof that [Anderson] was a repeat criminal traffic offender."[3]

[3] Specifically, Anderson claims the requirements of § 973.12(1), STATS., as set forth in the following cases were not met on this record: ***State v. Farr***, 119 Wis.2d 651, 350 N.W.2d 640 (1984); ***State v. Zimmerman***, 185 Wis.2d 549, 518 N.W.2d 303 (Ct. App. 1994); ***State v. Goldstein***, 182 Wis.2d 251, 513 N.W.2d 631 (Ct. App. 1994).

The supreme court has rejected Anderson's argument in ***State v. Spaeth***, No. 95-1827-CR, slip op. at 7-11 (Wis. Dec. 20, 1996).[4] The issue on this appeal thus becomes whether Anderson's enhanced sentence as a repeat OAR offender was properly imposed under the standards enunciated in ***Spaeth*** for establishing prior OAR convictions:

> We hold that hereafter, the State establishes the existence of a defendant's prior OAR convictions by competent proof when, at a minimum, it introduces into the record at any time prior to the imposition of sentence, either: (1) an admission; (2) copies of prior judgments of conviction for OAR; or (3) a teletype of the defendant's Department of Transportation (DOT) driving record.

Id. at 16-17. The court further held that "an admission" can be made by either the defendant or his or her counsel. ***Id.*** at 18.

Here, the State relies on Anderson's "admission" by pleading no contest to the charge of sixth offense OAR as charged in the criminal complaint. It is undisputed that no other proof of his prior convictions was offered into the record.

In both ***Spaeth*** and ***State v. Wideman***, No. 95-0852-CR (Wis. Dec. 20, 1996), a companion case to ***Spaeth*** involving the sentencing of a repeat operating a motor vehicle while intoxicated (OMVWI) offender, the defendants had been found guilty of the base offenses after jury trials. In each case the trial court proceeded immediately to impose sentence for the conviction, enhanced because of prior convictions for the same offense.

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[4] This appeal was filed and briefed while ***State v. Spaeth***, No. 95-1827-CR (Wis. Dec. 20, 1996) and ***State v. Wideman***, No. 95-0852-CR (Wis. Dec. 20, 1996) were pending before the Wisconsin Supreme Court. Anderson's arguments on this appeal are virtually identical to those made by the defendants in ***Spaeth*** and ***Wideman***. On this court's own motion, not objected to by the parties, submission was stayed until the cited decisions were issued.

In ***Spaeth***, even though the sworn complaint contained the specific dates of the prior offenses and convictions and the defendant acknowledged his understanding that he was being charged with a fifth OAR offense within five years at his initial appearance, the supreme court held that Spaeth's silence at sentencing was not a waiver of the State's burden to place "competent proof" of the prior convictions in the record. ***Spaeth***, No. 95-1827-CR, slip op. at 18. Spaeth had remained silent at his sentencing and his counsel had said only that "I understand that there is some jail time that is necessary in this case," a remark falling short of an admission by counsel of the prior convictions. ***Id.*** at 5. The failure to submit either the DOT driving record or certified copies of the prior convictions was thus fatal to sustaining the enhanced penalties.

The complaint against repeat OMVWI defendant Wideman recited only that the complainant had reviewed a DOT driving record which showed two prior convictions within the past five years. ***Wideman***, No. 95-0852-CR, slip op. at 4. As is true of the complaint against Anderson, Wideman's complaint contained no specific dates for the prior offenses and convictions. At sentencing following the jury verdict, the trial court stated the number of Wideman's convictions and the penalty range three times. Defense counsel argued for the "minimum" incarceration and fine. In response to the court's question "whether the `state of the record' indicated that this was a third conviction," defense counsel responded affirmatively. ***Id.*** at 5. Although it determined this record to be "marginal," ***id.*** at 19, the supreme court concluded it was sufficient to establish an admission of the prior offenses:

> The complaint, although not evidence, when coupled with the circuit court's direct inquiry at sentencing and defense counsel's concessions, was sufficient to inform the defendant of the prior offenses and to establish the prior offenses for purposes of sentencing.

Id. at 18 (footnotes omitted).

We conclude that the record in this case is at least as adequate as that in ***Wideman*** in establishing Anderson's admission of his prior convictions. Anderson pleaded no contest to what was clearly communicated to him to be a sixth offense of OAR. He acknowledged his understanding of the offense and

its potential penalties, and he stated he had discussed the same with counsel.[5] Defense counsel informed the court that the plea was to sixth offense OAR and that the plea agreement was for the "chart" penalties for that offense. As in ***Wideman***, the allegations in the complaint coupled with Anderson's plea, the trial court's inquiries and defense counsel's concessions, "was sufficient to inform the defendant of the prior offenses and to establish the prior offenses for purposes of sentencing." ***Id***. at 18.

By the Court.—Judgment and order affirmed.

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

[5] Anderson does not claim his plea was other than knowing and voluntary.