COURT OF APPEALS DECISION DATED AND FILED

June 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 02-0286-CR **Cir. Ct. No. 01-CT-32**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY W. SEXTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Reversed and cause remanded with directions*.

¶1 HOOVER, P.J.[1] Bradley Sexton appeals a judgment convicting him of operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(1)(a), and operating a vehicle with a prohibited blood alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

concentration, contrary to § 346.63(1)(b). Sexton argues that the trial court erred by not exercising its discretion when it ruled that Sexton's sixteen prior convictions were admissible for impeachment purposes pursuant to WIS. STAT. § 906.09.[2] This court concludes that the court erred when it proceeded with a misapprehension of the law and failed to apply the appropriate factors. Accordingly, this court reverses the judgment and remands for a new trial.

BACKGROUND

¶2 On February 3, 2001, deputy sheriff William Uelmen found a truck in a ditch with Sexton sitting in the driver's seat. Uelmen questioned Sexton and noticed that his speech was slurred. Uelmen also smelled the odor of intoxicants. Sexton failed field sobriety tests, and Uelmen arrested him for driving while intoxicated. Sexton agreed to a blood draw, and his blood alcohol concentration was .206%.

¶3 Just before the trial began, the prosecutor presented Sexton and the trial court with a list of sixteen prior convictions. She requested permission to use

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[2] WISCONSIN STAT. § 906.09 provides in part:

> (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer, (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,
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> (3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

all sixteen to impeach Sexton if he testified. Defense counsel urged the court to exercise its discretion and to exclude for impeachment purposes a number of these convictions. Counsel argued that Sexton's record was artificially inflated because some of the convictions were too remote, some involved traffic matters and some involved multiple counts for the same incident. The court nevertheless decided to admit all sixteen convictions for impeachment purposes.

¶4 On cross-examination, the prosecutor asked Sexton whether he had ever been convicted of a crime. Sexton replied that he had been convicted sixteen times. The prosecutor mentioned the number of prior convictions again in the closing argument and rebuttal. She argued, "We were allowed to get in the evidence the fact that he has 16 prior convictions, because that bears on his credibility, his believability;" and "that's where his prior record comes in, on the issue of credibility." The jury found Sexton guilty, and the trial court entered judgment.

DISCUSSION

¶5 Sexton contends that the trial court erred when it determined that the prosecutor could use all sixteen convictions to impeach him at trial. This court agrees because the trial court failed to engage in the balancing that WIS. STAT. § 906.09 requires or apply the factors set forth in ***State v. Smith***, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). The court also proceeded under a misapprehension of the law regarding admissibility of prior convictions. These legal errors make the court's exercise of discretion erroneous. ***Popp v. Popp***, 146 Wis. 2d 778, 786, 432 N.W.2d 600 (Ct. App. 1988).

¶6 Whether to admit prior conviction evidence for impeachment purposes under WIS. STAT. § 906.09 is within the trial court's discretion. ***State v.***

Kruzycki, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). When reviewing a discretionary decision, this court considers only whether the trial court properly exercised its discretion and not whether this court would have made the same ruling. ***Id.*** A court properly exercises its discretion when it correctly applies legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. ***State v. Kuntz***, 160 Wis. 2d 722, 745-46, 467 N.W.2d 531 (1991).

¶7 WISCONSIN STAT. § 906.09(1) creates the general rule that prior convictions are admissible for the purpose of attacking a witness' credibility. This general rule is limited by § 906.09(2), which provides that the convictions may be excluded if their "probative value is substantially outweighed by the danger of unfair prejudice." Finally, § 906.09(3) requires the trial court to exercise discretion and determine the admissibility of convictions before they are introduced.

¶8 In ***Smith***, 203 Wis. 2d at 295-96, this court set forth a guide for trial courts:

> A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. ***Kruzycki***, 192 Wis. 2d at 525, 531 N.W.2d at 435 (citation omitted). These factors are weighed in a balancing test to determine whether the probative value of the prior conviction evidence "is substantially outweighed by the danger of unfair prejudice." (Citation omitted.)

