WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 15 AP 584

BRIAN R. CORVINO,

Defendant- Appellant.

REPLY 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 OF THE CASE

The parties have outlined the facts of this case and the procedure followed at the circuit level. Therefore no further recitation is provided in this brief.

ARGUMENT

I. The language of Wis. Stat. § 967.055 does not allow a Trial Court to eliminate prosecutorial discretion at the time of charging.

Corvino demonstrated in its Brief of Appellant why the prosecutor is given unfettered charging discretion until such time as the arraignment. Wis. Stat. § 967.05, as cited by the State, does not modify or infringe on that charging discretion. Wis. Stat. § 967.05 indicates that the prosecution is commenced by the filing of a complaint. That is true for all cases. However, when a potential felony case is brought before the Court, the complaint is not the official charging document. Under these circumstances, the charging document is the Information.

As earlier stated 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 and found unfettered discretion for the prosecutor up until the time of arraignment. In its reasoning, the Court cites State v. Kenyon, 85 Wis.2d 36, 45, 270 N.W.2d 160 (Wis. 1978) and its predecessor:

> 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)*.

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 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.

The State argues that because Wis. Stat. § 967.055(2)(a) contains the phrase "Notwithstanding s. 971.29," prosecutorial discretion under the facts of this case has now been eliminated. This is simply not the case.

It is the position of Corvino that by utilizing the "notwithstanding" language, the legislature recognized that

Wis. Stat. § 971.29 would be affected by the enactment of Wis. Stat. § 967.055(2)(a). However, the affect is not and should not be the elimination of prosecutorial discretion.

The definition given to "notwithstanding" varies. In Maurin v. Hall, 274 Wis. 2d 28, 682 N.W.2d 866 (Wis. 2004), the Court looked to the varying meanings of "notwithstanding" and how to apply such meanings to statutory sections.

In Maurin, the Court stated as follows:

> "It would be easy enough to collect cases interpreting the word "notwithstanding." . . . But the better practice is to follow the advice in *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1224 (3d Cir. 1992), that 'courts must discern the meaning of 'notwithstanding' from the legislative history, purpose, and structure of the entire statute.'

Id. at 48.

The intent of the legislature is listed within the statute itself. Wis. Stat. § 967.055 (1) (a) provides "The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant . . ."

Certainly the legislature has expressed a very important and legitimate goal. The legislature has structured Wis. Stat. § 967.055 with this intent in mind and has raised the burden which the prosecutor must

demonstrate in order to have an OWI amended or dismissed. This reins in the prosecutor's discretion in modifications of OWI charges.

However, use of the word "notwithstanding" within the statute, while it restrains the prosecutor's discretion, does not and should not extend to remove any discretion from a prosecutor when filing the initial charges as he/she sees fit. Instead, the restricting language forces a prosecutor to obtain court permission to amend or dismiss an OWI charge, once pending, with a more stringent burden of demonstration than would ordinarily be required in other types of cases under Wis. Stat. § 971.29. Wis. Stat. § 967.055(2)(a) allows amendment "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 . . ." This is a significantly higher burden than that in Wis. Stat. § 971.29 which allows amendment of charges without such restrictions so long as such amendments are not prejudicial to the defendant.

In Maurin, the Court quotes the Legislative Reference Bureau's drafting manual which directs drafters to "[a]void overbroad preemption provisions[.]" Maurin v. Hall, 274

Wis. 2d 28,47, 682 N.W.2d 866 (Wis. 2004). Therefore, the term "notwithstanding" should be interpreted keeping in mind that the legislature would have been trying to avoid an overbroad interpretation of their statutory language. Such interpretation would include that the legislature would not have desired to trample prosecutor's discretion so as to make it non-existent, but would rather recognize that that statutory provisions within § 967.055 were limiting prosecutorial discretion.

