COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 1997

NOTICE

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.

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

No. 95-2220-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHON L. NORTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

DYKMAN, P.J.[1] Jonathan L. Norton appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), third offense, and an order denying his motion for postconviction relief. He argues that his sentence should be commuted to a first offense penalty because the State did

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

not adequately prove the prior OMVWI convictions. We disagree and therefore affirm.

BACKGROUND

On November 14, 1994, the State charged Norton with OMVWI, third offense. Section 346.65(2)(c), STATS., provides that any person who operates a motor vehicle while intoxicated "shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations and convictions counted under s. 343.307(1) equals 3 in a 10-year period …." As a basis for the repeater allegation, the complaint stated:

> [Y]our complainant has reviewed a teletype communication from the Wisconsin Department of Transportation/Division of Motor Vehicles. Your complainant has referred to said teletypes in the past and found the same to be reliable. Said record as maintained in the normal and ordinary course of business by said Department, indicates that on March 8, 1988 the defendant was convicted in the Racine County Circuit Court of operating while intoxicated for an offense that occurred on March 8, 1988. Said record further indicates that on December 18, 1990 the defendant was convicted in the Juneau County Circuit Court of operating while intoxicated for an offense that occurred on April 6, 1990.

On January 9, 1995, Norton pleaded guilty to OMVWI. The court continued sentencing, however, because Norton's attorney requested additional time to investigate whether this violation should be considered a second or third offense. On January 27, 1995, Norton's attorney wrote the court:

> Jonathon Norton objects to the use of his March 8, 1988 conviction for Operating While Intoxicated as a penalty enhancer. He was charged with Operating While Intoxicated on October 9, 1994 which is more than 5 years after said conviction.

> The District Attorney has charged Jonathon Norton with Operating While Intoxicated, third offense within a ten year period. Sec. 346.65 was amended effective April 30, 1994 but was made applicable to convictions that occurred after January 1, 1988. It is Jonathon Norton's contention that the retroactive effect of this law is an impermissible ex post facto violation of article one, sec. 12 of the Wisconsin Constitution.
>
> ….
>
> When Jonathon Norton was convicted of his second offense, his attorney advised him that the 1988 conviction would go off from his record in 1993. In fact, the conviction did go off his record in 1993 and only came back into effect when the law was changed in 1994. Accordingly, we contend that the choice of the District Attorney in charging third offense rather than second offense is an application of this law that violates the **ex post facto** clause.

At the February 6, 1995 pre-sentencing motion hearing, Norton's counsel again asserted that when Norton pleaded guilty to his second OMVWI offense in 1990, his attorney advised him that his 1988 conviction would be off his record in 1993. The court rejected Norton's argument that § 346.65(2)(c), STATS., was an *ex post facto* law and sentenced him as a third-time offender within a ten-year period.

On July 12, 1995, Norton filed a motion for postconviction relief. Norton did not renew his argument that his sentencing under § 346.65(2)(c), STATS., was violative of the *ex post facto* clause. Instead, he argued that the State did not adequately prove his prior convictions, and therefore his sentence should be commuted to that of a first-time offender. The trial court denied Norton's motion. Norton appeals.

DISCUSSION

On December 21, 1995, we stayed appellate proceedings in this case pending the supreme court's decision in ***State v. Wideman***, 206 Wis.2d 90, 556 N.W.2d 737 (1996). In ***Wideman*** and ***State v. Spaeth***, 206 Wis.2d 134, 556 N.W.2d 728 (1996), the supreme court set forth the standard for determining whether the State has adequately established prior offenses for the enhanced penalties of § 346.65(2), STATS., to apply.

In ***Spaeth*** and ***Wideman***, the court concluded that the requirements of the general repeat offender statute, § 973.12(1), STATS.,[2] do not apply to offenses under Chapters 341 to 349, STATS. ***Spaeth***, 206 Wis.2d at 145-46, 556 N.W.2d at 733; ***Wideman***, 206 Wis.2d at 99-102, 556 N.W.2d at 741-43. The court did conclude, however, that the State is obligated to present certified copies of the judgments of conviction or other competent proof to establish prior offenses before sentencing. ***Wideman***, 206 Wis.2d at 103-04, 556 N.W.2d at 743. An admission or a teletype of the defendant's Department of Transportation driving record are two other means of competent proof. ***Spaeth***, 206 Wis.2d at 152, 556 N.W.2d at 735.

---

[2] Section 973.12(1), STATS., provides in relevant part:

> (1) Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea…. If the prior convictions are admitted by the defendant or proved by the state, he or she shall be subject to sentence under s. 939.62 unless he or she establishes that he or she was pardoned on grounds of innocence for any crime necessary to constitute him or her a repeater or a persistent repeater. An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported….

In cases under § 973.12(1), STATS., a defendant's admission "may not by statute be inferred nor made by defendant's attorney, but rather, must be a direct and specific admission by the defendant." ***State v. Farr***, 119 Wis.2d 651, 659, 350 N.W.2d 640, 645 (1984). In ***Wideman***, the supreme court refused to apply ***Farr*** to § 346.65(2), STATS., cases and concluded that "defense counsel may, on behalf of the defendant, admit a prior offense for purposes of § 346.65(2)." ***Wideman,*** 206 Wis.2d at 104, 556 N.W.2d at 744.

The criminal complaint alleged that Norton had been convicted of OMVWI on March 8, 1988 and again on December 18, 1990. In his letter to the court and again at the pre-sentencing hearing, Norton's attorney admitted that Norton had been convicted twice before—in 1988 and in 1990—but argued that the 1988 conviction should not be considered under the *ex post facto* clause. This admission by Norton's attorney provided competent proof of Norton's prior convictions.

In ***Wideman***, the court stated that "[t]he complaint, although not evidence, when coupled with the circuit court's direct inquiry at sentencing and defense counsel's concessions, was sufficient to inform the defendant of the prior offenses and to establish the prior offenses for purposes of sentencing." ***Id.*** at 108, 556 N.W.2d at 745 (footnotes omitted). Likewise, Norton's attorney admitted that Norton was twice convicted of OMVWI and his admitted convictions matched the prior convictions contained in the complaint. It is irrelevant that Norton's attorney admitted to the prior convictions on his own volition, while in ***Wideman*** the admission was in response to the court's inquiry. Because the attorney's admission provided competent proof of Norton's prior convictions, the trial court did not err in denying his postconviction motion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* Rule 809.23(1)(b)4 , STATS.