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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2014AP001265-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.

BENJAMIN J. STROHMAN,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from the Judgment of Conviction and Sentence entered in
Brown County Circuit Court,
the Honorable William M. Atkinson presiding
Trial Court Case No. 13CT1609

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ISSUE PRESENTED

> Whether the circuit court erred in finding that Strohman was estopped from claiming that statute of limitations prevented the State from filing criminal charges for operating while intoxicated eight years after the date of the offense.

The circuit court ruled that Strohman was barred from asserting a statute of limitations defense, even though eight years had passed since the date of offense, where Strohman had successfully attacked and voided the municipal conviction over seven years after the conviction had been entered by the municipal court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument, as the facts are not disputed, and the issues are fairly straightforward and can be adequately addressed in briefing. However, the State of Wisconsin does request publication of the decision in this case, as the issue presented is one that arises often, and an opinion of binding precedent would be beneficial not just to the parties to this action, but to similarly situated parties across the state.

STATEMENT OF THE CASE AND FACTS

Strohman was arrested for operating while intoxicated (OWI) in the City of Green Bay, Brown County, Wisconsin, on March 23, 2005. (6:4). Strohman was originally adjudicated guilty of non-criminal, first offense OWI for this incident on July 25, 2005, in Green Bay Municipal Court. (6:4).

On February 21, 2013, Strohman brought a motion to reopen and vacate the conviction entered by the Green Bay Municipal Court for the March 25, 2005 offense. (6:4). Strohman took this action after he was charged with a third offense OWI in Portage County.[1] (33:2-3; 34:12). The basis for his motion to reopen and vacate the 2005 City of Green Bay conviction was the fact that Strohman also had a valid prior offense out of the State of Illinois, with a violation date of September 18, 1999, and a conviction date of November 3, 1999, which was apparently overlooked by or unknown to the City of Green Bay municipal court and the city attorney . (6:4).

[1] According to records on the Wisconsin Circuit Court Access (WCCA) website, Strohman was charged with OWI-3rd and operating with a prohibited alcohol concentration-3rd in Portage County case number 12CT136 on March 26, 2012, for an offense that occurred on March 26, 2012. Portage County 12CT136 was dismissed without prejudice on November 11, 2013, to allow the Portage County District Attorney's office to see how the case at bar was resolved.

On March 13, 2013, Green Bay Municipal Court Judge Jerry Hansen granted Strohman's request, reopening the case and vacating the conviction for OWI-1st for the March 25, 2005 offense. (6:6).

On October 15, 2013, the State of Wisconsin filed criminal charges, of OWI-2nd and operating with a prohibited alcohol concentration (PAC) - 2nd, contrary to Wis. Stats. §§346.63(1)(a), 346.63(1)(b), and 346.65(2)(b), against Strohman for the March 23, 2005 offense.

On October 28, 2013, Strohman moved to dismiss these charges, arguing that the three year statute of limitations under Wis. Stats. §939.74(1) applied here. (3:1). The State filed a motion to deny Strohman's motion to dismiss. (6:1). The circuit court denied Strohman's motion to dismiss, adopting the State's arguments set forth in its motion to deny the motion to dismiss, at a hearing on December 2, 2013. (33:8).

Strohman filed a motion for reconsideration, which the circuit court denied at a hearing on February 3, 2014. (11:1-15; 34:3).

A bench trial was then conducted upon stipulated facts on February 3, 2014, and Strohman was found guilty of the March 23, 2005 offense. (34:8). The circuit court sentenced Strohman to five days jail, and given a fine of $350 plus costs and 12 months revocation. (34:12). The circuit

court then stayed the sentence and penalties, pending this appeal. (34:12-14).

Strohman filed a motion for post-conviction relief, again asserting that the statute of limitations had been violated, and the circuit court denied Strohman's request at a hearing on May 13, 2014. (35:10)

ARGUMENT

THE CIRCUIT COURT CORRECTLY HELD THAT STROHMAN WAS EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS TO SUBSEQUENTLY AVOID THE OWI CHARGE

A. Standard of Review.

Normally prosecution for a misdemeanor, such as a second offense OWI, would have to be "commenced within 3 years after the commission thereof." Wis. Stats. §939.74(1). However, the time "during which a prosecution against the actor for the same act was pending shall not be included." Wis. Stats. §939.74(3).

A court may not exercise personal jurisdiction over an accused where the relevant statute of limitations has expired. *State v. Jennings*, 2003 WI 10, ¶15, 259 Wis.2d 523, 657 N.W.2d 393. This is a question of

statutory interpretation, which the court reviews *de novo*. *Id*. at ¶11. "The primary goal of statutory interpretation is to discern the legislature's intent." *Id*. "A 'literal reading of a statute may be rejected if it would lead to an absurd or unreasonable result that does not reflect the legislature's intent.'" *Id*.

B. Strohman should be equitably estopped from asserting the statute of limitations.

It is the State's position that given the facts in this case, Strohman should be equitably estopped from asserting the statute of limitations to prevent him receiving a conviction for the March 23, 2005 OWI offense, as the statute of limitations time period was tolled based on the defendant's bad acts.

