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**STATE OF WISCONSIN
COURT OF APPEALS**

DISTRICT III

Case No. 2015AP1838-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY A. GIESE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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On appeal from the Circuit Court
of Brown County, Hon. Thomas J. Walsh,
Circuit Judge, presiding.

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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 2015AP1838-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY A. GIESE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ISSUE FOR REVIEW

1. Is an OWI Second conviction void for lack of criminal subject matter jurisdiction when the complaint, on its face, failed to allege a prior qualifying offense?

The Trial Court Answered: "No."

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Oral argument and publication are not requested.

STATEMENT OF THE CASE

On March 22, 2009, Giese was arrested for operating while intoxicated. On May 29, 2009, a criminal complaint was filed charging Giese with an OWI Second. It alleged as follows:

Count 1: OPERATING A MOTOR VEHICLE WHILE INTOXICATED – 2ND OFFENSE

The above-named defendant on or about Sunday, March 22, 2009, in the Village of Allouez, Brown County, Wisconsin, did operate a motor vehicle on a highway while under the influence of an intoxicant, contrary to sec. 346.63(1)(a), 346.65(2)(am)2 Wis. Stats., a Misdemeanor, and upon conviction shall, *for the second offense within ten (10) years*, be fined not less than Three Hundred and Fifty Dollars (\$350) nor more than Eleven Hundred Dollars (\$1,100), *and imprisonment for not less than five (5) days nor more than six (6) months*.

(Emphasis added) (1:1; Appendix (“A:”): p. 6)¹. The complaint then further alleged:

Pursuant to 343.44(2g), the defendant is subject to the mandatory minimums *because he was convicted of Operating while intoxicated on 12/18/1989 with offense date(s) of 12/04/1989* and suspended as a result.

(Emphasis added) (1:2; A:7). On October 13, 2009, Giese entered a no contest plea and was convicted. He was sentenced to 20 days in jail. (13).

On March 12, 2015, Giese filed a motion to void the judgment because the circuit court lacked the *criminal* subject matter jurisdiction necessary to enter a judgment of conviction. (15). At the time the complaint was filed, the prior qualifying offense had to be less than 10 years old. Wis. Stats. § 346.65(2)(am)2 (2007-2008). (A:9). The state conceded the case should not have been charged as a criminal offense.

¹ The complaint also alleged a PAC violation with similar language. (1:1)

(19:2; A:2). On June 9, 2015, the circuit court issued a written decision denying Giese's motion to void the judgment. (19:1-4; A:1-4). While the circuit court agreed the case should not have been charged as a criminal offense and further, the court "may not have specifically had *criminal* subject matter jurisdiction[,]" it nonetheless still had "authority to hear the case." (Emphasis original). The complaint "still alleges an offense: first offense OWI." (19:2, 3; A:2, 3). Therefore, the judgment of conviction was not void for lack of subject matter jurisdiction. The circuit court did "believe" it was "appropriate to re-open the case," however, and offered to amend the judgment to a first offense if Giese agreed to do so. (19:4; A:4). Giese declined and the circuit court entered a final order on July 31, 2015, denying his motion. (20; A:5). On September 3, 2015, Giese filed a notice of appeal.

ARGUMENT

I. THE JUDGMENT OF CONVICTION IS VOID BECAUSE THE CIRCUIT COURT LACKED CRIMINAL SUBJECT MATTER JURISDICTION.

Criminal subject-matter jurisdiction is the "power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment." *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (1994). The circuit court's subject-matter jurisdiction attaches when the complaint is filed. *Id.* A complaint "which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea; the court does not have jurisdiction." *State v. Bush*, 2005 WI 103, ¶¶16, 18, 283 Wis. 2d 90, 699 N.W.2d 80, citing *Champlain v. State*, 53 Wis.2d 751, 753, 193 N.W.2d 868 (1972), and *State v. Lampe*, 26 Wis. 2d 646, 648, 133 N. W. 2d 349 (1965) ("If the defendant is correct that no offense is charged then the court had no jurisdiction to proceed to judgment.").²

2 The "criminal subject-matter jurisdiction" Giese refers to in this brief is not the plenary authority granted by Article VII, Section 8 of the Wisconsin Constitution, which vests all circuit courts with jurisdiction to hear "all matters civil and criminal within this state[,]" but the "circuit court's ability to *exercise* the subject matter jurisdiction vested in it." (Emphasis original). *Vill.*

A void charge “cannot sustain a verdict or a sentence based on it.” *State v. Schneider*, 60 Wis. 2d 563, 567, 211 N.W.2d 630 (1973). A void proceeding is null and void, “as if it never took place.” *City of Kenosha v. Jensen*, 184 Wis.2d 91, 99, 516 N.W.2d 4 (1994). A void judgment “cannot be validated by consent, ratification, waiver, or estoppel.” *Kohler Co. v. DILHR*, 81 Wis.2d 11, 25, 259 N.W.2d 695, 701 (1977). In addition, a void judgment is not subject to the limitations of Wis. Stat. § 974.06 but may be vacated at any time. *Jensen*, at 98; *State v. Michaels*, 142 Wis. 2d 172, 177, 417 N.W.2d 415 (Ct. App. 1987). Whether a judgment is void for lack of jurisdiction is a question of law. *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998), *affd*, 228 Wis. 2d 1, 596 N.W.2d 786 (1999).

