COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2782-CR **Cir. Ct. No. 2011CF644**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ANDRE M. CHAMBLIS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Reversed and cause remanded with directions; cross-appeal dismissed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals a judgment convicting Andre Chamblis of operating with a prohibited alcohol concentration

(PAC), as a sixth offense, in violation of WIS. STAT. § 346.63(1)(b) (2011-12).[1] In this appeal, the State raises multiple arguments that fall into three main categories: (1) the circuit court erred in concluding that the documentation the State originally submitted to prove that Chamblis had been convicted of two prior operating-while-intoxicated-related offenses in Illinois was not sufficient to prove those convictions; (2) the circuit court erred in excluding, at the plea hearing, additional evidence that the State sought to submit to prove the purported Illinois convictions; and (3) the additional evidence was sufficient to prove the Illinois convictions. Chamblis cross-appeals, arguing that the circuit court erred in denying his motion to suppress because the police did not have reasonable suspicion to stop the vehicle that Chamblis was driving.

¶2 As to the issues the State raises in its appeal, we conclude that the circuit court erroneously exercised its discretion in excluding the additional evidence that the State sought to submit to prove the purported Illinois convictions, and the additional evidence is sufficient to prove the Illinois convictions. In light of the foregoing, we need not and do not address the sufficiency of the documentation the State originally submitted to prove the purported Illinois convictions. As to Chamblis's cross-appeal, we conclude that the circuit court properly denied Chamblis's motion to suppress because the stop was supported by reasonable suspicion.

¶3 Accordingly, we reverse and remand to the circuit court to issue an amended judgment of conviction convicting Chamblis of operating with a PAC, as

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

a seventh offense, and to hold a resentencing hearing pursuant to the penalty ranges for a seventh offense set forth in WIS. STAT. § 346.65(2)(am)6.

BACKGROUND

¶4 In November 2011, Chamblis was arrested on suspicion of operating while intoxicated in La Crosse, Wisconsin. The State filed a complaint charging Chamblis with (1) operating while intoxicated (OWI) as a fifth or sixth offense and as a repeater; (2) operating with a PAC as a fifth or sixth offense and as a repeater; and (3) obstructing an officer as a repeater.[2] The complaint alleged that Chamblis had previously been convicted of five OWI-related offenses in Minnesota.

¶5 In January 2012, the State filed an amended information charging Chamblis with OWI as a seventh, eighth, or ninth offense and as a repeater, and operating with a PAC as a seventh, eighth, or ninth offense and as a repeater.[3] The State alleged that Chamblis had previously been convicted of two OWI-related offenses in Illinois, in addition to the five Minnesota convictions. The State attached documentation regarding the purported Illinois convictions to the

[2] A person convicted of OWI or PAC as a fifth or sixth offense is guilty of a Class H felony, and "shall be fined not less than $600 and imprisoned for not less than 6 months." WIS. STAT. § 346.65(2)(am)5. Unless a penalty enhancement statute applies, the total length of a bifurcated sentence for a Class H felony may not exceed six years. WIS. STAT. §§ 973.01(2) and 939.50(8)(h).

[3] A person convicted of OWI or PAC as a seventh, eighth, or ninth offense is guilty of a Class G felony, and "the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years." WIS. STAT. § 346.65(2)(am)6. Unless a penalty enhancement statute applies, the total length of a bifurcated sentence for a Class G felony may not exceed ten years. WIS. STAT. §§ 973.01(2) and 939.50(3)(g).

amended information. The circuit court granted the State's motion to amend the information.

¶6 In August 2012, Chamblis filed a motion challenging the two Illinois convictions alleged in the amended information on multiple grounds. The circuit court held a hearing on the motion on September 12, 2012. Chamblis first argued that the two purported Illinois convictions should be counted as one conviction because they "stem[med] from the same incident."[4] The State did not object to this argument, and the circuit court therefore determined that the two Illinois convictions alleged in the amended information would be counted as one conviction.[5]

¶7 Chamblis's other argument pertinent to the issues in this appeal was that the documentation that the State had submitted with the amended information was not sufficient to prove that Chamblis had been convicted of an OWI-related offense in Illinois. Citing ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996), the circuit court determined that the documentation the State had submitted to prove the purported Illinois conviction was "not competent evidence." The court explained, "I will not consider [the purported Illinois conviction] as a prior conviction unless there's other evidence. Obviously, judgments of conviction would make a difference or some other information."

[4] WISCONSIN STAT. § 346.65(2)(am) provides that "suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one."

