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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP584-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN R. CORVINO,

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER OF THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE MICHAEL H. BLOOM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication is warranted so that this court may provide guidance in interpreting and applying Wis. Stat. §§ 346.65 and 967.055.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Brian R. Corvino, appeals a non-final order of the circuit court requiring the prosecutor to file an information charging Corvino with a felony for operating a motor vehicle while under the influence of an intoxicant (OWI), as a fourth offense with one prior offense within five years (10).

The prosecutor initially filed a criminal complaint charging Corvino with OWI as a fourth offense, with one prior offense within five years—a felony—under Wis. Stat. § 346.65(2)(am)4m (1). The prosecutor alleged that Corvino's third countable conviction was for a violation on November 27, 2010, less than five years prior to his current offense, which occurred March 23, 2014 (1:2).

On June 24, 2014, Corvino waived a preliminary hearing, and the circuit court found probable cause to believe that Corvino committed a felony, and bound him over for trial.[1] On July 21, 2014, the court held the arraignment. The prosecutor filed an information charging Corvino with OWI as a fourth offense, without a prior offense in the last five years—a misdemeanor—under Wis. Stat. § 346.65(2)(am)4 (4). Corvino acknowledged receiving the information, waived the reading of the information, and entered a not guilty plea to OWI as a fourth offense, a misdemeanor.

On January 13, 2015, the circuit court held a pre trial hearing, at which the court asked the prosecutor about the amendment of the charge from a felony to a misdemeanor (*see* 21:2). The court did not make findings under Wis. Stat.

[1] Transcripts of the June 24, 2014 preliminary hearing, July 21, 2014 arraignment, and January 13, 2015 pre-trial hearing are not included in the appellate record. The State is relying on the CCAP entry for those hearings.

§ 967.055, as required in order to amend or dismiss an OWI charge (*see* 21:2).

On March 10, 2015, the circuit court held a plea/sentencing hearing (21). The court noted that it had asked the prosecutor about the amendment of the charge from a felony to a misdemeanor offense at the January 13 hearing, and it questioned whether it had made the findings required by Wis. Stat. § 967.055 to allow amendment of an OWI charge (21:2). The prosecutor told the court that the court had not made the findings under § 967.055, but asserted that findings were unnecessary because the information charging a misdemeanor was the first information the prosecutor had charged in the case, so the prosecutor was not amending the charge (21:2-3).

The court disagreed (21:3), and asked if there was a basis upon which the court could find that amending the charge from a felony to a misdemeanor was in the public's interest (21:4-5). The prosecutor and defense counsel argued that it would be in the public's interest and in Corvino's interest to amend the felony charge to a misdemeanor (21:5-9). The court disagreed, stating, "Under the circumstances that exist in this case, I simply don't believe that this is what the legislature had in mind under 967.055" (21:11).

The court concluded that because it could not make the findings required by § 967.055, it could not accept the information charging a misdemeanor (21:12). The court stated that it "would be willing to restore Mr. Corvino to his pre-preliminary hearing status" (21:2).

The next day, the court entered a written order in which it found that the filing of an information charging a misdemeanor OWI after the court bound the defendant over for felony OWI was an "amendment" of the charge that required findings by the court under § 967.055 (10:2). The court noted that it had not made those findings, and that the prosecutor therefore could not properly file an information

charging a misdemeanor (10:2). The court therefore ordered the prosecutor to file an information charging Corvino with a felony for OWI as a fourth offense, with a prior offense within five years (10:2).

The prosecutor and Corvino filed a joint petition for leave to appeal (13). This court granted the petition (14). This court also granted the parties' motion for a decision by a three-judge panel. The Wisconsin Department of Justice then commenced representation of the State of Wisconsin in this case, as respondent. This court struck the joint appellant's brief, and Corvino filed an appellant's brief. The State now responds.

SUPPLEMENTAL STATEMENT OF FACTS

As respondent, the State will present facts as appropriate in the argument section of this brief.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT WIS. STAT. § 967.055 PROHIBITS A PROSECUTOR FROM AMENDING AN OWI CHARGE WITHOUT PERMISSION OF THE COURT.

A. Introduction.

The facts of this case are not in dispute. The criminal complaint alleged that Corvino operated a motor vehicle while under the influence of an intoxicant, and that he had three prior offenses, one within five years of his current offense (1:1-2). The complaint therefore alleged that if found guilty of OWI, Corvino would be convicted and sentenced under Wis. Stat. § 346.65(2)(am)4m, for a felony (1:1).

