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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2014 AP 2273
Trial Court Case No. 14 CV 96

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JOHN N. NAVRESTAD,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Monroe County
The Honorable J. David Rice Presiding

Respectfully Submitted:

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STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED MR. NAVRESTAD'S MOTION TO VACATE HIS 1992 OPERATING WHILE INTOXICATED (FIRST OFFENSE) CONVICTION, WHEN HE HAD A PRIOR CONVICTION IN 1989?

Trial Court Answered: **No.**

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats., the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Appellant believes that the publication of this case is also unnecessary. Pursuant to Rule 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF FACTS AND CASE

On April 10, 2014, Mr. John N. Navrestad, the defendant-appellant, filed a motion to void and vacate his 1992 Operating While Intoxicated (First Offense) conviction because he had a prior Operating While Intoxicated (OWI) conviction from California in 1989. (R1)

Mr. Navrestad filed a direct attack to his 1992 conviction, but because all files were destroyed, the clerk of court's office assigned Mr. Navrestad's motion a new case number, 14 CV 96.[1] (R24 at 2.)

Mr. Navrestad also provided an affidavit stating that his 1992 OWI conviction was treated as a first offense and his "driving record abstract" which in relevant part, listed OWI convictions in 1989 and 1992. (R2 at 1, 4.)

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1 Importantly, because the original file was destroyed, much was unknown about the 1992 conviction. Subsequently, it was learned that the proper plaintiff should have been the County of Monroe, as Mr. Navrestad was charged under Monroe County Ordinance No. 5.01 adopting Wis. Stats Sec. 346.63(1)(a). (R24 at 4.)

On April 22, 2014, the government, by the Office of the District Attorney, filed a letter with the circuit court stating that they had "no objection to this Motion." (R5.) The circuit court responded by stating that it was "treating the combination of the motion and the letter as a stipulation between counsel to grant the motion. However, I do not approve that stipulation." (R4 at 1.)

The circuit court stated that its decision was based on *State v. Hammill*, 293 Wis. 2d 654 (Ct. App. 2006), which held that a "bright-line rule" bars collateral attacks on prior OWI conviction unless it is based on the alleged denial of the right to counsel. (R4 at 1.)

On April 28, 2014, the government responded by letter to the circuit court inviting it to reconsider its decision based on *Clark County v. Potts*, 2013 WI App. 55 (unpublished opinion)[2].

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2 *Potts* was cited for its persuasive value, and a copy was provided to the circuit court pursuant to 809.23(3). *Potts* is cited here to provide a

(R11 at 1.) Specifically, the letter stated that in *Potts* the appellate court concluded that "the 1996 judgment of conviction for first offense OWI entered against Potts was void because the court lacked subject matter jurisdiction to try Potts for first offense OWI in violation of Clark County's OWI ordinance." (R11 at 1.) In essence, the government argued that it had the discretion, under the totality of the circumstances of Mr. Navrestad's case, to oppose the motion or agree that the court lacked jurisdiction in 1992, and it chose agree with the motion in this case. *Id.*

Ultimately, a motion hearing was held on May 6, 2014. (R32) At the motion hearing, the government raised the issue that Mr. Navrestad's attorney may have a conflict of interest as he was the District Attorney in 1992.[3] (R32 at 4-5.) The circuit

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history of the case, and a copy is provided in the appendix.

3 Mr. Navrestad's original attorney later withdrew due to the conflict of interest concerns raised by the government. (R13); (R16)

court responded, in part, by raising concerns regarding whether the 1992 OWI conviction was actually treated as a first offense, its general concerns that the retention of documents needs to change in light of the fact that all OWI convictions after 1989 are to be counted in the graduated penalty system and that Mr. Navrestad is asking for a "break in 2014" after getting "a break in 1992." (R32 at 5-6, 7-8, 10.)

On May 28, 2014, the government filed its brief and for the first time opposed Mr. Navrestad's motion to vacate his 1992 conviction.[4] (R12) The government had changed its argument to be that a circuit court has jurisdiction over all civil and criminal cases citing *Village of Trempealeau v. Mikrut*, 2004 WI 79, and that "whether an [OWI] offense is civil or criminal in nature is, by definition, inherently dependent on how the prosecution is commenced." (R12 at 6, 13.)

4 The government also argued that the circuit court could not reopen the 1992 OWI conviction, which was not requested by Mr. Navrestad and

In other words, the government argued that its charging decision defines whether a defendant has committed a crime. The government gave a further example that it could charge a defendant of OWI with 42 prior convictions for drunk driving, but show up at the sentencing hearing and "fail to provide competent proof" i.e., chose to not provide any proof of any priors, and the court would be "mandated by statutory language to impose" a forfeiture. (R16 at 14.)

Thus, the government says that in this case, it "neither alleged nor proved any prior convictions to enhance the penalties" and the court in 1992 was mandated to impose forfeiture penalties. *Id.* Somewhat ironically, the government then states that for Mr. Navrestad to argue that second offense OWI cases "must be prosecuted criminally" would frustrate the legislative purpose behind the impaired operating laws. (R16 at 14-15.)

