COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 30, 1995

No. 95-0852-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. WIDEMAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

ANDERSON, P.J. The sole issue on appeal is whether the trial court at sentencing had sufficient evidence before it to establish that the defendant, Daniel J. Wideman, had two prior convictions for drunk driving. Because the trial court had before it sufficient evidence to establish that this was Wideman's third drunk-driving conviction within five years, the judgment and order are affirmed.

The State commenced this action with the filing of a criminal complaint charging that Wideman drove a motor vehicle on April 3, 1994, while under the influence of an intoxicant in violation of § 346.63(1)(a), *Stats*. The complaint stated:

PENALTY PROVIDED: Section 346.65(2), Wis. Stats.

> Upon a 3rd conviction of this offense, the maximum possible penalty shall be a fine of not less than $600 nor more than $2,000 and imprisonment for not less than 30 days nor more than one (1) year in the county jail.

The complaint alleged that a teletype from the Wisconsin Department of Transportation, Division of Motor Vehicles, showed that Wideman was convicted of violations of § 343.305, STATS., or § 346.63(1) twice within the last five years.[1]

Immediately after a jury found Wideman guilty of drunk driving under § 346.63(1), STATS., the circuit court moved to the sentencing phase of the proceedings. The court initially asked if this was Wideman's third drunk-driving conviction within five years, and Wideman's counsel replied that it was. In arguing that the court should deviate from the guidelines and impose the statutory minimums, Wideman's counsel told the court that Wideman's "previous offense[s] dated back to 1990 and 1989 so he has gone a substantial period, almost five years, with no offenses." The circuit court imposed a sentence under § 346.65(2)(c), STATS., consistent with this being Wideman's third violation of § 346.63 within a five-year period.

[1] Wideman's current violation occurred before § 346.65(2)(c), STATS., was amended to increase to ten years the period of counting prior convictions. *See* 1993 Wis. Act 317, § 7.

Wideman filed a postsentencing motion seeking vacation of the sentence and resentencing contending that the State had failed to offer competent proof of his prior drunk-driving convictions. Over Wideman's objections, the circuit court permitted the State to file a certified copy of Wideman's driving record which mirrored the teletype cited in the complaint in showing two drunk-driving convictions in the previous five years. The circuit court denied Wideman's motion and reaffirmed its earlier sentence.

On appeal, Wideman asserts that the mode and method of proof of prior drunk-driving convictions must conform to the requirements for proving an allegation of habitual criminality under § 973.12, STATS. Wideman argues that the record is devoid of any evidence establishing his status as a repeater. He contends that other than a reference to two prior convictions in the criminal complaint, no direct evidence was offered to establish the prior Operating While Intoxicated (OWI) conviction needed to trigger the mandatory jail sentence and license revocation required by § 346.65(2)(c), STATS. Wideman cites ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984), to rebut any argument that his counsel's comments at sentencing constituted an admission of his prior conviction. He also cites our recent decision in ***State v. Koeppen,*** No. 94-2386-CR, slip op. at 12 (Wis. Ct. App. May 31, 1995, ordered published July 25, 1995), for the proposition that a circuit court lacks authority to reopen sentencing proceedings to permit the State to introduce the necessary proofs of habitual criminality under § 973.12. Wideman reasons that this failure of proof requires this court to vacate the mandatory jail sentence and the suspension of

his operator's license, which the trial court imposed as a result of the alleged repeater status.

On appeal, the State abandons the argument it made in the circuit court that under the terms of § 973.12, STATS., it has a reasonable time to investigate a defendant's prior driving record and it met its burden of establishing Wideman's prior convictions at the postsentencing hearing. The State now argues that by not including any language specifying how or when the State shall prove prior drunk driving convictions under § 346.65(2)(c), STATS., the legislature intended to give the State greater latitude than it has under § 973.12.

Whether the mode and method of proving prior drunk driving convictions to invoke the increased penalties of § 346.65, STATS., are the same as those for proving habitual criminality under § 973.12, STATS., is a question of statutory interpretation. The interpretation of a statute is a question of law which this court reviews without deference to the trial court. ***Johnson v. ABC Ins. Co.,*** 193 Wis.2d 35, 43, 532 N.W.2d 130, 132-33 (1995).

Wideman's reliance upon § 973.12, STATS., and the requirements for proving habitual criminality imposed by appellate court decisions is misplaced. The Wisconsin Supreme Court has determined that § 346.65, STATS., is not a general repeater statute. ***State v. Banks,*** 105 Wis.2d 32, 45, 313 N.W.2d 67, 73 (1981). In ***Banks***, the court held that "the clear and unambiguous language of [§ 346.65] clearly manifests the legislature's specific intent that the sanctions of [the statute] be applied in a manner substantially different from

repeater penalties in general." ***Id.*** The court also held that a trial court has no authority to apply the lesser penalty of a first offense conviction when a second or subsequent offense within the five-year period is a fact. *See* ***id.*** at 47-48, 313 N.W.2d at 74.