The circuit court found probable cause that Corvino committed a felony, and bound him over for trial. The prosecutor then filed an information charging Corvino with OWI, but asserting that if he were found guilty of OWI,

Corvino would be convicted and sentenced under Wis. Stat. § 346.65(2)(am)4, for a misdemeanor (4).

The prosecutor did not apply for permission to amend the charge from a felony to a misdemeanor, as required by Wis. Stat. § 967.055, or even mention that the State sought to proceed with a misdemeanor charge rather than a felony charge. The court accepted the information without recognizing that the prosecutor had amended the charge from the felony upon which the court bound Corvino over for trial.

The court later recognized that the prosecutor had amended the charge without seeking leave of the court, as required by Wis. Stat. § 967.055. The court refused to accept Corvino's plea to OWI as a misdemeanor, and ordered the prosecutor to file an information charging a felony.

On appeal, Corvino argues that the prosecutor did not amend the charge, even though the criminal complaint alleged a felony, because the information alleged a misdemeanor. He also argues that prosecutors have unfettered discretion to amend a charge at any time before arraignment under Wis. Stat. § 971.29, and that Wis. Stat. § 967.055 does not apply to limit that discretion.

As the State will explain, the circuit court correctly concluded that the prosecutor initially charged Corvino with OWI as a felony, and then amended the charge to a misdemeanor. As the court recognized, § 967.055 explicitly provides that it applies, "Notwithstanding s. 971.29," and it prohibits a prosecutor from amending an OWI charge without permission of the court. In this case, the court was unaware that the prosecutor amended the charge, and did not grant permission for the amendment.

B. Wisconsin Stat. § 967.055 explicitly prohibits prosecutors from amending OWI charges without court approval.

Under Wis. Stat. § 967.055, "Prosecution of offenses; operation of a motor vehicle or motorboat; alcohol, intoxicant or drug," a prosecutor may not amend an OWI charge without court approval, and the court is not authorized to grant that approval unless it is in the public's interest in deterring drunk driving. In the statute, the legislature has explicitly set forth the purpose of Wisconsin's drunk driving laws, stating, "The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant." Wis. Stat. § 967.055(1)(a). The statute provides that, "Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63(1) . . . the prosecutor shall apply to the court," and that "[t]he application shall state the reasons for the proposed amendment or dismissal." The statute further provides that "[t]he 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." Wis. Stat. § 967.055(2)(a).[2]

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[2] Wisconsin Stat. § 967.055 provides as follows:

(1) Intent.

(a) The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, as defined in s. 340.01 (46m), offenses concerning the operation of

Corvino argues that § 967.055 does not apply in this case even though the prosecutor initially filed a criminal complaint charging a felony, because the charging document at the time of the arraignment was the information, which

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> motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, and offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.
>
> . . . .
>
> (2) Dismissing or amending charge.
>
> (a) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss or amend a charge under s. 346.63 (1) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle or an improper refusal under s. 343.305, 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, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving, in deterring the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, or in deterring the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more. The court may not approve an application to amend the vehicle classification from a commercial motor vehicle to a noncommercial motor vehicle unless there is evidence in the record that the motor vehicle being operated by the defendant at the time of his or her arrest was not a commercial motor vehicle.

charged a misdemeanor (Corvino's Br. at 11). Therefore, he argues, the prosecutor did not amend the charge (Corvino's Br. at 11).

Corvino's argument is seemingly based on the premise that the criminal complaint the prosecutor filed, charging Corvino with OWI and alleging three prior offenses including one within five years—a felony—was not a charging document. He asserts that the initial charging document was the information the prosecutor filed charging a misdemeanor even after the circuit court found probable cause that he committed a felony and bound him over for trial (Corvino's Br. at 11).

The State maintains that the initial charging document in this case was the criminal complaint. Wisconsin Stat. § 967.05 explains how a prosecution is commenced:

> (1) A prosecution may be commenced by the filing of:
>
> (a) A complaint;
>
> (b) In the case of a corporation or limited liability company, an information;
>
> (c) An indictment.

Wis. Stat. § 967.05(1).

The statute adds that, "[t]he trial of a misdemeanor action shall be upon a complaint," and that "[t]he trial of a felony action shall be upon an information." Wis. Stat. § 967.05(2) and (3).

"The complaint is a written statement of the essential facts constituting the offense charged." Wis. Stat. § 968.01(2). "[A] complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed." Wis. Stat. § 968.02(1).

As § 967.05(1) states, a prosecution is commenced by the filing of a complaint. For misdemeanor prosecutions in which an information is not filed, the criminal complaint is not only the initial charging document, it is the only charging document. And § 971.29 is titled, "Amending the charge." It begins with the words, "A complaint or information may be amended." Wis. Stat. § 971.29(1). A complaint is therefore a charge that can be amended.

