COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1164-CR **Cir. Ct. No. 2003CT2570**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE LOUIS MATAMOROS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Reversed and cause remanded.*

¶1 KESSLER, J.[1] Jose Matamoros was charged with operating a motor vehicle under the influence of an intoxicant, in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

§§ 346.63(1)(a) and 346.65(2) (2003-04).[2] He was also charged with operating a motor vehicle with a prohibited alcohol concentration level in violation of WIS. STAT. §§ 346.63(1)(b) and 340.01(46m). A jury convicted him of both charges. During the trial, as is appropriate,[3] there was no documentary or other evidence that Matamoros had any prior convictions for operating under the influence of intoxicants. At sentencing on August 30, 2004, the only evidence of prior convictions was in response to the trial court's question about imposing an ignition interlock, when the assistant district attorney stated:

> I think if there's a prior within five, it's mandatory that the Court do either interlock with immobilization or seizure of the vehicle. I'm taking a look to see if I have the driving record here. Prior OWI is within five years. It's from August 23rd, 2000. Violation date March 25th, 2000. So that would be up to the Court on which option it chooses.

The trial court imposed an enhanced sentence, observing repeatedly that this was a second offense within five years.

¶2 Neither Matamoros nor his trial counsel ever specifically admitted a prior violation. Nor did they dispute or correct either the trial court, when it referred three times during sentencing to Matamoros' prior OWI conviction, or the assistant district attorney, when he made the statement set out above. Matamoros was sentenced as a second offender. His sentence was stayed pending appeal. Matamoros moved for postconviction relief pursuant to WIS. STAT. § 809.30,

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[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] *See* ***State v. Wideman***, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996) ("[T]he State need not prove the existence of a prior offense as an element of the offense of operating a motor vehicle while intoxicated. (Citation omitted.) Thus, proof of a prior offense need not be submitted to the jury.").

alleging that, pursuant to WIS. STAT. § 973.13[4], commutation of his sentence was required because the State had not proved a prior OWI conviction as required by ***State v. Spaeth***, 206 Wis. 2d 135, 556 N.W.2d 728 (1996) and ***State v. Wideman***, 206 Wis. 2d 91, 556 N.W.2d 737 (1996). The trial court denied the motion. This appeal followed.

¶3 We review *de novo* the trial court's determination that the record is sufficient to sustain the sentence imposed. *See* ***Spaeth***, 206 Wis. 2d at 148. "When a court imposes a sentence greater than that authorized by law, Wis. Stats. § 973.13 voids the excess portion of the sentence. The sentence is commuted, without further proceedings, to the maximum allowed by statute." ***Spaeth***, 206 Wis. 2d at 155-156 (footnote in original).

¶4 ***Wideman*** and ***Spaeth***, cases involving two very similar penalty enhancing statutes, were decided by the Wisconsin Supreme Court on the same day. ***Wideman*** involved operating a vehicle while under the influence of alcohol (OWI), while ***Spaeth*** involved operating a vehicle after revocation of operating privileges (OAR). Each case refers to, and appears to specifically approve, principles explained in the other case. ***Wideman*** refers to ***Spaeth*** for "other methods by which the State may establish prior offenses." ***Wideman***, 206 Wis. 2d at 107. The court in ***Spaeth,*** at a point specifically referenced in ***Wideman***, explained that the minimum proof required "*prior to the imposition of sentence*

[4] WISCONSIN STAT. § 971.13 provides:

> **Excessive sentence, errors cured.** In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

[is] either: (1) an admission; (2) copies of prior judgments of conviction …; or (3) a teletype of the defendant's Department of Transportation … driving record." ***Spaeth***, 206 Wis. 2d at 153 (emphasis added). ***Spaeth*** refers to ***Wideman*** for the reasons why application of the standards for proof of repeater offenses set forth in WIS. STAT. § 973.12(1) are not applicable to penalty enhancer statutes involving OAR or OWI convictions. ***Spaeth***, 206 Wis. 2d at 146-48. We understand our supreme court to intend that we read these cases together, rather than, as the State argues here, as having limited impact only to the specific violation—OWI or OAR—that happened to be involved in each case. Had the intent of our supreme court been to consider these cases so limited, we expect the court would have specifically so explained and would not have linked the cases with cross referencing as it did.

