STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP1265-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN J. STROHMAN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. William J. Atkinson,
Circuit Judge, presiding.

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ARGUMENT

I. THE VOID MUNICIPAL CONVICTION DID NOT TOLL THE STATUTE OF LIMITATIONS.

1. Wis. Stat. § 939.74 governs whether the statute of limitations is tolled.

A criminal statute of limitations is tolled when a "prosecution" is "pending." Wis. Stat. § 939.74(3). A prosecution is "pending" when "a warrant or a summons has been issued, an indictment has been found, or an information has been filed." *Id*. A forfeiture judgment is not a "pending" prosecution under Wis. Stat. § 939.74(3). *State v. Faber*, 2010AP2324 (March 23, 2011, Unpublished Authored Opinion) at ¶¶8&9 (Appendix of Appellant's

Brief-in-Chief ("A:"):10-12). *Faber* explicitly rejected this argument: a "municipal traffic citation is not enough to confer personal jurisdiction in criminal proceedings before a circuit court." (*Id*., at ¶¶8&9, citing *State v. Banks*, 105 Wis. 2d 32, 40, 313 N.W.2d 67 (1981)). Therefore, "the tolling provision of Wis. Stat. § 939.74(3) does not apply…." *Id.* As the criminal charge in this case was filed 8 years after the incident occurred, the prosecution is well beyond the three-year statute of limitations.

The state attempts to distinguish *Faber* by arguing the OWI forfeiture actions in that case were never brought to completion while here, "there was a conviction." (State's brief, p. 12). Obviously, there was no conviction in municipal court. It began as a forfeiture and ended as a forfeiture. Whether pending or completed makes no difference. In either case, the tolling provisions under Wis. Stat. § 939.74(3) do not apply. A forfeiture action does not confer criminal jurisdiction.

The state nonetheless persists in its belief that Strohman is "estopped" from asserting a statute of limitations defense and therefore, Wis. Stat. § 939.74(3) is not relevant. The state presumably distinguishes *Faber* because the defendant in that case never "accepted" the forfeiture judgment and therefore never "represented" his lack of prior countable offenses. The state, however, has yet to cite any authority from any state or federal circuit where estoppel was applied against a defendant *in a criminal prosecution* to toll the statute of limitations. Wis. Stat. § 939.74(3) is what governs this case. Because Strohman's municipal citation was never "pending" under Wis. Stat. § 939.74(3), the prosecution is barred.

2. Alternatively, the state's estoppel argument fails on the merits.

Even if estoppel were possible, the state's argument has no legal or factual support. The state's estoppel arguments were for the most part anticipated in Strohman's Brief-in-Chief (pp. 10-16) and

will not be repeated here. Strohman, therefore, will limit his reply to those points the state raises for the first time in its response brief or which require further clarification.

The state argues that it:

> …failed to commence action within the three-year statute of limitations *only due to its reliance upon the (sic) 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.
> ….
> 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…"

(Emphasis added) (State's Brief, p. 6 &7).

At a minimum, the state must show that: 1) Strohman made a representation that he had no prior countable offenses under Wis. Stat. § 343.307; and 2) the state reasonably relied to its detriment on that representation. The state's argument fails for both legal and factual reasons.

a. Representation

The state concedes it did not rely on anything Strohman actually said. (33:6). Rather, it claims that by entering a no contest plea to the municipal charge, Strohman affirmatively represented he did not have any prior countable offenses under Wis. Stat. § 343.307. This argument fails for multiple alternative reasons.

First, it presumes Strohman had a legal duty to disclose any prior OWI related offenses that would qualify under Wis. Stat. § 343.307. Again, the state has failed to cite any legal authority showing such a duty, a duty that would in any event fail to pass constitutional muster. (See Appellant's Brief-in-Chief, pp. 14-16). Further, it was the state's duty, not Strohman's, to determine whether a defendant had any countable prior offenses. (*Id*., at 17). The state makes no response to either of these arguments and therefore concedes them. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108, 279 N.W.2d 493 (1979).

Second, the state presumes Strohman *knew* he had a countable prior offense under Wis. Stat. § 343.307 that he failed to disclose. Strohman's prior "conviction" was a six-year-old, out-of-state, implied consent violation. (6:1). The state did not present any evidence showing Strohman knew Wisconsin would count this as a prior offense under Wis. Stat. § 343.307, or that Strohman withheld this information from the municipal court deliberately. Without proof that Strohman knew he had a prior countable offense *and* knew he had a duty to disclose it, there can be no "representation."