In this case, the prosecutor filed a complaint charging Corvino with OWI. As this court has recognized, under Wis. Stat. § 967.055, "once prosecution has been commenced, the charge cannot be dismissed sua sponte by the district attorney because it becomes subject to court control." *State v. Dums*, 149 Wis. 2d 314, 321-22, 440 N.W.2d 814 (Ct. App. 1989) (citation omitted). Under § 967.055, the same applies to amendment of an OWI charge. Once the prosecutor files a complaint charging OWI, amendment of the charge is subject to court control.

The prosecutor in this case initially charged Corvino with OWI in a complaint alleging three prior offenses, one within five years of his current offense. The complaint alleged that if found guilty of OWI, Corvino would be convicted of and sentenced for a felony (1). Based on the complaint, including the three prior offenses, the court found probable cause that Corvino committed a felony and bound him over for trial. The prosecutor then filed an information charging Corvino with OWI and alleging three prior offenses, but charging him with a misdemeanor. (4)

In filing an information charging a misdemeanor rather than a felony, the prosecutor amended the charge from the felony that was originally charged. Under § 967.055, before amending the charge the prosecutor was required to file an application with the court and state the reasons for the amendment. The prosecutor did not do so. When it accepted the information, the court obviously did not realize that the prosecutor had amended the charge from a felony to a misdemeanor, and it did not make the findings

required for an amended charge. As the court recognized when it refused to accept Corvino's plea to OWI as a misdemeanor, the charge was not properly amended.

C. Wisconsin Stat. § 967.055 limits the prosecutor's ability to amend a charge under Wis. Stat. § 971.29 before arraignment.

The circuit court concluded that under Wis. Stat. § 967.055, the prosecutor is prohibited from amending an OWI charge without court approval (21:2-3). Corvino argues that the circuit court's conclusion is incorrect and improperly interferes with a prosecutor's discretion in amending a charge before arraignment (Corvino's Br. at 6). Corvino relies on Wis. Stat. § 971.29(1), which provides that "[a] complaint or information may be amended at any time prior to arraignment without leave of the court." He argues that until arraignment, the prosecutor has unfettered discretion to amend a charge (Corvino's Br. at 6-7).

Corvino made the same argument in the circuit court. At the hearing in which the court refused to accept Corvino's guilty plea to an amended charge, Corvino's defense counsel pointed out that § 971.29 authorizes a prosecutor to amend the complaint or information "at any time prior to arraignment without leave of the Court" (21:9). Defense counsel added, "And that statute makes no reference to 967.055" (21:9).

The circuit court rejected Corvino's argument, noting that "section 971.29 does not make reference to section 967.055, but 967.055(2)(a) and (2)(b) both start with the language, "Notwithstanding section 971.29" (21:10).

On appeal, Corvino argues that the circuit court misinterpreted § 967.055 because it did not take into account § 971.29 (Corvino's Br. at 6). He seems to assert that so long as a prosecutor amends an OWI charge before filing an information, § 967.055 does not apply.

Corvino is wrong for two reasons. First, § 967.055 explicitly applies, in spite of § 971.29, to curtail a prosecutor's discretion to amend or dismiss an OWI charge before arraignment. Second, allowing a prosecutor to circumvent § 967.055 in this fashion would be contrary to the legislative intent behind § 967.055 and drunk driving laws generally—that prosecutors vigorously prosecute drunk driving offenses.

In his brief, Corvino quotes § 967.055 twice, asserting that the statute states that:

> if the prosecutor seeks to dismiss or amend a charge under s. 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 vehicle by person who are under the influence of an intoxicant, a controlled substance . . .

(Corvino's Br. at 5-6, 10.)

When he quotes the statute, and asserts that it does not apply because of § 971.29, Corvino fails to acknowledge that the first words of § 967.055(2)(a) are, "Notwithstanding s. 971.29."

As the supreme court has concluded, after arraignment a prosecutor can amend a charge only with leave of the court. *State v. Conger*, 2010 WI 56, ¶ 16, 325 Wis. 2d 664, 797 N.W.2d 341; Wis. Stat. § 971.29(1). A prosecutor generally has unfettered discretion to amend a charge before arraignment. *Id.* However, the power of a prosecutor "'is subject to the enactments of the legislature.'" *Id.* ¶ 22 (quoting *State v. Kenyon*, 85 Wis. 2d 36, 42, 270 N.W.2d 160 (1978)).