¶9 Here, the trial court stated:

> Well, you know, obviously this doesn't prove he's guilty today. It just goes to credibility, which as near as I can tell,

> some sort of common sense human humanity criteria, that people who commit crimes are probably not that credible. I don't know how else we have this rule, and I guess in the great body of human experience, that's probably accurate. People who tend to be criminals probably tend to be not quite truthful. I don't know if that's always the case. Probably he pled to a number of these, which would probably attest to some truthfulness. I don't think he's gone through 16 jury trials. But that's the rule. That's why we have it. And I don't see any reason not, why, how the, you know, how would the court throw out one over the other? He obviously has a bad criminal record, and a couple of these are even burglaries, which is a bad property crime. So I guess they all go in. If he testifies, it's, he asks, it's 16.

¶10 The trial court appears to have believed the rule in Wisconsin is that all prior convictions are admissible to impeach credibility and that one conviction cannot be distinguished from the other. The State argues, "The judge's statement on the record clearly reflects his understanding that the presumption in the State of Wisconsin under Section 906.09 is that evidence that a witness has been convicted of a crime is admissible." This court cannot escape the conclusion that the court was under the impression that such evidence is automatically admissible.

¶11 While it is true that all convictions are presumed to be probative of credibility, ***Smith***, 203 Wis. 2d at 297, it is not true that they are presumptively admissible. The presumption that the number of convictions is relevant to a witness' credibility is merely the start of an analysis under WIS. STAT. § 906.09. ***Smith***, 203 Wis. 2d at 297-98. The court must exercise its discretion by analyzing each conviction in light of the ***Smith*** factors and determine whether the probative value of the prior convictions is outweighed by the danger of unfair prejudice. WIS. STAT. § 906.09(2).

¶12 The trial court asked rhetorically how it could distinguish one conviction from another: "how would the court throw out one over the other?"

However, the ***Smith*** factors and the balancing test in WIS. STAT. § 906.09(2) require the court to determine whether there are distinctions to be made between the various convictions. The court did not mention the ***Smith*** factors. Further, there is no evidence that the court considered the lapse of time since the convictions, Sexton's rehabilitation, the gravity of the crimes or the involvement of dishonesty in the crimes, except that it noted that burglary, which accounted for four of the sixteen convictions, was a "bad property crime." *See* ***Smith***, 203 Wis. 2d at 295-96. That was not enough.

¶13 Because of the number of convictions involved, of particular concern is the trial court's failure to specifically address whether the probative value of the prior conviction evidence was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 906.09(2). The danger of unfair prejudice is self-evident. The court should have expressly considered the potential for the jury to decide the case on grounds other than the evidence of guilt. It should have balanced that potential against what may have been the enhanced probative value attaching to the perception that, the more convictions, the more likely the person is not credible.

¶14 Although it may have been expedient to simply admit all of Sexton's prior convictions, a proper exercise of discretion requires the trial court to apply the ***Smith*** factors and balance the probative value and prejudice of the convictions under WIS. STAT. § 906.09. Here, as in ***Smith***, "A blanket ruling, while expedient and consistent, fails to show a consideration of the proper factors with respect to each witness, and thus, is an erroneous exercise of discretion." ***Smith***, 203 Wis. 2d at 299. In fact, a policy of admitting all prior convictions improperly removes all discretion.

¶15 Sexton also argues the specific factors regarding his prior convictions and contends that this court could, but should not, affirm the trial court's erroneous decision if "facts of record applied to the proper legal standard support the trial court's conclusion." ***State v. Pittman***, 174 Wis. 2d 255, 268-69, 496 N.W.2d 74 (1993). However, this court cannot do that here. Under the circumstances presented, that would be tantamount to exercising discretion, which is the trial court's province. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980). Also, the facts concerning the correct number of prior convictions are not clear.

¶16 Sexton argues that the trial court's error was not harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The State does not respond to Sexton's harmless error argument and thereby concedes it. *See* ***State v. West***, 214 Wis. 2d 468, 477, 571 N.W.2d 196 (Ct. App. 1997).

By the Court.—Judgment reversed and cause remanded with directions.

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