¶5 In ***Wideman,*** the court reiterated that "the State bears the burden of establishing prior offenses as the basis for enhanced penalties under [WIS. STAT.] § 346.65(2)," ***Wideman***, 206 Wis. 2d at 94, and specifically held that "[i]f the accused or defense counsel … *remains silent about a prior offense*, the State must establish the prior offenses for the imposition of the enhanced penalties of § 346.65(2) by presenting 'certified copies of conviction or other competent proof … before sentencing.'" ***Wideman***, 206 Wis. 2d at 95 (citation omitted; emphasis added). The court, in its decision in ***Spaeth***, noted that if the complaint is to be used as the basis for establishing the prior convictions for sentencing, the complaint "must be accompanied by reliable documentary corroboration of the asserted convictions." ***Spaeth***, 206 Wis. 2d at 153. In the case before us, both the accused and counsel remained silent about a prior offense. The State presented no copies of conviction or driving records. The complaint had no such records attached.

¶6 In ***Wideman***, unlike the present case, the complaint contained specific allegations of the date and nature of the prior convictions. ***Id.*** at 97. Here, the complaint refers to the statutes, and asserts only "that within ten years" of this incident, "defendant had one prior conviction, suspension or revocation for alcohol-related driving offenses." Accordingly, the complaint here is insufficient as a basis upon which to impose the enhanced penalty for it provides no "documentary proof" which establishes the specific prior conviction, within the previous five years, for operating a vehicle while intoxicated. *See* ***Spaeth***, 206 Wis. 2d at 152-153.

¶7 In ***Spaeth***, the court also noted that "it is difficult to discern the substance of a burden that the State may discharge with a mere assertion." *See* ***Spaeth***, 206 Wis. 2d at 150. At a sentencing hearing where, as here, nothing more than an oral assertion is provided by the State, the proof is inadequate. ***Id.*** If, as the trial court here later concluded, the State was actually reading from an official record, it would have taken minimal effort for the State to offer the document as proof of the asserted prior conviction. Had that occurred, this appeal would have been unnecessary.

¶8 In its oral decision on the postconviction motion on February 7, 2006—approximately six months after the August 30, 2004 sentencing hearing—the trial court found that there was "other competent proof" which established the prior conviction. The court concluded that "what [the State] [was] reading from is the driving record" and "that those [dates] aren't coming from some other source. It's very apparent to me that that was the case on the date of sentencing." However, nothing in the record supports that finding. The document allegedly read at the sentencing hearing is not part of this record, consequently, the trial court could not have known what the document was. The State could just as easily

have been reading from notes written on the file or on a loose scrap of paper. Nothing but the State's oral assertion tends to establish the fact or date of any prior conviction. As the court in ***Spaeth*** explained, a mere oral assertion is inadequate proof of a prior conviction for purposes of the penalty enhancing statutes. *See* ***id.*** at 150.

¶9 Additionally, in ***Wideman***, unlike this case, defense counsel acknowledged at sentencing that the record contained sufficient proof of the prior offense. ***Wideman***, 206 Wis. 2d at 97. Here, the trial court agreed that the record contains no evidence that either trial counsel or Matamoros acknowledged or stipulated to the prior offense.

¶10 The court in ***Wideman*** went on to discuss what future conduct it expected from both the State and defense counsel in these penalty enhancement cases, observing that:

> The State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof. Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses.

Wideman, 206 Wis. 2d at 108. As noted above, the State's burden to establish the existence of prior convictions must be accomplished using competent, "documentary" proof; as reflected in the record, this burden was not met by the State in the present case. Trial counsel, however, also did not conform his conduct to that recommended by the ***Wideman*** court. The record shows that trial counsel at no time advised the State that the information it stated was incorrect or that counsel could not verify it. *See* ***id.*** at 108. The State argues that this failure by trial counsel, coupled with trial counsel's request for jury instructions that could

only have been consistent with a second or subsequent offense, amounts to something in the nature of an admission of the accuracy of the State's representation. We do not agree. Because it is the State's obligation to prove the elements on which it relies for imposition of an enhanced sentence and, as our supreme court has explained, mere oral assertion by the State at sentencing is not sufficiently reliable proof of the prior conviction (particularly when the available methods of documentary proof are exceedingly easy to provide), the record of the sentencing hearing does not support the enhanced sentence imposed.

¶11 Because the record here does not contain more than an oral assertion of the prior conviction, the enhanced penalty was improperly imposed. WISCONSIN STAT. § 973.13 therefore mandates that the sentence be commuted without further proceedings to the maximum otherwise allowed by statute. *See* ***Spaeth***, 206 Wis. 2d at 155-156. Accordingly, we reverse the trial court's order denying Matamoros' postconviction motion and remand this matter to the trial court for entry of an amended order commuting Matamoros' sentence, pursuant to § 973.13, to the maximum permitted without the enhancement of WIS. STAT. § 346.65(2) and for entry of an amended judgment finding Matamoros guilty of operating a motor vehicle under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1)(a), and of operating a motor vehicle with a prohibited alcohol concentration level, in violation of WIS. STAT. §§ 346.63(1)(b) and 340.01(46m).

By the Court.—Judgment and order reversed and cause remanded.

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