When it enacted § 967.055, the legislature obviously understood that § 971.29 prohibits prosecutors from

dismissing or amending charges after arraignment, but grants prosecutors discretion to dismiss or amend charges before arraignment.

Wisconsin Stat. § 967.055 makes clear that the general rule in § 971.29 does not apply in OWI prosecutions. It provides that when a prosecutor seeks to dismiss or amend an OWI charge, the prosecutor must apply to the court for permission. Section 967.055 does not change the rule for dismissals or amendments after arraignment. The rule is the same after arraignment for OWI charges under § 967.055 as it is for other charges under § 971.29. After arraignment the prosecutor can dismiss or amend only with permission of the court.

The point of § 967.055(2), and the reason the legislature has stated that it applies, "Nothwithstanding s. 971.29," is that the rule is different in OWI cases before arraignment. Section 967.055(2) provides that notwithstanding that a prosecutor generally has discretion to amend or dismiss a charge before arraignment, in OWI cases the prosecutor does not have that discretion. A prosecutor may amend or dismiss a charge only with leave of the court. The statute has effect only in cases like this one, where a prosecutor wants to dismiss or amend a charge after the original charge is filed in a criminal complaint, but before arraignment.

The supreme court has recognized that "[s]ec. 971.29 is a general statute conferring upon prosecutors the right, subject to some conditions, to amend criminal complaints or informations." *State v. Brooks*, 113 Wis. 2d 347, 358, 335 N.W.2d 354 (1983). The court added that "the provisions of sec. 967.055(2) are to apply '[n]otwithstanding s. 971.29.'" *Id.* The court concluded that Wis. Stat. § 967.055 "shows a legislative intent to curtail a prosecutor's right to seek a dismissal." *Id.* at 358-59. The same applies to the amendment of a charge.

As the circuit court recognized, the general rule set forth in § 971.29, that "[a] complaint or information may be amended at any time prior to arraignment without leave of the court," does not apply in OWI prosecutions. Instead, § 967.055 applies. Under § 967.055, a prosecutor may not amend a charge without leave of the court, before or after arraignment.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DID NOT ALLOW THE PROSECUTOR TO AMEND THE FELONY OWI CHARGE AGAINST CORVINO TO A MISDEMEANOR.

A. Introduction.

At the plea hearing, the court noted that Wis. Stat. § 967.055 requires a prosecutor seeking to amend an OWI charge to apply to the court (21:4). The court asked the parties why it would be consistent with the public's interest in deterring OWI offenses to allow amendment of the OWI charge against Corvino from a felony to a misdemeanor (21:4-5).

The prosecutor argued that amending the charge to a misdemeanor was in the public's interest because the parties reached a plea agreement, so the potential for an acquittal "was taken off the table" (21:5). The prosecutor also asserted that "[m]ore importantly," on the facts of this case, amending the charge to a misdemeanor is in the public's interest (21:5). The prosecutor told the court that Corvino had addressed his drinking problem, that he had paid $4,000 for a "very comprehensive alcohol program," and that if he were convicted of a felony he might lose his job (21:5-6).

The prosecutor added that, "I think it would be very detrimental to society. It would take away any incentive he would have to continue on with the sober path, and I think the State made the right decision here, Judge. I really do" (21:6).

The prosecutor also asserted that Corvino waived his rights to a preliminary examination and to file a suppression motion, and that Corvino agreed to enter a guilty plea, and "he kept his end of the bargain" (21:6-7). The prosecutor added that "[w]hen you have a plea agreement that is beneficial to all parties and society itself, I think it's beneficial to society that the agreement be upheld" (21:7).

Corvino's defense counsel made a similar argument, asserting that amendment of the charge is in the public's interest because the parties reached a plea agreement, and that Corvino would still have three years of probation and "all the things that would accompany a felony conviction," but no felony conviction (21:8).

The circuit court rejected the arguments by the prosecutor and Corvino's counsel, and declined to approve the amendment of the charge. The court noted that the State had strong evidence proving that Corvino had operated a motor vehicle while under the influence of an intoxicant (21:10-11), and that "the State can prove up the prior convictions relatively summarily" (21:10). The court further noted that the standard for allowing an amendment to a charge under § 967.055 "has historically been applied, at least in Oneida County, is when the State's ability to prosecute the original charged violation is compromised in some form, where a stipulated resolution for a lesser charge is proposed" (21:11-12). The court stated, "We don't have that here," and it denied the application to amend the charge to a felony (21:12). As the State will explain, the court properly exercised its discretion in refusing to allow the prosecutor to amend the charge from a felony to a misdemeanor.