Such interpretation of Wis. Stat. § 967.055 appears to be recognized in State v. Dums, 440 N.W. 2d 814, 149 Wis. 2d 314 (Wis. App. 1989). In Dums, the case is factually different from the case at hand as the Trial Court was reviewing a misdemeanor complaint with a plea agreement involving an amendment from a criminal charge to a civil forfeiture. However, the Court reasoned that prosecutorial discretion remained intact at the time of the initial charging decision when it cited a number of cases including State v. Kenyon, 85 Wis. 2d 36, 45, 270 N.w.2d 160, 164 (1978), and stated as follows:

> Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney. . . It is also recognized that the district attorney's broad discretion whether to commence a prosecution is almost limitless. . . . However, once prosecution has been commenced, the charge

> cannot be dismissed sua sponte by the district attorney because it becomes subject to court control.
>
> After prosecution is commenced, the trial court under its own power may refuse a prosecutor's motion to dismiss or amend the charge if it determines the motion was not in the public interest. . . . In Wisconsin, it is equally clear that the legislature may, if it desires, spell out the limits of the prosecutor's discretion and can define the limits of that discretion. . . . Thus, a trial court may review the exercise of prosecutorial discretion to terminate or amend pending prosecution pursuant either to its own power or to a legislative standard for limited judicial supervision of prosecutorial motions to dismiss or amend.

Id. at 321-22 (citations omitted).

In this case, the formal charging document charged Corvino with a misdemeanor. There has been no motion to amend or dismiss that charge. As Dums demonstrates, prosecutorial discretion as was described in Kenyon remains intact. Therefore, Wis. Stat. § 967.055 does not serve to prevent the district attorney from filing the Information as she chose without approval by the Court.

II. The Trial Court improperly exercised discretion when it did not allow the prosecutor to proceed to conviction with a misdemeanor charge.

As the State notes, the legislature has required through § 967.055 vigorous prosecution of OWI charges. However, it is Corvino's position that an OWI 4th conviction as a misdemeanor by plea agreement and the penalties and

consequences associated therewith do meet with the legislative expectation in that regard. Further, when prosecuting criminal cases there are a number of considerations which the prosecutor evaluates when charging decisions are made.

> ABA Standard 3.9 specifies a number of discretionary factors beyond the question of the suspect's guilt that may legitimately be taken into consideration in the charging decision. These include the extent of harm caused by the offense; the threat posed to the public by the suspect; the ability and willingness of the victim to participate; the disproportion between the authorized punishment and the particular offense or offender; American Bar Association Standards for Criminal Justice, Vol. 1, Standard 3-3-9 (2d ed. 1980) . . . There may well be other legitimate discretionary charging factors relating to the particular circumstances of each individual complaint.

In the Matter of a Privately Filed Criminal Complaint, 2004 Wis. 58, ¶ 32 (Wis. 2004).

The Court makes clear that, contrary to the State's position, the district attorney's role in this process is not so narrow as to eliminate considerations other than the facts.

Corvino's plea agreement would have him convicted of OWI 4th offense as charged. He would have been sentenced thereon and any future OWI would be an OWI 5th offense. Certainly an agreed upon conviction of OWI 4th under the

circumstances of this case would have been a vigorous prosecution such that the legislature's concern as stated in Wis. Stat. § 967.055 would have been met. Further, clearly the public's interest would have been served by the State obtaining that conviction.

The question then turns to whether obtaining the felony conviction simply because there was a potential factual basis for that felony would have been a more vigorous prosecution or a better service to the public when taking into consideration the risks inherent in any trial to obtain conviction and the potential negative consequences on the society if Corvino's felony conviction stopped him from being a productive member of his community.

The State indicates in its brief, "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."

These types of statements are inconceivable. Of course an OWI 4th conviction as a misdemeanor by plea agreement is in the public's interest when one considers the potential risks of trial. Of course, an OWI 4th conviction would deter Corvino from drunk driving in the future. Misdemeanor OWI 4th convictions carry with them a significant jail sentence. Further, OWI convictions build on one another. The OWI 4th conviction misdemeanor or otherwise, means that Corvino will face an OWI 5th offense conviction and the resulting prison sentence with another similar arrest. Utilizing treatment to assist with alcoholism is a known deterrent to recidivism. Having a job will allow Corvino to function in society and will also allow him to afford such necessary treatment. Certainly an unemployed, untreated alcoholic felon would have a much higher chance of recidivism while an agreed upon plea resolution allowing the offender to try to better himself does nothing but encourage the positive outcome that the legislature hoped for when enacting § 967.055.