It has long been accepted in Wisconsin that the conduct of the asserting party can later bar that party from asserting the statute of limitations as a defense. *State ex rel. Susedik v. Knutson*, 52 Wis.2d 593, 596-98, 191 N.W.2d 23 (1971). The Wisconsin Supreme Court enumerated six rules for the application of equitable estoppel in this manner:

> (1) The doctrine may be applied to preclude a defendant who has been guilty of fraudulent or inequitable conduct from asserting the statute of limitations;

> (2) The aggrieved party must have failed to commence an action within the statutory period because of his or her reliance on the defendant's representations or act;
>
> (3) The acts, promises or representations must have occurred before the expiration of the limitation period;
>
> (4) After the inducement for delay has ceased to operate, the aggrieved party may not unreasonably delay;
>
> (5) Affirmative conduct of the defendant may be equivalent to a representation upon which the plaintiff may rely to his or her disadvantage; and
>
> (6) Actual fraud, in a technical sense, is not required.

Hester v. Williams, 117 Wis.2d 634, 644-645, 345 N.W.2d 426 (1984), citing *State ex rel. Susedik v. Knutson*, 52 Wis.2d at 596-97.

When these rules are applied to Strohman's March 23, 2005 OWI offense, it becomes clear that Strohman should be estopped from asserting the statute of limitations. The State failed to commence action within the three-year statute of limitations only due to its reliance upon the Strohman's representation that he had no prior OWI offenses when he accepted a conviction for that March 23, 2005 offense as a first offense in Green Bay Municipal Court on July 25, 2005. This representation occurred just four months after the March 23, 2005 offense, and continued in effect until Strohman filed the motion to reopen and vacate the conviction in February of 2013. After Strohman's motion to reopen and vacate the

conviction was granted on February 13, 2013, only seven additional months passed before he was charged criminally for the March 23, 2005 OWI offense, which if tolled, is well within the three-year statute of limitations period.

To its detriment and disadvantage, the State of Wisconsin effectively relied upon the representation of Strohman to the Green Bay municipal court that the March 23, 2005 OWI was his first offense. Strohman accepted the conviction as a first offense, even though it was not. As the circuit court observed, the Green Bay municipal court judge "was defrauded by [Strohman] who should have disclosed this was his second offense." (33:8). As a result of this representation, the State did not bring criminal charges of OWI-2nd and PAC-2nd until after Strohman notified the Green Bay Municipal Court that he *did*, in fact, have a prior OWI conviction and subsequently asserted that the municipal court actually did not have the jurisdiction to enter a conviction for the March 23, 2005 OWI offense.[2]

[2] Strohman asserts that the State "failed to do a proper background check before sending the case to municipal court." (Defendant-Appellant's brief, p. 18). This argument inaccurately represents that the State receives and reviews the OWI citation before it goes to municipal court on the date given to a defendant on the citation.

Meanwhile, Strohman received the benefit of his misrepresentation by not having to serve a jail sentence or face the longer revocation and higher fine he would have faced for a criminal second offense OWI. And now Strohman seeks to hide behind the statute of limitations and further benefit from his misrepresentation by having the consequences of the March 23, 2005 OWI offense forever prohibited.

This manipulation of the legal system is the same kind of "fraudulent or inequitable conduct" the *Knutson* Court determined should estop a defendant from asserting the statute of limitations. *Knutson*, 52 Wis.2d at 596.

C. The statute of limitations was tolled by the prosecution and conviction for the OWI offense in municipal court, until the time it was voided at Strohman's request.

The Wisconsin Supreme Court has also "held that prosecution for the act in question tolls the statute of limitations that would otherwise apply." *State v. Deilke*, 2004 WI 104, ¶28, 274 Wis.2d 595, 682 N.W.2d 945. (allowing the State to reinstate PAC charges from 1993 in 2001, after the defendant successfully collaterally attacked the 1993 OWI charge after another OWI arrest), citing *State v. Pohlhammer*, 78 Wis.2d 516, 522, 254 N.W.2d 478 (1977).

In its decision, the *Deilke* court noted that the "primary purpose of the statute of limitations is to protect the accused from criminal consequences for past actions." 2004 WI 104, ¶28, citing *Jennings*, 2003 WI 10, ¶15.

Strohman argues that *Deilke* should not apply to his case for three reasons: 1) because criminal charges were never issued, 2) the State was not a party to the original plea bargain, and 3) there was no plea bargain. However, these arguments do not prevent the *Deilke* rationale from being applied to Strohman.

First, Strohman's first two arguments ignore the fact that it was Strohman's actions (representing to the municipal court in 2005 that the March 23, 2005 OWI was his first) that prevented criminal charges being filed by the State and therefore the State being a party to the plea negotiations. Strohman avoided *criminal* prosecution, by going along with the prosecution of the March 23, 2005 OWI as a first, non-criminal offense. And since the prosecution of this case was thereby handled by the City of Green Bay, rather than the State, the State could not be a party to the plea negotiations.