[5] For the remainder of the opinion, we will refer to the "Illinois conviction" in singular form based on the circuit court's determination that the two Illinois convictions alleged by the State would be counted as one conviction.

The court further explained to the prosecutor that "if obviously more evidence is supplied, … we will review it at that point in time."

¶8 On September 14, 2012, the circuit court held a final pretrial hearing, at which the parties informed the court that Chamblis intended to enter a plea rather than proceed to trial. Chamblis's counsel stated: "Your Honor, this will be a plea…. I believe the State is going to be requesting a PSI [presentence investigation], so [we] don't need a sentencing hearing to go with the plea date." At this hearing, there was no discussion regarding additional evidence of the purported Illinois conviction.

¶9 The circuit court held a plea hearing on September 19, 2012. At the plea hearing, the parties informed the court that Chamblis intended to plead guilty to operating with a PAC as a fourth offense "or greater." Chamblis admitted that he had previously been convicted of five OWI-related offenses in Minnesota. However, the prosecutor and Chamblis's counsel informed the court that "proof of the prior" Illinois conviction remained an issue.

¶10 Regarding the purported Illinois conviction, the circuit court asked the prosecutor:

> Was there a particular amount of time ... that you thought you would need [in order] to try to get further information ... is that what you're trying to do is get further information on that prior [Illinois] conviction, or are you just going to make an argument based on the record we have here?

The prosecutor responded that he had obtained "additional information from Illinois." The prosecutor had not at that point turned over the additional evidence to the circuit court or to Chamblis's counsel. Chamblis's counsel argued: "[I]n terms of the State digging into things further ... there should be some stopping

point of information coming in, and at this point there shouldn't be any more information turned over to us at this late date." Determining that the additional evidence that the prosecutor stated he wanted to introduce was being offered "too late," the circuit court excluded the additional evidence. Chamblis subsequently pled guilty to operating with a prohibited alcohol concentration, as a sixth offense.[6]

¶11 At a sentencing hearing in November 2012, the circuit court sentenced Chamblis to four years' imprisonment (two years' initial confinement, two years' extended supervision). The State appeals, and Chamblis cross-appeals. Additional facts will be referenced below as necessary.

DISCUSSION

¶12 We first address and reject Chamblis's jurisdictional challenges to the State's appeal. We next address the State's arguments regarding the additional evidence that the State sought to introduce to prove the purported Illinois conviction. Finally, we address and reject Chamblis's cross-appeal.

I. Chamblis's Jurisdictional Challenges to the State's Appeal

¶13 Chamblis makes two jurisdictional challenges to the State's appeal. First, Chamblis contends that "the State's appeal of the judgment of conviction in this case is … an untimely appeal of the [circuit] court's decision denying the State's request to amend the information to increase the charges against Chamblis from OWI/PAC 5th or 6th … to OWI/PAC 7th, 8th, or 9th." Second, Chamblis

[6] The State dismissed the other charges as part of the plea agreement.

appears to argue that the State was required to seek leave from this court to appeal the circuit court's decision to exclude the additional evidence that the State sought to introduce to prove the purported Illinois conviction, and that by failing to do so, the State "abandoned" its right to appeal the final judgment. We reject Chamblis's arguments.

¶14 Chamblis's first argument fails because the circuit court did not deny the State's request to amend the information. The State filed an amended information on January 12, 2012. When asked by the circuit court about "the issue of amending the [i]nformation" at a hearing on January 23, 2012, Chamblis's counsel stated "I don't object," and the circuit court stated: "All right. Then [the information] will be amended ...." Accordingly, in January 2012, the circuit court granted the State's request to amend the information.

¶15 Chamblis's second argument is that the State should have sought leave from this court to appeal the circuit court's decision to exclude the additional evidence, pursuant to WIS. STAT. §§ 808.03(2)(c) and 809.50(1).[7] It may be true that the State could have sought leave to appeal the circuit court's decision to exclude the additional evidence of the purported Illinois conviction. However, Chamblis identifies no rule, statute, or case that required the State to do so in order to preserve its appeal rights. We therefore reject Chamblis's jurisdictional

[7] WISCONSIN STAT. § 808.03(2)(c) provides in pertinent part: "A judgment or order not appealable as a matter of right … may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will … [c]larify an issue of general importance in the administration of justice."