B. Under Wis. Stat. § 967.055(2)(a), a court may allow amendment or dismissal of an OWI charge only if it "is consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant."

On appeal, Corvino argues that the circuit court erred by too narrowly considering the public's interest. He asserts that the court considered only the strength of the State's case, and that it should also have considered other factors including "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" (Corvino's Br. at 13).

Corvino asserts that "[t]he 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" (Corvino's Br. at 14 (quoting *Missouri v. Frye*, __ U.S. __, 132 S.Ct. 1399 (2012)). Corvino also asserts that in considering whether to accept a plea agreement, a court should start by considering the reasons given by the prosecutor and defense counsel for recommending the plea (Corvino's Br. at 15 (citing *Conger*, 325 Wis. 2d 664)).

Corvino cites the standards that apply to whether acceptance of a plea bargain is in the public's interest. But those general standards do not apply to a determination whether to allow a prosecutor to dismiss or amend an OWI charge. Under § 967.055(2), a dismissal or an amendment must be in the public's interest in deterring drunk driving.

Wisconsin Stat. § 967.055 sets forth the legislative intent behind Wisconsin's drunk driving laws generally, and the legislative intent behind limiting the ability of a prosecutor to amend or dismiss a drunk driving charge. Subsection (1) provides that "[t]he legislature intends to encourage the vigorous prosecution of offenses concerning

the operation of motor vehicles by persons under the influence of an intoxicant." Wis. Stat. § 967.055(1)(a). Subsection (2) provides that when a prosecutor moves to amend or dismiss a drunk driving charge, "[t]he 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." Wis. Stat. § 967.055(2)(a).

When it enacted § 967.055(2), "the legislature mandated judicial supervision of prosecutorial motions to dismiss or amend OWI charges to ensure the vigorous prosecution of drunk driving offenses." *Dums*, 149 Wis. 2d at 322.

The court in this case considered the strength of the State's case. In doing so, the court reasonably exercised its discretion. Logically, if the State's case were in some way flawed such that a drunk driver might escape conviction, a court might conclude that allowing an amendment to the charge in the context of a plea bargain would be in the public's interest in deterring drunk driving. But in this case, the court recognized that the prosecutor pointed to no problems with the State's case on the substantive OWI charge, and no problem proving the prior convictions that are alleged (21:10-11).

On appeal, Corvino does not explain how pretending that his November 27, 2010 OWI occurred more than five years prior to his March 23, 2014 offense constitutes "vigorous prosecution" of drunk driving offenses, or is "consistent with the public's interest in deterring the operation of motor vehicles by persons who are under the influence of an intoxicant."

In this case, the prosecutor attempted to amend an OWI charge. Preventing this type of amendment is precisely the purpose of § 967.055(2)(a). The statute is intended "to curtail a prosecutor's right to seek a dismissal," or an

amendment of an OWI charge. *See Brooks*, 113 Wis. 2d at 359. The court did not erroneously exercise its discretion by not allowing an amendment with no showing that amendment is in the public's interest in deterring drunk driving.

C. The facts alleged in the criminal complaint demonstrate why amending the felony charge against Corvino to a misdemeanor would not be in the public's interest in deterring drunk driving.

The facts alleged in the criminal complaint amply demonstrate that the court was correct in concluding that amending the OWI charge against Corvino from a felony to a misdemeanor is not in the public's interest in deterring drunk driving.

A Woodruff Police Officer answered a dispatch and arrived at 3:09 a.m. on March 23, 2014, to find a Jeep Liberty stuck in a four foot high snow drift (1:3). The vehicle was running and in gear, and Corvino was in the driver's seat, talking on a cell phone (1:3). When the officer knocked on the window, Corvino "immediately stated that he hadn't been driving" (1:3). The officer "detected a strong odor of an intoxicant on [Corvino's] breath," and noted that Corvino's "speech was very slurred and slow" (1:3).

The officer asked Corvino for his driver's license and Corvino fumbled with his money clip and discarded his cell phone onto the passenger seat in order to remove his driver's license (1:3). Corvino's "eyes were red, bloodshot and glassy," and he "repeatedly stated that he wasn't driving the vehicle, that his friend Gary had been driving but had took off running westbound across the lake" (1:3).

The officer conducted the horizontal nystagmus test and noted that Corvino's eyes did not pursue smoothly, and showed distinct jerkiness (1:3). The officer observed four clues of intoxication even though Corvino "would

continuously stop the test" and showed "an inability to follow instructions" (1:3).