And while it is true that the State *could* have filed criminal charges for this offense at any time, in operation the State did not become aware of the March 23, 2005 offense until Strohman sought to void the conviction, as it was no longer beneficial to him to have this municipal conviction on his record. And at this point, more than three years had already lapsed.

Strohman's third argument against the application of *Deilke* is that there was not a plea agreement also fails, as the State is not arguing that there was a plea bargain agreement between it and Strohman. There may or may not have been a plea agreement between Strohman and the municipal prosecutor in 2005. Since it appears there was only a conviction for OWI and not the PAC count, it would appear that there was some kind of agreement. But that is not the entire point.

It is the State's postion that *Deilke* is analogous to this case, and its holding should be extended to Strohman's circumstances. Both Deilke and Strohman accepted consequences for OWI convictions that were beneficial to them at the time. Deilke had entered pleas to OWI-2nd in 1993, OWI-3rd in 1994, and OWI-4th in 2000, having several other charges dismissed, including another OWI from 1994. *Deilke*, 2004 WI 104, ¶¶4-5. Here Strohman accepted a conviction for a 2005 OWI as a non-criminal first

offense, even though he had a prior conviction out of Illinois from 1999. When Deilke was arrested for his fifth OWI in 2001, Deilke subsequently successfully collaterally attacked the three convicitons from 1993, 1994, and 2000. *Id.*, ¶6. When Strohman was arrested for a third offense in Portage County in 2012, he attacked the 2005 City of Green Bay municipal conviction as being void. As the Court noted in *Deilke*, once the prior convictions were successfully collaterally attacked, those convictions were also *void*. *Id*., ¶17.

Strohman attempts to limit the application of the *Deilke* case to his own, arguing that criminal charges were only allowed to be reinstated in *Deilke* because the same *criminal* charges had originally been commenced within the limitations period. While it's true that no *criminal* charges had been commenced against Strohman for the March 23, 2005 offense, there not only was a prosecution of the offense, there was a conviction.

Although there was not a violation of a plea agreement with the State here, like there was in *Deilke*, there certainly was subsequent action taken by Strohman that undermined the conviction obtained by the prosecuting agency in that case. Strohman's action, of accepting a first OWI offense when it was actually his second, led the State "to refrain from

prosecuting" this case criminally. See, *Deilke*, 2004 WI 104, ¶30, citing *Pohlhammer*, 78 Wis.2d at 522. And Strohman now seeks to forever avoid the consequences of that prior offense, by arguing that the statute of limiations expired while there was a judgment of conviction in place for over seven years. This would certainly appear to be "inconsistent with concepts of fairness that run to both the State" and the accused. *Deilke*, 2004 WI 104, ¶24. Applying that reasoning here, the defendant in the case at hand should be barred from now asserting the statute of limitations for the March 23, 2005 OWI offense.

Strohman also attempts to argue that *State v. Faber*, 2010AP2324, 2011 WI App 58, an unpublished case, held that the tolling provision of Wis. Stats. §939.74(3) does not apply to an OWI commenced as a forfeiture action. However, *Faber* is distinguishable from Strohman's case as the munipal prosecuting agency failed to fully prosecute two pending OWI-1st citations, even while Faber was accruing three additional OWI charges. Faber had never been convicted of either of the original OWI-1st offenses. The citations apparently just languished in municipal court. *Faber*, ¶¶2-3. That is far different from a case like Strohman's, where he has entered a plea to the OWI-1st and a conviction entered—over seven years earlier.

D. Strohman's use of the *Rohner* decision to void the 2005 conviction and then avoid its consequences beyond the statute of limitations period is contrary to statutory intent.

It is true that under *County of Walworth v. Rohner*, a second OWI offense within the statutory period is to be exclusively within the province of the State for prosecution. 108 Wis.2d 713, 716, 324 N.W.2d 682 (1982). But reading the *Rohner* case in its entirety, it is clear that the Wisconsin Supreme Court was attempting to prevent prosecutors from amending second offenses down to non-criminal OWI offenses. Strohman now attempts to use *Rohner* as a shield, years after the statute of limitations has passed, to avoid the consequence of a second non-criminal OWI conviction that, by all appearances, seems to have been entered without any bad faith by the municipal prosecutor or the State. This twisting of the *Rohner* decision neglects to acknowledge that our Supreme Court was actually interpreting the statute "in accord with the state's policy of strict enforcement of the drunk driving laws. *Id.*, at 721. The Court specifically stated that "the drunk driving statutes must be construed to further these legislative purposes." *Id*. Applying *Rohner* in a way that allows a convicted drunken driver avoid the long term consequence of that

conviction, *i.e.*, the cumulative counting of the convictions, certainly seems to fly in the face of that stated objective.

CONCLUSION

For the above reasons, the State of Wisconsin respectfully requests that this court uphold Benjamin J. Strohman's conviction, and deny his appeal.

Respectfully submitted this _____ day of September, 2014.

_____
Eric R. Enli
Assistant District Attorney

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2738 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Dated this 29th day of September, 2014.

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