WISCONSIN STAT. § 809.50(1) provides in pertinent part: "A person shall seek leave of the court to appeal a judgment or order not appealable as of right under s. 808.03(1) by filing within 14 days after the entry of the judgment or order a petition and supporting memorandum, if any."

challenges and conclude that the State's appeal is properly before this court as an appeal of a final judgment pursuant to WIS. STAT. § 974.05(1)(a).[8]

II. The State's Appeal

A. The Additional Evidence of the Illinois Conviction

¶16 The State argues that the circuit court erred by excluding, at the plea hearing, the additional evidence that the State sought to introduce to prove the purported Illinois conviction, because "[t]he number of prior offenses that count for sentence enhancement purposes is determined at sentencing."

¶17 The Wisconsin supreme court has held that "prior OWI offenses 'may be proven by certified copies of conviction or other competent proof offered by the state before sentencing.'" ***State v. Wideman***, 206 Wis. 2d 91, 104-05, 556 N.W.2d 737 (1996) (quoting ***State v. McAllister***, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982)). The supreme court has also explained that "'[t]here is no presumption of innocence accruing to the defendant regarding the previous conviction,' but the accused must have an opportunity to challenge the existence of the prior offense." ***Id.*** at 105 (quoting ***McAllister***, 107 Wis. 2d at 539). Consistent with this law, the circuit court agreed with the State that the "proof … of each of the prior convictions" is a question "that goes before the Judge at the time of the sentencing." The issue on appeal is whether the circuit court properly precluded the State from introducing proof of the purported Illinois conviction at

[8] If Chamblis means to argue that this court cannot review the circuit court's decision to exclude the additional evidence because it "was not a final order or judgment," this argument fails under WIS. STAT. RULE § 809.10(4), which provides: "MATTERS REVIEWABLE. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon."

the plea hearing, when the sentencing hearing was going to be scheduled for a later date.

¶18 We review a circuit court's decision to exclude evidence under an erroneous exercise of discretion standard. ***La Crosse Cnty. Dep't of Human Serv. v. Tara P.***, 2002 WI App 84, ¶6, 252 Wis. 2d 179, 643 N.W.2d 194. "We will not upset a circuit court's decision to admit or exclude evidence if the decision has 'a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of the record.'" ***Id.*** (quoted source omitted).

¶19 Here, the circuit court excluded the State's additional evidence of the purported Illinois conviction at the plea hearing on September 19, 2012. A week earlier, at a hearing on September 12, the court concluded that the documentation the State had originally submitted to prove the purported Illinois conviction was insufficient. However, through its statements at the September 12 hearing, the court explained to the parties that it would consider additional evidence of the purported Illinois conviction if the State were to supply such evidence. While clarifying that the "only piece of evidence" the State had submitted prior to the September 12 hearing to prove the purported Illinois conviction was the "Illinois certified [driving] record[]," the court stated: "[T]his is why I was very careful to ask about the piece of evidence. Now this *can be changed by the time of sentence* if the State is able to establish that there's further evidence." (Emphasis added.) The court made at least three similar statements, including the following: (1) "[O]bviously, we are not at sentencing …. There could be further proof that comes up"; (2) "I will not consider that as a prior conviction unless there's other evidence. Obviously, judgments of conviction would make a difference or some other information"; and (3) "[I]f obviously more evidence is supplied, … we will review it at that point in time." Through these statements, the court made clear

that it would consider additional evidence regarding the purported Illinois conviction if such evidence were presented.

¶20 Despite these statements, the circuit court prevented the State from introducing additional evidence of the purported Illinois conviction at the September 19 plea hearing. At the September 19 hearing, the prosecutor explained that he had obtained additional evidence of the purported Illinois conviction, including a "microfiche of the original citations and … the order of suspension and a report of Court disposition." Chamblis's counsel argued that the court should not allow the State to present additional evidence of the purported Illinois conviction, stating: "[T]here should be some stopping point of information coming in, and … there shouldn't be any more information turned over to us at this late date." The court stated: "I can't justify extending things more. You [the prosecutor] had plenty of time …. It's too late, it's just too late ...." Accordingly, the court excluded the additional evidence as untimely.

¶21 Based on ***Wideman*** and ***McAllister***, which provide that the State must prove the prior convictions "before sentencing," and the circuit court's statements at the September 12 hearing that the court would consider additional evidence of the purported Illinois conviction if such evidence were supplied, we conclude that the circuit court erroneously exercised its discretion when, at the September 19 plea hearing, it excluded the additional evidence of the purported Illinois conviction as "too late."