The officer attempted to conduct the walk-and-turn test, but Corvino "would continually stop the test and state he was 'drunk'" (1:3). The officer noted that Corvino "had upper body sway and was unable to maintain his balance" (1:3). The officer detected three clues of intoxication in this test (1:3).

Corvino refused further field sobriety tests (1:3). "He stated that he 'was fucked up.' And that he wasn't driving" (1:3).

The officer administered a preliminary breath test, which registered an alcohol concentration of .224 (1:3). The officer placed Corvino under arrest for OWI, as a fourth offense (1:3). The officer read the Informing the Accused information to Corvino, who agreed to submit to a blood draw for testing (1:3). The officer transported Corvino to the hospital, where Corvino's blood was drawn (1:4).

Before leaving the scene, the officer and another officer who had arrived searched for "Gary's" footprints, but "[t]here were no footprints near the vehicle in any direction in the snow or going across the lake" (1:4).

Corvino had three prior convictions (1:2). He was therefore prohibited from operating a motor vehicle with a blood alcohol concentration in excess of .02. Wis. Stat. § 340.01(46m)(c). While the results of a test of his blood are not in the appellate record, the PBT indicated a blood alcohol concentration of .224, more than eleven times the legal limit. One of Corvino's prior OWI convictions was for driving drunk on November 27, 2010, less than four years before his current OWI (1-2).

In his argument at the plea hearing, and in his brief, Corvino has disputed none of these alleged facts. He simply argues that it would be in the public's interest to amend the

charge to a misdemeanor. But nothing in these facts suggests that it would be in the public's interest in deterring drunk driving to amend the OWI charge against Corvino from a felony to a misdemeanor. There is no reason to think that amending the charge in this case would deter Corvino from driving drunk, or that it would deter others from driving drunk. Amending the charge and allowing Corvino to escape the legislatively-mandated punishment simply because he has a job and money to pay for treatment would not be consistent with deterring drunk driving, or with the legislative intent that OWI cases be vigorously prosecuted. The circuit court therefore properly exercised its discretion in refusing to allow the prosecutor to amend the charge against Corvino from a felony to a misdemeanor.

III. THE CIRCUIT COURT PROPERLY REFUSED TO ACCEPT A GUILTY PLEA TO OWI AS A MISDEMEANOR.

A. Introduction.

The circuit court in this case refused to accept a guilty or no contest plea to a charge of OWI as a fourth offense, a misdemeanor, under Wis. Stat. § 346.65(2)(am)4 (21:3-4, 11-12). The court recognized that in the criminal complaint, the State had alleged that Corvino had three prior convictions, with one resulting from an offense occurring November 27, 2010, within five years of Corvino's current March 24, 2013 offense (1:1-2).

On appeal, Corvino argues that the circuit court erroneously exercised its discretion by not accepting his guilty plea (Corvino's Br. at 5).

As the State will explain, the court properly exercised its discretion by refusing to accept Corvino's guilty plea to a misdemeanor because (1) a plea to a misdemeanor in this case would be contrary to the public's interest in deterring drunk driving, (2) there is no factual basis for a plea to OWI as a misdemeanor, and (3) even if it accepted a guilty plea to

OWI, the court would be required to impose sentence for a felony.

B. The court properly exercised its discretion when it refused to accept Corvino's guilty plea because a plea to OWI as a misdemeanor would not be in the public's interest in deterring drunk driving.

Whether to accept or reject a guilty plea is solely a matter of circuit court discretion. *Conger*, 325 Wis. 2d 664, ¶ 24. "A circuit court must review a plea agreement independently and may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public's interest." *Id.* ¶ 48.

In *Conger*, the Wisconsin Supreme Court set forth a number of factors that a court might consider in determining whether accepting a plea is in the public's interest, including the reasons stated by the prosecutor and defense counsel for recommending the plea agreement, as well as

> whether a defendant has voluntarily and intelligently entered into a plea bargain; whether a factual basis exists for his or her guilty plea; the general public's perception that crimes should be prosecuted; the interests of the victim; the court's ability to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant; and the plea's usefulness in securing a legitimate and important prosecutorial interest.

Id. ¶ 32.

The Wisconsin Legislature has explained the public's interest in regard to whether to accept a plea to a reduced charge in an OWI case. It has stated that "[t]he legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant." Wis. Stat. § 967.055(1)(a). The legislature added that in OWI cases, a court "may approve" a prosecutor's application to reduce a charge only if the reduction in the charge "is consistent with the public's

interest in deterring" drunk driving. Wis. Stat. § 967.055(2)(a).

