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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.

REPLY BRIEF 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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ADDITIONAL STATEMENT REGARDING FACTS

In its brief, the government asserted in its statement of facts section that "unbeknownst to the court or the prosecutor [in the 1992 case], [Mr. Navrestad] had been convicted of a prior OWI in California in 1989. (Id.)" (Response br. at 5.)(citing R.1). The assertion regarding what was known by the prosecutor or the court is unsupported by the record.[1] The portion of the record cited by the government is Mr. Navrestad's Motion to Void and Vacate his 1992 conviction. The motion contains no assertions regarding what people knew about the prior California conviction.

Admittedly, the government's assertion may be correct, but one cannot make that determination based on the record. Critically, the government's subsequent arguments rest on this

1 Later, the government more correctly stated that "there is no indication that either the prosecutor or the circuit court had any knowledge of" the 1992 conviction. (Response br. at 7.)

unsupported assertion. For example, the government begins its brief by misreading, as will be discussed in more detail below, *County of Walworth v. Rohner*, 108 Wis. 2d 713 (1982). Then the government argued that that unknowing—or what it calls "accidental"—undercharged cases should not be subject to the holding in *Rohner*.[2] *See* (Response br. at 10-11.) Thus, the government's argument that only "knowingly undercharged matters before a circuit court should be dismissed on jurisdictional grounds" fails under the weight of its unproven factual assertion. *See id.*

Moreover, placing those unconfirmed allegations in front of this Court appears to be an attempt to bolster its theme that Mr. Navrestad should not benefit from the 1992 mistake, i.e., Mr. Navrestad seeks an "absurd" result. *See* (Response br. at 5.)

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2 Again, *Rohner* held that "the state has the exclusive authority to prosecute second offenses for drunk driving. The trial court was therefore without jurisdiction to proceed under the county ordinance because such a local traffic regulation can have no application to a second or subsequent offense for drunk driving within five years." *Rohner*, 108 Wis. 2d at 722.

More specifically the government is attempting to place the blame for any mistake at Mr. Navrestad's feet.

To the contrary "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)." (Navrestad's br. at 20.) Even in its Response Brief the government continued its attempt to avoid responsibility for the 1992 mistake by claiming that "branches of government are discrete, with different knowledge." (Response br. at 7n.1) The government, however, does not cite any authority for why it should not be held accountable for any alleged compartmentalizing of information.

The government has simply failed to discuss its duty during the 1992 case and has failed to accept that it is solely responsible for the mistake.[3]

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3 The circuit court below noted that attorneys and defendants should "diligently prepare" their cases. (R24 at 14.) In this case, one cannot shift

Lastly, Mr. Navrestad's brief mentioned that the circuit court conducted its own investigation into the facts of the 1992 conviction. *See* (Navrestad's br. at 10-11.) Missing from the facts section is that the circuit court, prior to making its decision, notified the parties of the results of its investigation. (R23.); (R24 at 3.) Further, Mr. Navrestad informed the circuit court that he did not object to the circuit court taking judicial notice of the documents provided by the circuit court. (R26.)

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 government's position has been evolving throughout the proceedings of this case. For example, on April 28, 2014, the government provided the circuit court with a copy of *Clark*

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the burden of production regarding the number of prior offenses to the defendant. Importantly, the circuit court stated that the mistake in the 1992 case was "the prosecution's error." (R24 at 15.)

County v. Potts, 2013 WI App 55, 347 Wis. 2d 551,[4] in support of granting Mr. Navrestad's motion to void and vacate his 1992 conviction. (R11 at 1.)

Then, on May 28, 2014, the government changed its position. Specifically, the government filed a brief stating that it now opposed Mr. Navrestad's motion because "a decision in this case could have wide ranging implications for other cases." (R12. at 3.)

In its brief, the government cited and seemed to agree with *Walworth County v. Rohner*, for the proposition that "the state has the exclusive authority to prosecute second offenses for drunk driving" – yet the government also continued to argue that prosecutors have sole discretion over whether a suspected drunk driver has committed a crime or forfeiture based upon "how the prosecution is commenced." (R12 at 8-9, 13.)