¶22 We acknowledge the circuit court's concerns, expressed at the September 19 plea hearing, that: (1) Chamblis's case had "been set for trial a long time"; (2) the issue of the sufficiency of the documentation the State had submitted to prove the purported Illinois conviction "was flagged a long time

ago"; and (3) this issue had prevented the parties from "hav[ing] this case resolved in a way that would have made more sense months ago." We recognize that such delays justifiably concern circuit courts. Circuit courts "are … under tremendous pressure to handle ever-increasing caseloads and to manage the caseloads efficiently." ***State v. Burns***, 226 Wis. 2d 762, 765, 594 N.W.2d 799 (1999). We do not express any view as to whether the circuit court at or before the September 12 hearing could have, consistent with ***Wideman*** and ***McAllister***, ordered the State to produce all evidence it intended to present regarding the purported Illinois conviction within so many days or by a particular date in the future. That would, in effect, be the opposite of what occurred here, where the court explicitly invited additional evidence.

¶23 Chamblis argues that the circuit court properly exercised its discretion in excluding the additional evidence pursuant to WIS. STAT. § 971.23, the statute governing discovery in criminal cases. We reject Chamblis's argument. Regardless of the discovery statute, governing case law sets forth the general rule that the State must prove prior convictions before sentencing. *See* ***Wideman***, 206 Wis. 2d at 104-05; ***McAllister***, 107 Wis. 2d at 539. Given that the circuit court here stated at the September 12 hearing that it would consider additional evidence of the Illinois conviction if the State were to produce such evidence, the State was entitled to rely on this general rule, at least in the absence of any further direction from the circuit court setting a deadline for the submission of additional evidence or otherwise changing its approach on this issue.

¶24 The State argues that the additional evidence that it sought to introduce was sufficient to prove the purported Illinois conviction. Chamblis does not dispute this argument, and we construe this as a concession. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493

(Ct. App. 1979) (a respondent's failure to dispute a proposition in the appellant's brief may be taken as a concession on that point). Moreover, the additional documents, which appear in the record, definitively show that Chamblis was convicted of "operating a motor vehicle while under the influence" on June 19, 2002, and that as a result, Chamblis's Illinois driver's license was revoked. We therefore conclude that the State succeeded in proving that Chamblis had been convicted of an OWI-related offense in Illinois.

B. Remedy on Remand

¶25 Pursuant to WIS. STAT. § 343.307(1)(d), the five OWI-related convictions from Minnesota and the one OWI-related conviction from Illinois count as prior convictions.[9] Pursuant to § 343.307(1)(a), the conviction in this case for operating with a PAC also counts as a conviction. Accordingly, under

[9] WISCONSIN STAT. § 343.307(1) provides in pertinent part:

> The court shall count the following … to determine the penalty under … [WIS. STAT. §] 346.65(2):
>
> (a) Convictions for violations under s. 346.63(1) ….
>
> ….
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

§ 343.307(1), Chamblis has seven "[c]onvictions" that "[t]he court shall count" to determine the penalty under WIS. STAT. § 346.65(2).[10]

¶26 The State argues that this court should "remand the case to the circuit court with instructions to count the Illinois prior offense, and unless Chamblis is able to successfully challenge the prior, to impose sentence for … a seventh offense." Chamblis argues that we cannot grant the State's request because doing so would: (1) "compromise the knowing and intelligent nature of Chamblis'[s] plea;" and (2) violate "constitutional protections against double jeopardy."

¶27 Chamblis bases his first argument, that granting the State's request would compromise the knowing and intelligent nature of his plea, on ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08. Chamblis asserts: "***Bangert*** and due process principles required that Chamblis know and understand the specific penalty he faced prior to entering the plea."

¶28 Chamblis fails to demonstrate that he was not aware of the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, or that he could be convicted of that offense, if the State succeeded in proving the

[10] WISCONSIN STAT. § 346.65(2)(am)6., the section applicable in this case, provides in pertinent part that any person convicted of OWI or operating with a PAC under WIS. STAT. § 346.63(1),

> is guilty of a Class G felony if … the total number of suspensions, revocations, and other convictions counted under s. 343.307(1), equals 7, 8, or 9, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one. The court shall impose a bifurcated sentence under s. 973.01 and the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years.

purported Illinois conviction. The record demonstrates to the contrary. At the outset of the plea hearing, the prosecutor informed the circuit court that Chamblis intended to enter a plea to operating with a PAC in the "fourth to seventh [offense] … range." Chamblis's counsel explained that Chamblis "will be pleading to a prohibited alcohol concentration offense of a fourth degree or greater," and that Chamblis was "willing to confess today to the five priors … from Minnesota." Chamblis's counsel explained that proof of the purported Illinois conviction remained "at issue."