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further argued that Mr. Navrestad's attorney has a conflict of interest.

On June 27, 2014, Mr. Navrestad filed his brief again stating that the circuit court in 1992 lacked subject matter jurisdiction because courts do not have the discretion to "treat the second [OWI] offense as anything but a second offense." (R21 at 3.)(citing *State v. Banks*, 105 Wis. 2d 32 (1981) and *Walworth County v Rohner*, 108 Wis. 2d 713 (1982).)

Further, Mr. Navrestad distinguished *Mikrut* noting that Mr. Navrestad's 1992 conviction was never validly before the court. (R21 at 5.)

On August 11, 2014, the circuit court denied Mr. Navrestad's motion. (R24) The circuit court began by determining that Mr. Navrestad was indeed charged with OWI (first offense) in 1992 – having not accepted Mr. Navrestad's "self-serving statement" that he was. (R24 at 2-4.)

Specifically, tn the circuit court conducted an independent investigation and obtained a copy of Mr. Navrestad's original 1992 citation from the Driver Record

Section of the Division of Motor Vehicles. (R24 at 3.) Further, the circuit court found that Mr. Navrestad was charged with a violation of Monroe County Ordinance 5.01 adopting sec. 346.63(1), he was found guilty of that charge, and that his driver's license was revoked for six months. (R24 at 4.)

The circuit court, however, noticed a discrepancy between the citation which indicated that Mr. Navrestad's license had been revoked for six months, and his Driver Record Abstract which showed that he had actually lost his license for 1 year. *Id.*

Accordingly, the circuit court continued its independent investigation and was "informed by a representative of the Driver Record Section that because the defendant's abstract showed a prior conviction, the Department automatically would revoke the defendant for 12 months, even though the court had ordered a six month revocation." (R24 at 4.)

The circuit court then concluded by discussing *Mikrut,* and distinguishing cases conflicting with its holding that "a circuit court is never without subject matter jurisdiction." (R24 at 10.)(citing *Mikrut,* 273 Wis. 2d at 81-2.)

Thus, the circuit court held that Mr. Navrestad's objection did not go to the court's subject matter jurisdiction in 1992, but rather to the court's competence, which Mr. Navrestad had waived. (R24 at 14-15.)

The circuit court ended its analysis by pointing out that its decision encourages defendants to "diligently prepare" their cases and prevents litigants from "sandbagging" errors. *Id*.

Mr. Navrestad now appeals the circuit court's order denying his motion to vacate his 1992 conviction for OWI (first offense) under Monroe County Ordinance 5.01 because he had a prior OWI conviction from California in 1989. *See* (R24 at 16.)

STANDARD OF REVIEW

"[W]hen the facts are not in dispute, whether a judgment is void for lack of jurisdiction is a question of law subject to de novo review." *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998).

ARGUMENT

MR. NAVRESTAD COULD NOT BE CONVICTED OF OWI (FIRST OFFENSE) IN 1992 FOR A VIOLATION OF MONROE COUNTY ORDINANCE 5.01 BECAUSE HE HAD A PRIOR OWI CONVICTION IN 1989.

"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 Wisconsin Supreme Court in *Rohner* further held that counties have "no jurisdiction over [an OWI second] 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*. at

721; *see also State v. Banks*, 105 Wis. 2d 32, 43-43, 313 N.W.2d 67 (1981)(agreeing with an opinion of the Attorney General of Wisconsin stating that a district attorney has no authority and a court has no discretion to accept an OWI second offense as a first offense).

"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). "A void judgment cannot be validated by consent, ratification, [forfeiture], or estopple." *Id.*

In the present case, the circuit court below found that Mr. Navrestad was convicted of "a civil traffic ordinance violation, and not a criminal offense" in 1992. (R24 at 4.) Further, the circuit court found that "the 1992 conviction was the defendant's second such conviction. His first conviction was the California conviction on August 21, 1989, as shown by his Driver Record Abstract." (R24 at 4.)

The government argued below, and the circuit court agreed that *Village of Trempealeau v. Mikrut*, 273 Wis. 2d 76, 681 N.W.2d 190 (2004), controls this case. Specifically, the circuit court below stated, "a circuit court is never without subject matter jurisdiction. *Mikrut*, 273 Wis. 2d at 818-2." (R24 at 10.)

The circuit court's decision was based on the following passage from *Mikrut*:

> Article VII, section 8 of the Wisconsin Constitution provides that: '[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within the State.' Accordingly we have stated that in Wisconsin, 'no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.'

Mikrut, 273 Wis. 2d at 86. (internal citation omitted).

The circuit court below knew that its decision was contrary to many appellate court decisions. For example, the circuit court cited:

1. ***Walworth County v. Rohner,*** 108 Wis.2d 713 (1982)

> (holding "the legislature intended a second offense for drunk driving to be within the exclusive province of the state to prosecute as a crime. [The] County had no jurisdiction over the offense and the prosecutor had no discretion to charge under the county ordinance.")

The circuit court found that *Rohner* was "distinguished from the present case because [it] was decided prior to *Mikrut*." (R24 at 11.)

