COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3107-CR **Cir. Ct. No. 1999CT66**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUDY A. GARBOW SWANSON,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Burnett County: MICHAEL J. GABLEMAN, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Judy A. Garbow Swanson appeals a judgment of conviction for operating a motor vehicle while intoxicated, fourth offense. She

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

contends there was insufficient evidence to convict her and that the State failed to establish this was her fourth offense. This court rejects these arguments and affirms the judgment.

¶2 As for Swanson's first claim, this court may not substitute its judgment for that of the trier of fact unless no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Swanson's case was tried before a jury, and this court concludes there was sufficient evidence to support the jury's verdict.

¶3 Just after 2 a.m. on May 29, 1999, a motorist approached officer David Lein and gave him a description and license plate number of a vehicle that was weaving back and forth and following the motorist too closely. Lein found the vehicle and followed it for several miles, observing it cross both the center line and fog line. He stopped the vehicle, which had two occupants. Swanson was driving, and her brother was in the passenger seat. In the back seat was a twenty-four pack of beer, of which four or five cans had been opened.

¶4 Swanson told Lein that she was taking her brother to the hospital, but she did not know why. When Lein asked for Swanson's drivers license, she told him that it had been revoked. Swanson was upset and crying, raising her voice and waiving her arms. Swanson refused to perform field sobriety tests. She also refused to submit to chemical tests.

¶5 Swanson argues that there was no direct evidence of her intoxication, and that the jury therefore could only have based its verdict on negative inferences from her refusals to perform field sobriety tests and take chemical tests. However, taken together, the evidence was sufficient to support

her conviction and was not supported solely by her refusals. In addition to refusals, there was also her erratic driving, behavior during the traffic stop, and the presence of alcohol in the vehicle.

¶6 Swanson's second claim is that the State failed to establish this was her fourth offense. First, this issue is not properly before this court because it was not raised in the circuit court at sentencing or in a postconviction motion. ***State v. Gomez***, 179 Wis. 2d 400, 407, 507 N.W.2d 378 (Ct. App. 1993). This court nevertheless chooses to address the issue. *See* ***Shoreline Park Preserv., Inc. v. DOA***, 195 Wis. 2d 750, 763, 537 N.W.2d 388 (Ct. App. 1995) (This court may, in its discretion, address issues not properly raised in the circuit court.).[2]

¶7 For sentencing purposes, prior offenses may be established either by competent proof of the prior offenses or by an admission of the prior offenses by the defendant or defendant's counsel. ***State v. Wideman***, 206 Wis. 2d 91, 104-05, 556 N.W.2d 737 (1996). Silence by the defendant or counsel is not sufficient to constitute an admission. ***Id.*** at 95. While Swanson and her counsel did not explicitly admit to the prior offenses, they were not silent either. Rather, Swanson's counsel joined in the State's sentencing recommendation, which was based on the guidelines in effect at the time for a fourth-offense OWI, after the State identified it as such. This case is therefore distinguishable from ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996), where defendant's counsel was unsure of the appropriate sentence. *See* ***id.*** at 149. Further, in the complaint, the

[2] Were this court not to address the issue, Swanson could still raise it in a WIS. STAT. § 974.06 motion to the circuit court, and the successive claims rule of § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), would not bar it. *See* ***State v. Flowers***, 221 Wis. 2d 20, 29-30, 586 N.W.2d 175 (Ct. App. 1998).

swearing officer stated that he had reviewed a teletype revealing a prior offense in 1995 and two offenses in 1998.[3] Together, the complaint and counsel's tacit admission by joining in the State's sentencing recommendation were sufficient to allay any concerns that counsel was in doubt about whether this was Swanson's fourth offense. *See* ***Wideman***, 206 Wis. 2d at 110.

By the Court.—Judgment affirmed.

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

[3] This court notes that had a copy of the teletype been attached to the complaint, it would be competent proof of the prior offenses and no admission would be required. *See* ***State v. Spaeth***, 206 Wis. 2d 135, 153, 556 N.W.2d 728 (1996).