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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2014AP000742

CITY OF STEVENS POINT,
Plaintiff-Respondent,

v.

JARED LOWERY,
Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN THE
CIRCUIT COURT OF PORTAGE COUNTY,
THE HONORABLE THOMAS EAGON PRESIDING.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. MAY LOWERY CHALLENGE THE VALIDITY OF A CONVICTION THAT IS VOID DUE TO LACK OF SUBJECT MATTER JURISDICTION MORE THAN THREE YEARS AFTER THE JUDGMENT WAS ENTERED?

Answered by the trial court: No. The trial court held that given the lapse in time, Lowery waived his right to challenge the judgment and therefore denied Lowery's motion to Vacate.

II. DOES THE CIRCUIT COURT HAVE A DUTY TO ANNUL AN INVALID JUDGMENT?

Answered by the trial court: No. The trial court held that, due to the importance of finality of judgments, waiver and *Village of Trempealeau v. Mikrut*, it had discretion under its inherent authority not to vacate the judgment given the facts of this case.

STATEMENT REGARDING ORAL ARGUMENT

The facts in this case appear not to be in dispute. The legal issues are straight forward and can be adequately addressed in the briefs of the parties. Consequently, oral argument is unnecessary in this case.

STATEMENT REGARDING PUBLICATION

All of the grounds for vacating Lowery's 2010 OWI conviction involve the application of well settled precedent. Therefore, no request for publication is being made.

STATEMENT OF THE CASE

This is an appeal from an Order of the Circuit Court denying Lowery's motion to vacate an OWI (1st offense) conviction that was void due to a lack of subject matter jurisdiction.

On March 4, 2014, the trial court held that it is never without subject matter jurisdiction, and therefore the court could exercise its jurisdiction and deny Lowery's motion due to the fact that the conviction occurred more than 3 years prior and Lowery waived his right to challenge the court's jurisdiction over the matter because he did not raise the objection at trial. R.18, pgs. 11, 15-18. The court appeared to hold that it was not required to vacate a judgment that was void for lack of subject matter jurisdiction and exercised its discretion denying Lowery's motion. R.18, pgs. 17-18.

Following the court's decision, Lowery filed a Notice of Appeal challenging the court's ruling. R.12.

STATEMENT OF FACTS

On December 20, 2010, Lowery was found guilty and convicted for a first offense OWI after a court trial. R.6.; R.18, pg. 2. Prior to this case being charged, Lowery had been convicted of a first offense OWI in Milwaukee County in 1996, and an implied consent violation arising out of Florida in 2002. R.9, pgs. 3,4.

On December 16, 2013, Lowery filed a Motion to Vacate the 2010 conviction because the City of Stevens Point lacked the authority and jurisdiction to prosecute a third OWI as a first offense. R.8. The City of Stevens Point did not file a written response to Lowery's motion.

The motion hearing was held on March 4, 2014. R.18, pg. 1. At the hearing, the City argued the 2002 Florida conviction should not be counted pursuant to Wis. Stat.

§343.307(a). Lowery responded by entering into evidence his Wisconsin Department of Transportation Certified Driving Record and a copy of the applicable Florida implied consent statute under which Lowery was convicted. R.18, pg. 3-4; R.9; R.10. The Court found that the Florida statute was substantially similar to Wisconsin's and that the violation should be counted under Wis. Stat. §343.307(a), rendering the Steven's Point OWI a third offense.

During the motion hearing, the trial court, sua sponte, challenged the timeliness of Lowery's motion, distinguished this case from *Walworth County v. Rohner*, 108 Wis.2d 713, 324 N.W.2d 682 (1982) and relied on *Village of Trempealeau v. Mikrut* to determine that the trial court is never without subject matter jurisdiction, apparently that the circuit court does not have a duty to vacate void judgments and that Lowery waived his ability to challenge the judgment because he did not object at trial. R.18, pgs. 9-18.

The court appeared to imply that voiding a judgment based upon the lack of subject matter jurisdiction was discretionary stating "I conclude that Mr. Lowery cannot bring this motion to challenge the court's competency, having waived it by not asserting it, and I find there are no extraordinary facts that would call for overcoming the waiver." R.18, pgs. 17-18.

STANDARD OF REVIEW

When the facts of a case are not disputed, whether a judgment is void for lack of jurisdiction is a question of law the court reviews without deference. *KETT v. Community Credit Plan, Inc.*, 222 Wis.2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998); *Ball v. District No. 4. Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

ARGUMENT

I. THE CITY OF STEVENS POINT DOES NOT HAVE JURISDICTION TO CONVICT LOWERY OF A THIRD OWI AS A FIRST OFFENSE.

“The legislature intended a second offense for drunk driving to be within the exclusive province of the State to prosecute as a crime.” *Walworth County v. Rohner*, 108 Wis.2d 713, 721, 324 N.W.2d 682 (1982). The County “had no jurisdiction over the offense and the prosecutor had no discretion to charge under the county ordinance which can have no application to a subsequent drunk driving offense.” *Id.* The trial court does not have “discretion to treat the second offense as anything but a second.” *State v. Banks*, 105 Wis.2d 32, 42-43, 313 N.W.2d 67 (1981). Although the instant case deals with a third offense rather than a second, this distinction does not affect the underlying rule that prohibits a municipality from prosecuting what should be a criminal OWI as an ordinance violation.