In this case, the circuit court refused to accept the amendment of the charge against Corvino, and his guilty plea to OWI as a misdemeanor, because it concluded that a plea to a misdemeanor would not be in the public's interest (21:11-12). The court recognized that reducing a charge that is supported by the facts and that the State can prove does not constitute vigorous prosecution of OWI cases, and is inconsistent with the public's interest in deterring drunk driving. Because it considered the facts and the public's interest, the court properly exercised its discretion in refusing to accept Corvino's guilty plea.

C. OWI as a fourth offense with one or more priors is a felony penalized under § 346.65(2)(am)4m, not a misdemeanor penalized under § 346.65(2)(am)4.

The circuit court's refusal to accept the plea was correct because the criminal complaint alleged that Corvino had three prior OWI convictions, one of which occurred within five years of his current offense. The criminal complaint properly alleged that if found guilty of OWI, the penalty for Corvino's current offense is the one set forth in § 346.65(2)(am)4m, not the one set forth in § 346.65(2)(am)4.[3] There is no factual basis for a plea to

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[3] Wisconsin Stat. § 346.65 provides, in relevant part, as follows:

(2) (am) Any person violating s. 346.63 (1):

. . . .

4. Except as provided in subd. 4m. and pars. (dm), (f), and (g), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year in the county jail if the number of convictions under ss. 940.09 (1) and 940.25 in the

OWI as a misdemeanor, and if the court accepted a plea to OWI it would be required to impose sentence for a felony.

When it accepts a guilty plea, a circuit court must hold a colloquy with the defendant and ensure that the defendant's plea is knowing, intelligent, and voluntary. One of a court's specific duties is to "[a]scertain personally whether a factual basis exists to support the plea." *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906.

In this case, it is undisputed that there is a factual basis for the OWI charge. OWI has only two elements (1) that a person operated a motor vehicle on a Wisconsin highway; and (2) while under the influence of an intoxicant. The issue is what penalty applies. The criminal complaint alleges that Corvino has three prior OWI convictions that count for sentence enhancement. If convicted of OWI, Corvino would be sentenced for a fourth offense.

The criminal complaint alleges that one of Corvino's prior offenses occurred November 27, 2010, within five years of the current offense, which occurred March 23, 2014. The

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> person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307 (1), equals 4, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.
>
> 4m. Except as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than $600 and imprisoned for not less than 6 months if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307 (1), equals 4 and the person committed an offense that resulted in a suspension, revocation, or other conviction counted under s. 343.307 (1) within 5 years prior to the day of current offense, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

complaint correctly identifies § 346.65(2)(am)4m as the appropriate penalty section, and correctly states that if convicted, Corvino is guilty of a felony.

The information that amended the charge to a misdemeanor did not allege different prior offenses or allege that the prior offenses occurred on different dates. It simply alleged—incorrectly—that none of Corvino's three prior offenses were committed within five years of his current offense. By attempting to have Corvino enter a plea to the charge in the information, the parties were asking the court to find a factual basis that does not exist, by pretending that March 23, 2014 is not within five years of November 27, 2010. This is contrary to the mandatory sentencing structure of § 346.65, and to the legislature's intent of the "vigorous prosecution" of drunk drivers.

In addition to finding a factual basis, a court accepting a guilty or no contest plea is required to inform the defendant of the range of punishments the defendant faces. *Brown*, 293 Wis. 2d 594, ¶ 34. Before it accepted Corvino's plea the court would have been required to determine whether November 27, 2010, the date of Corvino's most recent prior offense, was within five years of March 23, 2014, the date of his current offense. Because the court could not have determined that March 23, 2014, was not within five years of November 27, 2010, the court would have been required to inform Corvino that if he pled guilty, and admitted to the three prior offenses alleged in the criminal complaint, he would be guilty of a Class H felony, and would face penalties for a felony.

The subparagraphs of § 346.65(2)(am) provide the penalty for violations of § 346.63(1). Subparagraph 4m provides that a person who violates § 346.63(1) "is guilty of a Class H felony" if the conviction is the person's fourth OWI related offense, and at least one prior offense occurred within five years of the current offense.

Subparagraph 4 provides that a person who violates § 346.63(1), "[e]xcept as provided in subd. 4m," is guilty of a misdemeanor if the conviction is the person's fourth OWI related offense.

The penalty statute for § 346.65(2)(am)4m is clear. A person who is guilty of OWI "shall" be sentenced under § 346.65(2)(am)4 if the conviction is the person's fourth, and one of the prior convictions occurred in the prior five years. A person who is guilty of OWI "shall" be sentenced under sub. 4 if the conviction is the person's fourth, "except" as provided in sub. 4m.