It is easy to say what the district attorney could have or should have done. It is also easy to say that a felony conviction should have occurred simply based on the

facts. However, nothing is that simple. The legislature has given the district attorney prosecutorial discretion to make these decisions. It has done so because the district attorney is in the best position to weigh all of the considerations prior to making a charging decision. This discretion cannot and should not be taken away from the prosecutor and Wis. Stat. § 967.055 does not allow a Trial Court to take such discretion away.

III. The Trial Court erred when it refused to accept a guilty plea of OWI as a misdemeanor.

Corvino does not dispute that the Court generally can refuse to accept a plea agreement and therefore refuse to accept a plea of guilty associated with that agreement. However, in this case, the defendant was entering a guilty plea to the one pending charge, misdemeanor OWI 4th, and the Court took issue with the actual charge as opposed to the plea agreement. The Court is attempting to force the prosecutor to change the one pending charge to another charge entirely. This is not within the contemplation of State v. Conger, 325 Wis. 2d 664, 797 N.W.2d 341 (Wis. 2010).

Contrary to the State's assertion, there is a factual basis for a plea to misdemeanor OWI 4th. The factual basis required for misdemeanor OWI 4th is the same as for felony

OWI 4th, but without the more stringent and additional requirement within the felony that the previous OWI conviction be within the five years prior to the charged offense. Therefore, as is required in State v. Brown, 293 Wis. 2d 594, 716 N.W.2d 906 (Wis. 2006), the Court must and would find that a factual basis exists to support the plea to misdemeanor OWI 4th.

Also contrary to the State's assertion, the Information did not allege that none of Corvino's three prior offenses were committed within five years of his prior offense. The filed Information is silent as to dates of previous convictions and simply asserts that the charge qualifies as an OWI 4th. The parties never asked the Court to find a factual basis that does not exist and never pretended that March 23, 2014 is not within five years of November 27, 2010. To assert such is entirely unfounded.

While the penalty statute for § 346.65(2)(am)(4m) utilizes "shall" in its language, contrary to the argument of the State, the word "shall" relates to the penalties upon conviction of a felony as opposed to requiring a felony conviction. The Court would only get to the applicable section of § 346.65(2)(am) after conviction on the pending charge. In this case, the pending charge was a misdemeanor OWI 4th. Upon conviction of misdemeanor OWI

4th, the applicable sentencing provision was 346.65(2)(am)(4) where the Court "shall" utilize a certain penalty structure. The sentencing structure utilized in Wis. Stat. § 346.65 certainly does not guide the prosecution. Instead, the prosecution guides what sentencing provision is applicable to the case at hand.

For all of these reasons, the Court erred when it refused to accept a guilty plea to OWI as a misdemeanor.

IV. The Trial Court erred when it ordered the prosecutor to file an information charging Corvino with a felony.

As has been discussed in several areas of the Appellant's brief and in this Reply, it is the position Corvino that the prosecutor had the discretion to file the Information as a misdemeanor. There is no basis to argue that the prosecutor attempted to amend the charge as the Information is the initial charging document and was charged as a misdemeanor. The Court does not have the right under Wis. Stat. § 967.055 to prohibit such a filing and therefore, also does not have the right to force an amendment to the filing. Since the Court has no independent right to govern charging of defendants, it is clear that the Court erred when it attempted to step in and force the prosecutor to charge a felony.

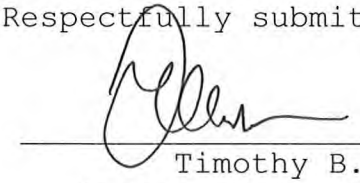
CONCLUSION

In conclusion, prosecutorial discretion should be maintained and respected. Wis. Stat. § 967.055 does not and should not remove 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.

Based on this, it is the request of the Appellant that the Courts 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 9th day of February, 2016.

Respectfully submitted:



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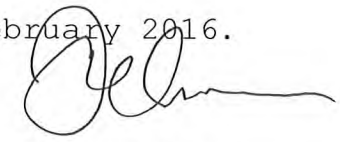
CERTIFICATION

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 13 pages.

Dated this 9th day of February 2016.



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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.

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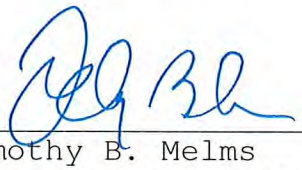

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