WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 15 AP 584

BRIAN R. CORVINO,

Defendant- Appellant.

BRIEF OF APPELLANT

Appeal From The Circuit Court For Oneida County
Trial Court Case No. 14-CF-50
The Honorable Michael H. Bloom, Presiding

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant does not request oral argument. The parties' briefs should fully address the issues presented.

Publication is warranted because there is not currently in existence authority to instruct the Court to address the issues in this case. Further, publication is necessary to clarify or modify existing authority.

STATEMENT OF THE CASE

I. Statement of Facts

A complaint was filed in this matter citing a basis for a charge of felony OWI 4th on March 24, 2014. (App. 1). However, after the waiver of the preliminary hearing, at the arraignment on July 21, 2014, the State filed an Information charging the defendant with misdemeanor OWI 4th. (App. 2). The defendant entered a plea of not guilty to the misdemeanor charge contained within the Information and the Court accepted that plea. At the pretrial conference on March 10, 2015, the Circuit Court was presented with a joint plea agreement which would convict the defendant of misdemeanor OWI 4th. The Court refused to accept the joint plea agreement and ordered that the State file an Information charging the defendant with felony OWI 4th.

The Circuit Court held that "in the absence of the court making the necessary findings under sec. 967.055(2), Stats., the State may not file an information charging a misdemeanor violation for operating a motor vehicle while intoxicated after the Court has made a finding of probable cause that a felony offense of operating a motor vehicle while intoxicated was committed by the defendant." The Court further held that "such filing constitutes an 'amendment' of an operating a motor vehicle while

intoxicated charge under sec. 967.055(2)." The Court finally held that "the State's failure to file an information charging the offense for which probable cause was found, in the context of a prosecution covered under sec. 967.055, Stats., in absence of the Court making the necessary findings under sec. 967.055(2), Stats., constitutes an abuse of discretion insofar as such failure is contrary to the legislative mandate set forth therein." The Court then ordered the State to "file an information charging the defendant with operating motor vehicle while intoxicated as a fourth offense within five years, contrary to secs. 346.63(1)(a) and 346.65(2)(am)4m., Stats., a Class H felony." (App. 3; App. 4).

II. Statement of the Issues Presented for Review

1. Whether the Circuit Court's refusal to accept an Information which charges the defendant with a misdemeanor OWI 4th is an infringement by the Court on the State's prosecutorial discretion?

The Circuit Court answered "No."

The Appellant believes that the Circuit Court erred and infringed on the State's prosecutorial discretion when it mandated that the State re-file an Information which charged the defendant with a felony OWI 4th.

2. Does Wis. Stat. § 967.055(2) require the Circuit Court to approve as an 'amendment' the submission of an Information which charges the defendant with a misdemeanor OWI 4th when the Court had found probable cause to charge defendant with felony OWI 4th upon the waiver of the preliminary hearing?

The Circuit Court answered "Yes."

The Appellant believes that the Circuit Court incorrectly determined that Wis. Stat. § 967.055 requires court approval of an Information which charges the defendant with a misdemeanor OWI 4th.

3. Can the Court, after accepting defendant's plea of not guilty to the misdemeanor charge contained within the Information, at a later date, reject such charge as not being consistent with the mandates of Wis. Stat. § 967.055?

The Circuit Court answered "Yes."

The Appellant believes that the Circuit Court erred in rejecting the plea agreement on the misdemeanor charge contained in the Information when the Court had previously accepted a not guilty plea to that same misdemeanor charge at the time of arraignment.

4. When the Court considers the public's interest in deterring operating while intoxicated under Wis. Stat. §

967.055, is such consideration limited to the strength of the prosecution's case?

The Circuit Court answered "Yes."

The Appellant believes that the Circuit Court erred in placing such a limited scope on its consideration of the public's interest and argues that consideration of the public's interest should be so broad as to consider the implications to the defendant, his family, his community, and any other circumstances which would affect the public either directly or indirectly.

ARGUMENT

I. The Trial Court erred and infringed on the State's prosecutorial discretion when it refused to accept the Information which charged the defendant with a misdemeanor OWI 4th.

A. Standard of Review

A circuit court's rejection of a plea agreement is reviewed to determine whether the Court appropriately exercised its discretion. State v. Conger, 325 Wis. 2d at 677. The court of appeals "will sustain a court's exercise of discretion if the court: (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrably rational process, reached a conclusion that a reasonable judge would reach." Id.

B. Analysis

It is the position of the Appellant that the Trial Court abused its discretion when it refused to accept the plea agreement offered in this case which involved a plea of guilty or no contest to the Information previously filed and accepted by the Trial Court.