2. ***City of Kenosha v. Jensen***,
184 Wis. 2d 91. 516 N.W.2d 4 (Ct. App. 1994)

> (holding "As the State points out in its *amicus curae* brief, a municipal court does not have subject matter jurisdiction to try and convict a criminal operating while intoxicated. Any such municipal action is null and void.)

The circuit court found that *Jensen* was "distinguished from the present case because [it] was decided prior to *Mikrut*." (R24 at 11.)

3. ***State v. Bush***, 2005 WI 103

> (holding "Circuit courts have original jurisdiction over all matter civil and criminal, except as otherwise provided by law. If a complaint fails to state an offense

known at law, no matter civil or criminal (case) is before the court, resulting in the court, resulting in the court being without jurisdiction in the first instance.")

The circuit court found that *Bush* only concerned "facial challenges to the constitutionality" of a statute. (R24 at 12-14.)

4. ***La Crosse County v. Pettis,***
2009 WI App. 77
(unpublished – cited by circuit court below and for persuasive value only – copy of decision in appendix)

(holding "the charge of first offense OWI was not valid, and thus the case was not validly before the court in the first instance. *See Rohner*, 108 Wis. 2d at 171-22. The circuit court did not lose competency to exercise its jurisdiction; an invalid charge is nover validly before the courts *See State v. Bush*.")

Circuit Court found that *Pettis* misplaced its reliance on *Bush*. (R24 at 12.)

5. ***Clark County v. Potts***, 2013 WI App. 55
(unpublished – cited by circuit court below and for persuasive value only – copy of decision in appendix)

(holding a "a motion for relief from a void judgment may be brought at any time" and "the 1996 judgment against Potts for first offense OWI is void because the court

> lacked subject matter jurisdiction to try Potts under the Clark County ordinance" because of a previous OWI conviction)

The circuit court found that Potts was unpersuasive as an unpublished decision because it relied solely on *Rohner* without considering the implications of *Mikrut*. (R24 at 11.)

In reality, it is the circuit court below that has misplaced its reliance on *Mikrut*. For example, just one year after *Mikrut*, the Wisconsin Supreme Court said "the jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is murky at best." *Bush*, 2005 WI 103, ¶16.

Furthermore, *Rohner* is not mentioned or cited at all in *Mikrut*. Thus, *Mikrut* is distinguishable from *Rohner* because *Mikrut* limited its discussion to "subject matter jurisdiction" based upon noncompliance with statutory requirements

pertaining to the invocation of the circuit court's jurisdiction. (R24 at 8.)(citing *Mikrut*, 273 Wis. 2d at 83 n.1, 86-88.)

Furthermore, *Mikrut* cited and relied upon earlier decision which predated *Rohner*. For example, *Mikrut* relied on *Mueller v. Brunn*, 105 Wis. 2d 171 (1982) and *Rohner* was decided 10 months later. Thus, the idea that *Mikrut* invalidated *Rohner* is misplaced.

Lastly, a recent unpublished Court of Appeals decision further leads to the conclusion that *Mikrut* did not modify *Rohner*. Specifically, the Court of Appeals stated, "we do not read *Mikrut* as modifying *Rohner* in any way. The court's holding in *Rohner* that we apply here continues to be good law in Wisconsin." *City of Stevens Point v. Lowery*, Slip op. at ¶11 (Dist. IV, February 5, 2015)(this case is cited for persuasive value only, and a copy is in the appendix).

Importantly, the circuit court raised a couple of red herrings below. Specifically, the court stated that it is difficult

to find prior convictions because they may have occurred in Puerto Rico, and the passage of time may deprive the State of the opportunity to recharge defendants for an earlier improperly charged first offense. (R24 at 5.)

To the contrary, the circuit court in this case was able to find the necessary documents to confirm that this was a second OWI first offense in 1992. Furthermore, the circuit court discovered that in 1992, the government knew Mr. Navrestad had a prior OWI conviction in 1989, and increased the length of his revocation to 12 months. (R24 at 4.) Moreover, defendants have no obligation to disclose a prior offense, and the establishment of prior offenses is unquestionably a duty belonging to the State. *See State v. Wideman*, 206 WIs.2d 91, 94-95, 556 N>W.2d 737 (1996).

While not raised below, it must be noted that the government by charging an OWI second offense as a first offense, has deprived that person of their due process rights to

be judged at the beyond a reasonable doubt standard of proof. *See generally State v. Talley*, 2013 WI App. 55 ¶18. Further, it deprives that individual of their constitutional right to an attorney under the Sixth Amendment to the Constitution. This further makes clear that there is no discretion to treat a criminal OWI second offense as a civil OWI first offense.

CONCLUSION

WHEREFOR, Mr. Navrestad respectfully requests this Court to reverse the circuit court below and void his 1992 OWI first offense conviction because the court lacked subject matter jurisdiction due to a prior OWI conviction in 1989.

Dated this ____ day of February, 2015.

Respectfully submitted,

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APPENDIX

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,308 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the 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 further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 9th day of February, 2015.

Respectfully submitted:
By:_____
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