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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY ARGUMENT

I. The holding in *State v. Banks*, 105 Wis.2d 32, 313 N.W.2d 67 (1981), applies to this case.

The City attempts to attempts to distinguish *Banks* because "Lowery was tried before Portage County Circuit Court Judge Frederic Fleishauer, not a circuit court commissioner." *Respondent's Brief in Chief*, pg. 1. In making this argument, the City ignores that the defendant in *Rohner* was also tried before the Circuit Court, like Lowery. 108 Wis.2d 713, 324 N.W.2d 682 (1982). Further, *Rohner* was decided one year after *Banks*, so even if *Banks* did limit this type of challenge only to cases presided by court commissioners, *Rohner* expanded that limitation. Therefore, the holding in *Banks*, as argued in Lowery's intial Brief, applies to this case.

II. *Village of Trempealeau v. Mikrut* did not supersede *Walworth County v. Rohner.*

The City takes an expansive, almost unlimited, view of the decision in *Village of Trempealeau v. Mikrut*, arguing that it has superseded *Walworth County v. Rohner*. *Respondent's Brief in Chief*, pg. 1. The City makes this argument despite the fact that *Rohner* is not mentioned or cited to at all in *Mikrut*. 2004 WI 79, 273 Wis.2d 76, 681 N.W.2d 190 (2004). This is because *Mikrut* dealt with issues unrelated to *Rohner*.

The City's reliance on *Mikrut* is misplaced for two reasons. First, the issue in *Mikrut* is distinguishable from the instant case. Second, the holding in *Mikrut* was based on earlier precedent that had been established when *Rohner* was decided.

A. THE ISSUE IN MIKRUT IS DISTINGUISHABLE

The issue in this case is markedly different from what the Court was faced with in *Mikrut*. First and foremost, *Mikrut* dealt with whether or not the Village of Trempealeau failed to follow certain statutory mandates in issuing 21 citations dealing with Mikrut storing junked vehicles on his property. 273 Wis.2d 76, 84, 681 N.W.2d 190, 193-94 (2004). Unlike the instant case, the charges in *Mikrut* were issued by the correct prosecutorial agency and before the proper court. Importantly, the jurisdictional defect in *Mikrut* is statutory, while the defects in this case deprive Lowery of the constitutional protections afforded to a criminal defendant. For example, because Lowery was charged civilly with a criminal offense, he was never provided with constitutionally protected rights such as the right to an attorney, right to a trial, right to remain silent, and right to require the state to prove guilt beyond a reasonable doubt. *Art. I. §7 Wis. Const.*; *Amend. V and VI U.S. Const.* These protections, whether intentionally or inadvertently, cannot by avoided. Just as someone cannot be found guilty of criminal damage to property in a civil eviction proceeding, a defendant cannot be found guilty of a criminal OWI when charged with a civil forfeiture.

B. THE HOLDING IN *MIKRUT* WAS BASED ON EARLIER PRECEDENT THAT HAD BEEN ESTABLISHED WHEN *ROHNER* WAS DECIDED.

The holding in *Mikrut* is not new law and is based on pre-*Rohner* precedent. Although the City attempts to paint the *Mikrut* decision as an overruling of *Rohner*, it is clear from precedent that the Court was not contemplating *Rohner* in the *Mikrut* decision.

Respondent's Brief in Chief, pg. 1. The language in *Mikrut* that "no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever" is a direct quote from earlier Supreme Court decisions. *Mueller v. Brunn*, 105 Wis.2d 171, 176, 313 N.W.2d 790 (1982) (citing *Matter of Guardianship of Eberhardy,* 102 Wis.2d 539, 307 N.W.2d 881 (1981)). Like *Mikrut, Mueller* held that a failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court. *Id.* at 177. Further, *Mueller* distinguished competency and jurisdiction in that, "a defect in competency ... is not jurisdictional." Id at 189.

The *Mueller* decision was issued on January 5, 1982. It was already established law, and was still fresh in the mind of the Supreme Court when *Rohner* was decided merely ten (10) months later. The assertion by the County that the holding in *Mikrut* somehow invalidates the holdings in *Rohner* is misplaced, as *Rohner* was decided in the context of *Mueller*.

II. LOWERY'S MOTION TO VACATE THE JUDGMENT CANNOT BE WAIVED

In its response, the City ignores Lowery's assertion that the waiver rule has no application to a motion to vacate a void judgment. *Appellant's Brief in Chief,* pg. 8. Instead, the City argues that if Lowery's challenge is to the circuit court's competency rather than its subject matter jurisdiction, then the waiver rule applies. *Respondent's Brief in Chief*, pg. 4. The City then outlines a history of the waiver rule and why it is important to jurisprudence. *Id* at 4-6. In doing so, the City cites no authority suggesting the waiver rule applies to a motion to vacate a void judgment. The

Wisconsin Supreme Court has also rejected the application of Wis. Stat. § 806.07(1) (requiring motions to be brought within a reasonable time) to void judgments. *Neylan v. Vorwald*, 124 Wis.2d 85, 97, 368 N.W.2d 648 (1985).

The City's waiver argument seems to urge the Court to apply the waiver rule as a matter of fairness and equity. However, in *Clark County v. Potts*[1], the Court of Appeals recently overturned a trial court that ignored the above authorities in a nearly identical factual scenario as this case. *Clark County v. Potts*, No. 2012AP2001, unpublished opinion, ¶ 4-5, ¶7.

In *Potts*, the defendant brought a motion to vacate a civil OWI conviction that should have been charged as a criminal 3rd offense OWI, arguing that the court lacked subject matter jurisdiction to try him for an ordinance violation. *Id* at ¶ 3. The trial court denied Potts' motion, disregarding the holding in *Neylan* and "determined that Potts should not be allowed to benefit from his delay in waiting approximately *sixteen years* to move for relief because of the resulting prejudice to the County." *Id* at ¶ 4 (internal quotation marks omitted) (emphasis supplied).

The court of appeals reversed the trial court, declining to adopt a good faith exception to the rule that a defendant is entitled to relief from a void judgment, stating:

> We appreciate the circuit court's and the County's frustration with Potts' failure to disclose his prior…OWI convictions. However, the County does not cite any legal authority

[1] This is an unpublished opinion authored by a single Court of Appeals judge and is being cited for it persuasive value in accordance with Wis. Stat. § 809.23(3)(b).

> showing that a defendant, such as Potts, is required to disclose his prior convictions. . .

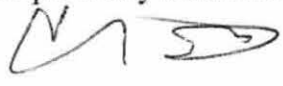
Id at ¶ 13, note 4.

The County's argument in *Potts* is nearly identical to the City's in this case, "Mr. Lowery offered no explanation for why his motion was not filed nearly three years after the date of his conviction. . ." *Respondant's Brief in Chief*, pg. 5. As the court decided in *Potts*, Lowery respectfully requests that this Court apply the rule in *Neylan* in holding that a defendant cannot waive a motion to vacate a void judgment.

CONCLUSION

For the reasons set forth above and in his initial brief, 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 reply brief and appendix conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a reply brief and appendix produced with a proportional serif font. The length of this reply brief is 1,606 words. I further certify that the appendix contains a copy of all unpublished opinions cited within the brief. 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 certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Christopher Smith