Wis. Stat. §§ 346.63 and 346.65(4m) provide that the defendant could be charged with and found guilty of a Class H felony due to him allegedly having been convicted of three prior OWI's and having committed an offense that resulted in a suspension, revocation or other conviction counted under Sect. 343.307(1) within 5 years prior to the date of the current alleged offense (the alleged fourth offense OWI in this case). The Court has cited Wis. Stat. § 967.055 as requiring the prosecution of this matter as a felony OWI 4th and eliminating the prosecutor's discretion to initially charge the matter, by Information, as a misdemeanor OWI 4th once probable cause has been found at the time of the preliminary hearing.

Wis. Stat. § 967.055(2) states that "if the prosecutor seeks to dismiss or amend a charge under 346.63 . . . where the offense involved the use of a vehicle or an improper refusal . . . the prosecutor shall apply to the Court. The application shall state the reasons for the proposed

amendment or dismissal. The Court may approve the application only if the Court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant, a controlled substance . . ." It is the position of the Appellant that the Court's interpretation of § 967.055 interferes with prosecutorial discretion when used to stop the prosecutor from filing the charges it so chooses.

Wis. Stat. Sect. 971.29 states "Amending the charge. (1) A complaint or information may be amended at any time prior to arraignment without leave of the Court." This statute has been clarified and supported throughout Wisconsin case law history. In State v. Conger, 325 Wis.2d 664, 797 N.W.2d 341 (Wis. 2010), the Court discussed a prosecutor's discretion. "The legislature has defined the circumstances under which a prosecutor may amend charges. 'A complaint or information may be amended at any time prior to arraignment without leave of the Court.' Wis. Stat Sect. 971.29(1). It seems evident that the language 'prior to arraignment' is most sensibly read to set the outer limit of when the prosecutor may make such an amendment in his or her sole discretion. Otherwise, the language is surplusage." Id. at 678.

In State v. Conger, the Wisconsin Supreme Court addressed at length when the Court can begin to exercise its discretion with regard to pending criminal charges. In its reasoning, the Court cites State v. Kenyon, 85 Wis.2d 36, 45, 270 N.W.2d 160 (Wis. 1978) and its predecessor:

> Under Kenyon and its predecessor, Guinther . . . we reconciled the apparent tension between powers within the prosecutors realm and those within the Court's realm with reference to the point in time that marks the boundary between the two in any given case: the point at which the Court's jurisdiction is invoked.
>
> As we said in Kenyon, the discretion resting with the District Attorney in determining whether to commence a prosecution is almost limitless . . . ; however, when the jurisdiction of the Court is invoked by the commencement of a criminal proceeding, the Court can exercise discretion as described in Guinther. . . . This Court in Kenyon also described another check on the power of the district attorney, legislature:
>
> [T]he position of district attorney, though constitutional, was not one of inherent powers, but was answerable to specific directions of the legislature. It appears settled, therefore, in Wisconsin at least, that the prosecutor is subject to the enactments of the legislature…
>
> Thus both the fact that the Court's jurisdiction is 'invoked by the commencement' of a case and that the legislature has granted prosecutors sole discretion to amend a charge only prior to arraignment mean that the prosecutor's unchecked discretion stops at the point of arraignment.

Id. at 683 *(citations omitted)*.

> Our approach vests authority in the circuit court to determine what pleas are in the public interest without permitting the court to intrude

> on the authority of the prosecutor to decide what charges to file and whether to file charges in the first instance. As we stated in Kenyon,
>
> '[I]n all cases some findings should be made with respect to the impact of the ruling on the public interest in proper enforcement of its laws and the public interest in allowing the prosecutors sufficient freedom to exercise legitimate discretion, to employ to the best effect his experience and training, and to make the subjective judgment implicit in the broad grant of authority under Sect. 59.47 Stats.'

Id. at 686.

Due to the recent enactment of § 346.65(2)(4m) and the fact that in this type of circumstance, both the State and Defendant were aligned in their desire to have the matter charged as a misdemeanor, there are no Court of Appeals cases involving the facts as we have them. However, there is similar case law regarding whether a prosecutor has the right to file an Information which does not charge a defendant as a repeater even when repeater status may apply. Specifically, Wis. Stat. § 973.132(1) states, "whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment and before acceptance of any plea." (Emphasis added).

That statute, Wis. Stat. § 973.132(1), has been interpreted to allow the prosecutor discretion in filing the Information. "While the first sentence clearly establishes a time frame when a prosecutor 'may' in his or her discretion put a repeater allegation in a charging document, we would agree with the state that this sentence standing alone does not expressly address or prohibit repeater amendments after arraignment and plea acceptance." State v. Martin, 162 Wis.2d 883, 470 N.W.2d 900, 904 (Wis.1991).