Third, Strohman argued in his appellant's brief that as a matter of law, a no contest plea does not admit anything that can be used against the defendant in a subsequent criminal or civil proceeding apart from the fact of conviction.[1] Again, the state does not address this and thus concedes it.

b. Detrimental reliance

The state argues it did not commence criminal charges within three years "only due to its reliance upon Strohman's representation

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1 Wis. Stat. § 904.10. See also *State v. Suick*, 195 Wis. 175, 177, 217 N.W. 743 (1928); *Lee v. Wisconsin State Bd. of Dental Examiners*, 29 Wis. 2d 330, 334, 139 N.W.2d 61, 63 (1966).

that he had no prior OWI offenses…in Green Bay Municipal Court on July 25, 2005." (State's Brief, p. 6). Yet, the state admits it "did not become aware of the March 23, 2005 offense until Strohman sought to void the conviction,…." (State's Brief, p. 10). The obvious question is how the state could have relied on a "representation" Strohman made in municipal court on July 25, 2005, when it did not even know about the offense until it was vacated in 2013? The state fails to articulate how, exactly, it relied on Strohman's no contest plea. Clearly, it cannot rely on a "representation" it doesn't know about.

The state, moreover, does not address any of Strohman's other "reliance" arguments. (See Appellant's Brief-in-Chief, pp. 14-18).

3. Alternatively, *Deilke's* holding does not apply to a forfeiture judgment.

Strohman addressed *State v. Deilke,* 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945 at length in his Brief-in-Chief. (See Appellant's Brief-in-Chief, pp. 19-22).

In response, the state agrees Deilke's OWIs were originally filed as criminal charges, unlike the forfeiture action here. (State's Brief, p. 9). The state argues, however, that it doesn't matter because "Strohman's actions…prevented criminal charges being filed…." Strohman prevented criminal charges "*by going along* with the prosecution of the March 23, 2005 OWI as a first, non-criminal offense." (Emphasis added) (State's Brief, p. 9).

The state blames Strohman for the lack of criminal jurisdiction using the same estoppel theory it argued earlier. Yet, as the state concedes, it could have filed criminal charges any time during the initial three year period, regardless of the forfeiture judgment. (State's Brief, p. 10). The state has no one but itself to blame. The circuit court never obtained criminal jurisdiction, and now it's too late.

The state also concedes it was neither a party to nor the beneficiary of any plea bargain, assuming there was one. (Brief, p. 9-11). For this reason alone, *Deilke* does not apply.

The state also makes a convoluted attempt to analogize the collateral attacks in *Dielke* with Strohman's motion to vacate the municipal court judgment. It argues Strohman benefitted from vacating the forfeiture judgment just as Deilke benefitted from his collateral attack on the criminal OWIs and therefore Strohman should likewise be subject to a new prosecution. The problem with this argument is that it ignores the central reason why the charges could be re-instated in *Deilke*. Not only did Deilke's collateral attacks breach the plea agreement he had with the state, the circuit court retained jurisdiction from the criminal charges originally filed within the three-year statute of limitations. In addition, Strohman's motion to vacate the forfeiture judgment is not analogous to a collateral attack because the forfeiture judgment was already void as a matter of law.

4. The State's policy argument would lead to an absurd result.

Finally, the state argues that *County of Walworth v. Rohner*, 108 Wis.2d 713, 324 N.W.2d 682 (1982), is somehow being misused by the defendant. In *Rohner,* the court found a municipal forfeiture judgment was null and void because it should have been charged as a criminal offense. According to the state, the purpose of this holding was to prevent prosecutors from amending a second offense charge to a first. While *Rohner* may have that effect, it was not the primary holding of the case. Rather, the court denied relief to a defendant who sought to keep his forfeiture adjudication on double jeopardy grounds. The pertinent point is that for 32 years, the state has been on notice that each OWI arrest requires a determination whether to charge criminally or issue a citation. The state failed its duty, not Strohman.

In addition, the state's policy argument leads to an absurd result. Once a forfeiture judgment was entered on what should have been a second offense, the state would have no limit on when it could file a subsequent criminal prosecution. While the state "has a strong interest in punishing repeat drunk drivers, it also has a statutory obligation to prosecute cases within the relevant statute of limitations." *Faber*, at ¶7. Criminal statutes of limitations force law enforcement to "act promptly to investigate and prosecute criminal activity, which helps to preserve the integrity of the decision-making process in criminal trials" and protects the accused "from having to defend himself against charges for remote conduct." *Faber*, at ¶7, citing *John v. State*, 96 Wis.2d 183, 194, 291 N.W.2d 502 (1980).

In short, applying the statute of limitations in this case *is* good policy as it forces the state to make sure it charges appropriately in the first place.

CONCLUSION

This Court should reverse the conviction and direct the circuit court to dismiss the case with prejudice.

Respectfully submitted this 13th day of October, 2014.

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 2713 words.

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Dated this 13th day of October, 2014.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on October 13th, 2014. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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