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4 This case is cited for persuasive value only, and a copy of the decision is located in the appendix of Mr. Navrestad's initial brief.

The government's odd dual position was based on its complaint that "it would be impractical to expect" the government to know the correct number of priors.[5] *See* (R12 at 14.)

The circuit court understood the government's argument to mean it had to "disregard prior decisions such as *Rohner*, and *City of Kenosha v. Jensen*." (R24 at 11.) The circuit court did ultimately agree with the government's final position, it distinguished *Rohner* and held that *Mikrut* controlled this case. (R24 at 11, 14.)

The circuit court below, however, improperly placed blame on Mr. Navrestad for failing to state he had a prior drunk driving conviction and incorrectly relied on *Mikrut*.

5 The government's argument is a red herring because Mr. Navrestad's driving record actually contained the prior California conviction. (R24 at 4.)

THE GOVERNMENT MUST PROVE PRIOR OFFENSES

The circuit court stated:

> Navrestad surely knew in 1992 that he had previously been convicted of OWI in California. Navrestad and any similarly situated defendant would be unlikely to point out the prior conviction to the prosecution at a time when the state could dismiss the traffic forfeiture and still prosecute him criminally.

(R24 at 15.)

Thus, the circuit court's decision did not acknowledge that "the establishment of prior offenses is unquestionably a duty belonging to the State." *Wideman*, 206 Wis. 2d at 94-95.

The law could not be clearer in this regard, and yet, the circuit court and the government want to hold defendants responsible for errors committed by others.

ROHNER IS GOOD LAW

In its Response Brief, the government again changes its position on *Rohner*. Now the government believes that *Rohner* is good law, but has a different holding than it discussed before the circuit court. Furthermore, the government now claims that

the circuit court below relied on "*Rohner* itself" when it denied Mr. Navrestad's motion. (Response br. at 7.)

Specifically, the government now believes that *Rohner* stands for the proposition that only "knowingly undercharged matters before a circuit court should be dismissed on jurisdictional grounds and re-charged correctly." (Response br. at 10.)(citing *Rohner*, 108 Wis. 2d at 722.) Importantly, the government makes no attempt to explain how a prosecutor's mistake can confer jurisdiction to a court, but an intentional decision by a prosecutor leads to a loss of jurisdiction.

The government simply misstates *Rohner's* holding. For example, the government stated in the Response Brief:

> After determining that Walworth County prosecutors did not have discretion to undercharge, **the court instructed the county to proceed with a criminal charge**, pursuant to the intent of the law. *Rohner*, 108 Wis. 2d at 722.

(Response Br. at 10.)(emphasis added).

To the contrary, the *Rohner* court did not instruct the prosecution to "proceed with a criminal charge." Rather, the *Rohner* court held:

> Because the complaint is to be dismissed for want of subject-matter jurisdiction, there could not have been a valid proceeding against Rohner. There has been no valid adjudication and no jeopardy attached. **The state is at liberty to commence the criminal action**.

Rohner, 108 Wis. 2d at 722.

Thus, the holding in *Rohner* was not dependent on the government being able to commence a criminal action, but rather, the *Rohner* court was merely noting that the government was not precluded from doing so.

Lastly, the government does not directly address *City of Stevens Point v. Lowery*, Slip op.(Dist. IV, February 5, 2015)(this is an unpublished case cited for persuasive value only and a copy was provided in Mr. Navrestad's Initial Brief). Again, the *Lowery* court held that "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." *Id*. at ¶11.

Rather, the government states that the non-binding case law cited by Mr. Navrestad holding that "*Mikrut* does not modify *Rohner*… is fundamentally impossible." (Response br. at 15.)

To the contrary, it is the government's misreading of *Rohner* that is impossible. The circuit court below and the government have misplaced reliance on *Mikrut*.

For example, while the government cites *State v. Bush*, 2005 WI 103 at ¶13, for the proposition that "the jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is murky at best" – the government fails to notice that the *Bush* court is modifying and calling into question its previous holding in *Mikrut*. *See* (Response br. at 14.) Again, *Bush* was decided just one year after *Mikrut*. (Navrestad's br. at 18.)

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 April, 2015.

Respectfully submitted,

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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 1,783 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 10th day of April, 2015.

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