It is the position of the Appellant that charging an OWI 4th as a felony is very similar to charging as a repeater. There is no basis in law which would demonstrate that charging as a repeater is discretionary while an OWI 4th felony charge is mandatory. Further, there is no statutory and/or case law authority which support that a prosecutor's discretion at the time of filing the Information has somehow been removed by the legislature under § 967.055 when the Circuit Court has found probable cause for charging the felony OWI 4th at the time of preliminary hearing.

II. The Trial Court erred when it held that Wis. Stat. § 967.055(2) required the Circuit Court to approve as an 'amendment' the submission of an Information which charges the defendant with a misdemeanor OWI 4th when the Court had found probable cause to charge defendant with felony OWI 4th upon the waiver of the preliminary hearing.

Wis. Stat. § 967.055(2) states that "if the prosecutor seeks to dismiss or amend a charge under 346.63 . . . where the offense involved the use of a vehicle or an improper refusal . . . the prosecutor shall apply to the Court. The application shall state the reasons for the proposed amendment or dismissal. The Court may approve the application only if the Court finds that the proposed amendment or dismissal is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant, a controlled substance . . ." It is the position of the Appellant that the Court's interpretation of § 967.055 creates a requirement of court review of an initial filing rather than simply approval of a motion to amend or dismiss.

As stated above, there is no statutory and/or case law authority which support that a prosecutor's discretion at the time of filing the Information has somehow been removed by the legislature under § 967.055 when the Circuit Court

has found probable cause for charging the felony OWI 4th at the time of preliminary hearing.

As in any case initially labeled as a felony case in a Complaint, the matter was scheduled for preliminary hearing and then arraignment. Due to a waiver of the preliminary hearing, the court made the probable cause finding and then scheduled an arraignment. The prosecutor introduced the misdemeanor Information as the charging document in this case at the time of arraignment. At no time did the prosecutor make any attempt to dismiss or amend any charge. Instead, the defendant entered the plea of not guilty to the filed Information and the Court accepted that plea.

Because this matter involves an initial charge, it is the position of the Appellant that Wis. Stat. § 967.055(2) was not applicable. There is no amendment or dismissal sought in this case. Instead, Appellant is merely asking the Trial Court to allow a conviction on the crime charged in the Information.

A finding of probable cause by the Trial Court does not mandate the filing of a felony charge. Further, the finding of probable cause does not trigger a review of Wis. Stat. § 967.055 for any charge filed thereafter. The clear language of Wis. Stat. § 967.055 provides that the court

approval only becomes necessary when a prosecutor requests an amendment or dismissal of an existing charge.

The Trial Court erred when it held that Wis. Stat. § 967.055(2) applied due to it having made a probable cause finding that a felony had been committed at the time of the preliminary hearing. At that time, there was no charge filed. When the charge was filed in the form of an Information, which is the initial charging document,§ 967.055 was not triggered. Therefore, no court approval was necessary.

III. The Trial Court erred when, after accepting defendant's plea of not guilty to the misdemeanor charge contained within the Information, at a later date, it rejected such charge as not being consistent with the mandates of Wis. Stat. § 967.055.

The Circuit Court in this case accepted the filing of the misdemeanor Information on July 21, 2014. The Court also accepted the defendant's plea of not guilty on that misdemeanor charge. The case proceeded forward with only the misdemeanor pending. At the time of the pretrial conference, on March 10, 2015, the Trial Court rejected the plea agreement which anticipated a plea of guilty on the one pending charge, misdemeanor OWI 4th. The Appellant argues that at no point until after arraignment does the Court have any ability to exercise discretion as to criminal charges. The Court certainly cannot at the time

of plea and sentencing look back and reject the Information upon which it accepted a plea of not guilty approximately 8 months before. This is an error of the Circuit Court.

IV. The Trial Court erred when it limited its consideration of the public's interest in deterring operating while intoxicated under Wis. Stat. § 967.055 to the strength of the prosecution's case.

Finally, while the Appellant believes that the prosecutor has absolute discretion to file the misdemeanor Information without Court approval, in the event the Court of Appeals determines that a Wis. Stat. § 967.055 analysis is required, the Appellant argue that such analysis is not limited to the strength of the prosecutor's case. Wis. Stat. § 967.055 mandates the Circuit Court's consideration of the public's interest in deterring the operation of a vehicle while intoxicated. While the strength of the prosecutor's case is definitely a fair consideration, other circumstances also affect the public's interest such as the effect on the defendant's family and employer and the community's interest in the defendant remaining sober and a productive member of society.