“When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and *may be challenged at any time.*” *Kohler Company v. DILHR*, 81 Wis.2d 11, 25, 259 N.W.2d 695 (1997) (emphasis added). “The municipal judgment having no force or effect, it is as if it never took place.” *City of Kenosha v. Jensen*, 184 Wis.2d 91, 99, 516 N.W.2d 4 (Ct. App. 1994).

In this case, the trial court found that Lowery had two convictions prior to the 2010 conviction that should be counted pursuant to Wis. Stat. §343.307(a). R.18, pgs. 8-9.

Based upon the clear precedent cited above, the City of Stevens Point had no jurisdiction to charge or prosecute an OWI 3rd as a county ordinance violation, rendering the case against Lowery void at its inception. Therefore, the judgment is void due to lack of subject matter jurisdiction.

II. A JUDGMENT THAT IS VOID DUE TO THE LACK OF SUBJECT MATTER JURISDICTION CAN BE CHALLENGED AT ANY TIME.

“A judgment or order which is void may be expunged by a court at any time. Such rights to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments.” *Kohler*, 81 Wis.2d at 25, 259 N.W.2d at 701. “A void judgment cannot be validated by consent, ratification, *waiver*, or estoppel.” *Id.* (emphasis added)

The trial court found that Lowery waived his right to make a motion to vacate a void judgment because, unlike the defendant in *Rohner*, Lowery did not object to the Court’s jurisdiction at trial. R. 18, pg. 9-11, 17-18. However, case law sets forth a very clear precedent that there are no statutory or equitable time limits that apply to a void judgment. Without such a limitation, Lowery’s challenge is appropriate and not barred for any statutory or equitable reason.

III. THE CIRCUIT COURT HAS A DUTY TO ANNUL AN INVALID JUDGMENT AND FAILURE TO DO SO WAS AN ABUSE OF DISCRETION.

The trial court relied heavily on *Village of Trempealeau v. Mikrut*, in deciding that it did not have a duty to annul the invalid judgment against Lowery, and instead the decision of whether to vacate the judgment was within

its discretion. R. 18, pgs. 11-17. 273 Wis. 2d 76, 681 N.W.2d 190 (2004). Additionally, the trial court implied that *Mikrut* modified *Rohner*'s holding due to the following language, "[c]ircuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over all matters civil and criminal." R. 18, pgs. 6, 11, *Mikrut*, 273 Wis. 2d 76, 82, 681 N.W.2d 190.

However, trial court ignored a major distinction between *Mikrut* and *Rohner* type cases, such as Lowery's. *Mikrut* dealt with a court's noncompliance with statutory requirements pertaining to the invocation of its subject matter jurisdiction over cases validly before it. 273 Wis. 2d 76, 681 N.W.2d 190. This is different than a *Rohner* challenge, where a matter was never validly before the court in the first instance. Thus, the trial court relied on *Mikrut* in error in deciding that it had discretion, rather than a duty, to annul an invalid judgment such as Lowery's.

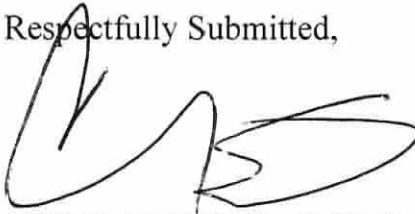
"It is the duty of the court to annul an invalid judgment." *Halbach v. Halbach*, 259 Wis. 329, 331, 48 N.W.2d 617 (1951). "A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity, but he must establish that the judgment is void." *Neylan v. Vorwald*, 124 Wis.2d 85, 99, 368 N.W.2d 948 (1985). The Portage County judgment was void. The trial court took issue, however, with the fact that Lowery did not object at trial, and then waited over three years to file his motion to vacate. Such considerations avoid the central issue that the case lacked subject matter jurisdiction at its inception. The judgment against Lowery is void and the City, by its prosecution of him,

acted in excess of its authority. *Jensen*, 184 Wis.2d at 99, 516 N.W.2d at 7.

CONCLUSION

For the reasons set forth above, appellant Jared Lowery respectfully requests that the court reverse the trial court's decision denying the Defendant's Motion to Vacate the 2010 judgment for lack of subject matter jurisdiction. This court should determine, based upon the facts of the record, and as a matter of law, that the 2010 City of Stevens Point case is void and direct the trial court to reopen and vacate said matter.

Respectfully Submitted,

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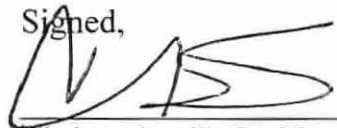
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,474 words. I hereby further certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Signed,

A handwritten signature in black ink, appearing to read 'CRS', written over a horizontal line.

Christopher R. Smith