In ***State v. McAllister***, 107 Wis.2d 532, 538, 319 N.W.2d 865, 868 (1982), the supreme court held that a previous conviction for OWI is not an element of the offense. The supreme court noted, however, that the defendant does have an opportunity before the court to challenge the existence of previous penalty-enhancing convictions prior to sentencing. The convictions may be proven by certified copies of conviction or other competent proof offered by the State before sentencing. ***Id.*** at 539, 319 N.W.2d at 869.

In ***Banks***, 105 Wis.2d at 48-49, 313 N.W.2d at 74-75, the court recognized that the legislature intended the criminal penalties of § 346.65(2), STATS., to be applied to a driver who repeatedly violates § 346.63(1), STATS., to be consistent with the recognized national and state legislative objective of removing drunken drivers from the highways. In ***State v. Neitzel***, 95 Wis.2d 191, 193, 289 N.W.2d 828, 830 (1980), the court reasoned that because the clear policy of § 343.305, STATS., is to facilitate the identification of drunken drivers and their removal from the highways, the statute must be construed to further the legislative purpose. The ***Banks*** court held that the same objective of removing drunken drivers from the highways is the underlying premise of the criminal penalties of § 346.65(2).

Similarly, this court must apply § 346.65(2), STATS., to further its legislative purpose. We conclude that ***Banks*** and ***McAllister*** permit the court to impose the harsher penalties of § 346.65(2) when, from all the facts and circumstances, it is clear that there is unchallenged evidence that the defendant has prior drunk-driving convictions.[2]

We are satisfied that there was competent proof offered before sentencing that Wideman had two previous convictions for drunk driving. The criminal complaint specifically alleged Wideman's two prior drunk-driving

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[2] We do not reach the question of whether the State can wait until after sentencing to introduce a certified copy of the defendant's driving record because we hold that proof of a defendant's prior drunk-driving convictions can be by any competent evidence produced prior to sentencing. However, our decision should not be read as a license that relieves the State of its obligations to properly prove prior convictions before sentencing. As we have commented in a number of decisions, we are seeing a steady stream of cases —under the criminal code, the Uniform Controlled Substances Act or the motor vehicle code—in which the State fails to properly allege or prove repeater allegations. We recognize that prosecutors face many difficult tasks; however, properly pleading and proving repeater allegations are not among them. In ***State v. Koeppen,*** No. 94-2386-CR, slip op. at 13 (Wis. Ct. App. May 31, 1995, ordered published July 25, 1995), we commented that "this matter often receives loose prosecutorial attention because the task is so elementary and is secondary to the State's principal goal of obtaining a conviction on the underlying charge."

In an age when resources devoted to the justice system are severely limited a failure to properly plead and prove a repeater allegation is a waste of the taxpayers' money. This case is a good example. The failure of the prosecutor to submit a certified copy of Wideman's driving record prior to sentencing has resulted in limited resources being spent for a staff attorney from the State Public Defender's office and an assistant district attorney to research and write motions and briefs in the trial court and this court. Limited resources were expended so that a circuit judge could hear and decide the motion from the public defender. Limited resources were expended so that this court could research and write this decision. Finally, limited resources were expended on an unknown number of staff people who support the lawyers and judges involved.

The failure to properly complete so elementary a task that results in the needless waste of limited resources is unfathomable.

offenses. At Wideman's first appearance, the court advised him of the charge and the increased penalty because of the two prior convictions. At a pretrial hearing where Wideman appeared with counsel, the court again advised Wideman that he had two prior drunk-driving convictions and if convicted of a third offense, harsher penalties would be imposed.

At no time did Wideman ever challenge the existence of the prior convictions. Rather, at the time of sentencing, Wideman and his lawyer operated under the assumption that this was his third offense when counsel argued for the minimum jail time and license revocation under the statute and asked the court to grant Wideman Huber privileges,[3] credit for time served and to transfer the location of the jail time to Appleton. Wideman had the opportunity before the court to challenge the existence of the prior drunk driving convictions, but did not.

Because the court had sufficient information before it to show that this was Wideman's third drunk-driving conviction within the previous five years, the court had no choice but to impose the increased penalty. Therefore, the judgment is affirmed.

By the Court.—Judgement and order affirmed.

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

[3] *See* § 303.08, STATS.