

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

January 15, 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. 96-2435-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**TODD A. IMME,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Ozaukee County:  
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

BROWN, J. The State charged Todd A. Imme with operating a motor vehicle with a prohibited blood alcohol concentration, as a third offense.<sup>1</sup> Although the State had the burden of proving that Imme had two prior OWI-related convictions, Imme offered to stipulate to his prior convictions and requested that the trial court accordingly remove this issue

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<sup>1</sup> See §§ 346.63(1)(b) and 346.65(2)(c), STATS., 1993-94. The State also brought the companion charge of operating a motor vehicle while intoxicated. See §§ 346.63(1)(a) and (c).

from the jury's consideration. The trial court, however, ruled that the bare facts of Imme's convictions must be presented to the jury since the jury was responsible for making the ultimate determination of whether the State proved all of the elements of the charge. We conclude that the trial court properly treated Imme's offer to stipulate and affirm his conviction.<sup>2</sup>

The facts are not in dispute. Imme's sole appellate claim concerns the legal question of whether an accused intoxicated driver, through an offer to stipulate, may unilaterally remove from the jury's consideration the prior offense element of an OWI-related charge. See WIS J I—CRIMINAL 2660B (“The second element requires that at the time the defendant [operated] a motor vehicle, the defendant had two or more convictions, suspensions, or revocations ....”).

Prior to trial, Imme presented the trial court an “Offer to Stipulate to the fact of prior OWI convictions on the part of the defendant and consent to jury waiver on that element.” Imme conceded to the trial court (as he does on appeal) that his prior OWI offenses were an element of the charge as the statutes lower the prohibited blood alcohol concentration from 0.10% to 0.08% when the

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<sup>2</sup> Imme also argues that his operating while intoxicated conviction violates the double jeopardy clause because he was previously subjected to an administrative suspension of his operating privileges. However, in *State v. McMaster*, No. 95-1159 (Wis. Dec. 13, 1996), the supreme court held that the double jeopardy clause does not preclude the state from pursuing OWI charges after an administrative suspension. *McMaster* controls this issue and it holds against Imme.

accused driver has two or more offenses. See *State v. Ludeking*, 195 Wis.2d 132, 139, 536 N.W.2d 392, 395 (Ct. App. 1995); see also § 340.01(46m)(b), STATS., 1993-94. Nevertheless, Imme argued that in light of his stipulation, the State's reference to his prior offenses would be irrelevant and prejudicial. The State refused Imme's offer.

The trial court, however, relying on its power to control the admission of evidence, fashioned the following compromise. Since the prior convictions were an element of the case, the trial court determined that the jury was entitled to that information. But owing to the potential for prejudice, the court also determined that it would permit the jury to hear:  
[n]othing else about the nature of the prior offenses. Nothing about the alcohol level. Simply the fact that there were two prior offenses and the dates because of the fact they were within a 10-year period is also relevant. They have to make that determination. I am going to give a limiting instruction as to the jury's use of it.

We now turn to Imme's contention that the trial court erred in reaching this compromise position.

Much of Imme's appellate argument is addressed towards the issue of whether he can unilaterally waive his right to a jury trial on the multiple conviction element. He presumably believes that the factual elements of the crime should be broken down. The jury should resolve the factual issue of whether the driver had a prohibited blood alcohol concentration, and the trial

court, through the evaluation of a stipulation, should determine if the driver had prior offenses.

However, Imme's basic concern is that the evidence of his prior convictions is prejudicial. Hence, he relies on § 904.03, STATS., to support his argument that trial courts must essentially bifurcate this charge to protect OWI defendants against the inherent "bias" of the lay jury.

We reject Imme's claim. In *Ludeking*, this court stressed that the statute was designed so that the jury would make the determination of whether the accused driver had prior convictions and thus whether the lower standard applied. See *Ludeking*, 195 Wis.2d at 139-40, 536 N.W.2d at 395. Since proof of prior convictions is therefore necessary, plain facts about the accused driver's prior convictions—like what the trial court permitted here—cannot be prejudicial. Since probative information is only excludable when its value is substantially outweighed by its prejudicial effect, see § 904.03, STATS., the bare facts of an accused driver's convictions are important enough to keep the scale from pointing towards exclusion.

Indeed, in *State v. Wallerman*, 203 Wis.2d 158, 165-66, 552 N.W.2d 128, 132 (Ct. App. 1996), we recognized that a defendant may wish to stipulate to factual elements which are not relevant to his or her defense theory. Nonetheless, even when such a stipulation is accepted, we explained that the State is still allowed to offer the stipulation to the jury and that the jury is permitted to rely on the stipulation in its factfinding. See *id.* at 168, 552 N.W.2d at 132-33.

We note that the trial court in this case did very much what this court envisioned when it wrote *Wallerman*. The trial court crafted a compromise which balanced the necessity that the jury pass on Imme's prior convictions and the risk that the jury would be prejudiced by his prior convictions. Contrary to Imme's claim, the trial court had no legal authority to keep this information entirely out of the jury's view.

*By the Court.* – Judgment affirmed.

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