¶29 Chamblis's counsel then stated on the record that the penalty for operating with a PAC as seventh offense includes: (1) a maximum fine of $25,000; (2) a ten-year maximum term of imprisonment; (3) a five-year maximum term of initial confinement; and (4) a three-year minimum term of initial confinement. In addition, the record contains a "Plea Questionnaire/Waiver of Rights" form, signed by Chamblis, which states: "I understand that the judge … may impose the maximum penalty. The maximum penalty I face upon conviction is: $25,000 fine and 10 years imprisonment." Based on this document and Chamblis's counsel's statements at the plea hearing, we conclude that, under the particular facts of this case, Chamblis was aware both of the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, and that he faced this possible punishment if the State succeeded in proving the purported Illinois conviction.

¶30 Chamblis's second argument, that granting the State's request would violate constitutional protections against double jeopardy, is undeveloped. We therefore do not address it. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (court of appeals need not address an undeveloped argument).

¶31 Having rejected the only arguments that Chamblis makes in opposition to the remedy requested by the State, and in light of our conclusion that Chamblis has seven convictions that count for purposes of WIS. STAT. § 346.65(2), we remand to the circuit court with instructions to: (1) issue an amended judgment of conviction reflecting a conviction for operating with a PAC, as a seventh offense, in violation of WIS. STAT. § 346.63(1)(b); and (2) hold a resentencing hearing, and impose a sentence consistent with the penalty ranges for a seventh offense set forth in WIS. STAT. § 346.65(2)(am)6.[11]

III. Chamblis's Cross-Appeal

¶32 Chamblis filed a cross-appeal challenging the circuit court's denial of his motion to suppress evidence obtained "in connection with the stop of his vehicle." Chamblis argues that the circuit court's finding, that the officer who stopped the vehicle that Chamblis was driving observed a crack in the vehicle's windshield, is clearly erroneous.[12] As we explain, Chamblis fails to demonstrate how the circuit court's finding is clearly erroneous.

¶33 When we review a circuit court's decision on a motion to suppress, we uphold the circuit court's factual findings unless those findings are clearly erroneous. ***State v. Kramer***, 2008 WI App 62, ¶8, 311 Wis. 2d 468, 750 N.W.2d

[11] Nothing in this opinion prevents Chamblis from "challeng[ing] the existence of the prior offense[s]." ***Wideman***, 206 Wis. 2d at 105. This opinion is based on the undisputed facts in the record as developed to date. However, if Chamblis were to successfully challenge the existence of one or more of the prior offenses, the circuit court would be required to reassess the number of countable prior convictions under WIS. STAT. § 343.307(1) before determining the penalty under WIS. STAT. § 346.65(2).

[12] A crack in the area of the windshield that is swept by the windshield wipers violates WIS. ADMIN. CODE §§ TRANS 305.34(3)(a) and 305.05(43).

941. "The application of constitutional principles to the facts is a question of law that we review *de novo*." ***Id.***

¶34 Based on the testimony presented at the suppression hearing, the circuit court found that: (1) the officer who stopped the vehicle that Chamblis was driving recognized the vehicle as one he had seen with a windshield crack a few weeks before; (2) before stopping the vehicle, the officer "look[ed] to see if the [windshield] was fixed"; (3) the officer saw "a glimmer" of light from a crack in the vehicle's windshield; and (4) the officer stopped the vehicle to follow up on the cracked windshield.

¶35 Chamblis argues that the circuit court's finding that the officer observed the crack in the windshield is clearly erroneous because "many of the vehicle's features would naturally have obscured if not prevented [the officer's] view of the lower section of the windshield." Chamblis bases his argument solely on two photographs introduced at the suppression hearing, which he contends show that the officer could not have observed the crack in the windshield from the officer's "vantage point" behind the vehicle that Chamblis was driving.

¶36 We disagree with Chamblis that the photographs demonstrate that the officer could not possibly have observed the crack in the windshield. The photographs appear to have been taken from in front of the vehicle, and do not show what an individual driving behind the vehicle (the position of the officer in this case) would have been able to see. Chamblis makes no other argument as to how the circuit court's finding that the officer observed the crack in the windshield is clearly erroneous. Accordingly, we affirm the circuit court's finding and conclude that the circuit court properly denied Chamblis's motion to suppress.

¶37 In sum, we conclude that: (1) the circuit court erroneously exercised its discretion when it excluded the additional evidence of the Illinois conviction that the State sought to introduce; (2) the additional evidence is sufficient to prove the Illinois conviction; and (3) the circuit court properly denied Chamblis's motion to suppress. We therefore reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions; cross-appeal dismissed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.