Plea bargaining is an important part of the criminal justice system. When considering a plea bargain, the court is charged with considering the public's interest just as it is within Wis. Stat. 967.055. "The potential to

conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). "Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. 'To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Id. (citing Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) and Scott & Struntz, Plea Bargaining as a Contract, 101 Yale L.J. 1909, 1912 (1922)). Because the value of plea bargaining is so significant, it is imperative that the Trial Court does not so narrowly construe the scope of the public interest when considering plea agreements involving Wis. Stat. § 967.055 so as to have a chilling effect on the ability to negotiate plea agreements.

In State v. Conger, the court discussed extensively the public interest standard which needed to be considered by the court at the time of the plea hearing. "It is true,

as this court noted in Kenyon, that the public interest standard is 'admittedly broad,' and that Guinther sheds little light on the various factors and considerations which may legitimately be included under this rubric.' It is also true that Kenyon did not ameliorate that problem. Rather, this court simply noted that '[i]t would be impossible to make an exhaustive list of just what to take into account in this regard. . . We agree that it would be impossible to set forth an exhaustive list that would apply to the variety of facts and charges that face circuit courts every day . . .'' Conger, at 687-88 (quoting Kenyon, at 46-7). The Court's reasoning in Conger involves an extensive discussion of the case law which sets forth different factors which have been utilized in weighing the public interest, but succinctly states where the Trial Court could begin in this analysis:

> Given those contours, a sensible -and important- starting point for a circuit court evaluating a plea is to consider the reasons stated by the prosecutor and defense counsel for recommending the plea agreement. Giving weight to the prosecutor's recommendation and supporting reasoning reflects the court's interest in honoring the public interest in providing a prosecutor freedom to exercise the discretion that his or her position authorizes. Likewise, the court's evaluation of the defense attorney's reasoning and recommendations reflects a balancing consideration of the public interest in a fair prosecution.

Id. at 688.

In this case, the Trial Court clearly too narrowly construed the appropriate inquiry as to what is in the public interest in deterring operating a motor vehicle while intoxicated. The facts and circumstances in this case and how it affects the public interest are so much broader than whether the prosecution had a strong case against the defendant. Appropriate analysis of the public interest would certainly require considering whether the public interest could still be as served with a misdemeanor conviction as with a felony conviction for OWI 4th. Would a felony conviction better serve the public? A felony conviction could cause the defendant the loss of his job. The loss of his job would put his family's financial future at risk. With the loss of his job, the defendant would no longer have employer health insurance coverage. The loss of health insurance would potentially make alcohol treatment cost prohibitive. Certainly that would not serve the public's interest. The Circuit Court erred when it limited its consideration to the strength or weakness of the prosecutor's case and ignored the potential

harm to the public's interest a felony conviction would cause.

Therefore, the Appellant respectfully requests the Court of Appeals to reverse the decision of the Trial Court and advise the Trial Court as to the parameters of review of the charging decision and plea proposal under these circumstances.

CONCLUSION

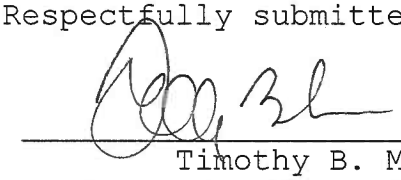
In conclusion, prosecutorial discretion should be maintained and respected. Wis. Stat. § 967.055 does not and should not impinge on this power of the prosecution. Therefore, the charging decision of the State should be respected by the Court. The Court does not have the power to force the State to charge a felony OWI 4th even where probable cause was found to charge the felony at the time of the preliminary hearing. Certainly, the Court should not interpret Wis. Stat. § 967.055 to require review of an initial charge. Nor should Wis. Stat. § 967.055 limit any amendment or dismissal to only those cases where the prosecution may fail at trial.

Based on this, it is the request of the Appellant that the Court of Appeals reverse the decision of the Trial Court and advise the Trial Court as to the parameters of

review of the charging decision and plea proposal under these circumstances.

Dated this 6th day of October, 2015.

Respectfully submitted:



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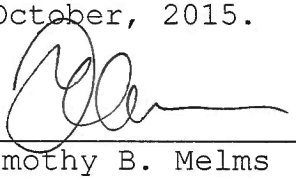
CERTIFICATION

I hereby certify that the Brief of Appellant conforms to the rules contained in sec. 809.19(8)(b) and (C) for a brief produced with a monospaced font. The length of this brief is 18 pages.

Dated this 6th day of October, 2015.



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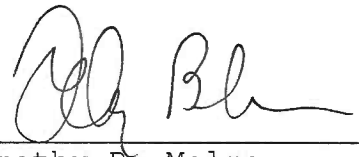
ELECTRONIC FILING CERTIFICATION

I hereby certify that the Brief of Appellant has been filed in conformance with the rules contained in sec. 809.19(12) in that the brief has been filed electronically in PDF format and the text of the electronic copy is identical to the text of the paper copy of the brief.

Dated this 6th day of October, 2015.



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