In other words, a person "shall" be sentenced for a fourth offense as a misdemeanor, except that if one of the prior convictions occurred within five years of the current offense, the person "shall" be sentenced for a fourth offense as a felony.

In his brief, Corvino asserts that when a person commits an OWI and the person has three prior offenses, one or more within five years, the prosecutor has discretion to charge the OWI as a felony or as a misdemeanor (Corvino's Br. at 5). He argues that charging as a misdemeanor or as felony is similar to the decision whether to charge a crime as repeater (Corvino's Br. at 8).

However, the repeater statute, Wis. Stat. § 939.62, is different than the OWI penalty statute, § 346.65. The repeater statute says, repeatedly, that penalties "may" be increased if a person is a repeater.

In contrast, Wis. Stat. § 346.65 uses the term "shall." The statute grants no discretion. It makes clear that if a person is convicted of a fourth offense the person "shall" be sentenced under § 346.65(2)(am)4, except that if one prior offense was within five years, the person "shall" be sentenced under § 346.65(2)(am)4m.

The sentencing statute is mandatory. A sentencing court has no discretion—it must impose sentence depending on the number of prior offenses, and if there are three prior offenses, with at least one within five years of the current offense, it must impose sentence for a felony. In this case, if it accepted a guilty plea to the underlying OWI charge, the court would have been required to impose sentence for a felony.

For all of these reasons the circuit court properly refused to accept Corvino's guilty plea to OWI as a misdemeanor.

IV. THE CIRCUIT COURT DID NOT ERR BY ORDERING THE PROSECUTOR TO FILE AN INFORMATION CHARGING CORVINO WITH A FELONY.

As explained above, the prosecutor in this case initially charged Corvino with OWI as a fourth offense, with one prior offense within five years—a felony. The prosecutor then filed an information charging Corvino with OWI as a fourth offense, with no prior offenses within five years—a misdemeanor.

The court recognized that the prosecutor had improperly amended the charge without the court's approval, as required under § 967.055, and it concluded that it could not make the findings required to allow an amendment. The court therefore refused to accept a guilty plea to a misdemeanor and ordered the prosecutor to file an information charging a felony.

On appeal, Corvino argues that the circuit 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" (Corvino's Br. at 17).

The State disagrees. The prosecutor initially charged a felony. When the court found probable cause, the prosecutor could not amend the charge to a misdemeanor without court approval. The State maintains that the court could not give that approval because if it convicts Corvino of OWI, it is required to impose sentence under § 346.65(2)(am)4m, for a felony. But even if the court had discretion to allow amendment of the charge, the court has made clear that it will not approve an amendment because amendment is not in the public's interest in deterring drunk driving. Under § 967.055, the prosecutor can neither amend the charge, nor dismiss the charge.

The State maintains that the circuit court has inherent authority to require the prosecutor to file an information charging Corvino with OWI as a felony. The Wisconsin Supreme Court has explained the parameters of the circuit courts' inherent authority, as follows:

> It is beyond dispute that circuit courts have "inherent, implied and incidental powers." *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995). These powers are those that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions. *Id.* Wisconsin courts have generally exercised inherent authority in three areas: (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice. *Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999).

State v. Henley, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350.

The supreme court added that "'[a] court is understood to retain inherent powers when those powers are needed to 'maintain [the courts'] dignity, transact their business, [and] accomplish the purposes of their existence.'" *Id.* (quoted

source omitted). "A power is inherent when it 'is one without which a court cannot properly function.'" *Id.* (quoting *State v. Braunsdorf*, 98 Wis. 2d 569, 580, 297 N.W.2d 808 (1980)).

In this case, the court accepted the information charging a misdemeanor, but it did so while not knowing that the prosecutor was amending the charge without seeking the court's permission. Under Wis. Stat. § 967.055(2), the court could not properly accept the information that amended the charge without making the required findings. The court did not make those findings. In order to accomplish its "legislatively mandated function" by preventing the amendment of an OWI charge without court approval, the court must have inherent authority to reconsider its acceptance of the information, and order the prosecutor to file an information reinstating the original charge, for which the court found probable cause.

The prosecutor initially charged OWI as a felony, and the court has not granted approval to amend the charge. Under § 967.055(2) the prosecutor has no discretion to dismiss or amend the charge without court approval, and must proceed with a felony prosecution.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court affirm the order of the circuit court requiring that the prosecutor file an information charging Corvino with OWI as a fourth offense with at least one prior conviction within five years of the current offense—a felony.

Dated this 19th day of January, 2016

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,738 words.

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Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 19th day of January, 2016.

_____
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