A complaint must allege a “crime known to law” in order to confer jurisdiction. *Lampe*, at 648. A complaint does not allege “a crime known to law” when it fails to allege facts necessary to meet an essential jurisdictional element. *State v. Dreske*, 88 Wis.2d 60, 27-30, 276 N.W.2d 324 (Ct. App. 1979).

In *Dreske*, for example, the facts alleged did not satisfy the elements of the crime. The defendant was accused of laundering campaign contributions and, among other counts, was charged with violating Wis. Stat. §11.24(1). Wis. Stat. §11.24(1) prohibits a person from furnishing funds or property to another “for the purpose of making a contribution in other than his own name.” The allegations were that Dreske went to a bank and purchased a cashier's check in the amount of \$450 from A.H. Krueger, a bank employee. The check was made payable to the Republican Senate Committee. Dreske used the check to purchase tickets to a political fund raiser, listing nine individuals as purchasers (including Susan Daw). *Id.* Count 6 of the information alleged that:

of Trempealeau v. Mikrut, 2004 WI 79, ¶9 273 Wis. 2d 76, 681 N.W.2d 190. A circuit court with general “subject matter jurisdiction” may still lack “competency” to render a valid order or judgment in a particular case. *Id.* This type of “competency,” however, cannot be waived. *Bush*, 2005 WI 103, ¶¶16, 18.

...during the middle of September, 1974, in the County of Milwaukee, State of Wisconsin, the defendant George Dreske, as party to a crime, did intentionally and feloniously directly furnish funds to another person, A. H. Krueger, for the purpose of making a contribution in other than his own name, to wit: in the name of Susan Daw, contrary to Wisconsin statutes sections 11.24(1), 11.61(1) (a) and 939.05.

Dreske, at 27-28. Dreske argued the judgment was void for lack of subject matter jurisdiction because the information failed to allege a crime. The court of appeals agreed. The only funds he transferred were to a bank teller in exchange for a cashier's check: "Transferring funds to a bank teller for whatever nefarious purpose, unaccompanied by any other conduct, is not a crime under sec. 11.24(1)." *Id.*, at 29. Therefore, the information did "not charge acts which are criminal under the laws of Wisconsin." *Id.* As the information failed to charge a crime, the judgment was void:

An information charging no offense is insufficient to bestow jurisdiction on a court. It is defective and void. No verdict or sentence can be based on it. *Champlain v. State*, 53 Wis.2d 751, 754, 193 N.W.2d 868 (1972). A material element of the crime designated in sec. 11.24(1) is absent. The convictions on counts 6 and 7 must accordingly be reversed.

Id., at 29.³

In *Champlain v. State*, 53 Wis.2d 751, 753, 193 N.W.2d 868 (1972), the defendant was charged with armed burglary pursuant to Wis. Stat. §943.32(1). The information failed to allege that Champlain "in taking the property used any force to overcome the owner's resistance or that he took the property by threatening the imminent use of force against the owner." *Champlain*, at 753. The Wisconsin Supreme Court agreed with Champlain that the information failed to

3 See also *Mack v. State*, 93 Wis.2d 287, 295-96, 286 N.W.2d 563 (1980); and *State v. Diehl*, 205 Wis.2d 1, 11, 555 N.W.2d 174 (1996) (The complaint need not allege the same crime for which the defendant was ultimately convicted, but must allege *a* crime).

allege a crime and therefore the conviction was void:

A complaint which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea; the court does not have jurisdiction. *State v. Lampe* (1965), 26 Wis. 2d 646, 648, 133 N. W. 2d 349; *Burkhalter v. State* (1971), 52 Wis. 2d 413, 424, 190 N. W. 2d 502. Nor can a void charge sustain a verdict or a sentence based on it. See *Howard v. State* (1909), 139 Wis. 529, 534, 121 N. W. 133; *Paxton v. Walters* (1951), 72 Ariz. 120, 231 Pac. 2d 458. While a verdict can aid the charge or information which is defective, indefinite but not void, a verdict cannot cure the absence in the information of a material element of the crime. 41 Am. Jur. 2d, *Indictments and Informations*, p. 1072, sec. 310; 42 C. J. S., *Indictments and Informations*, pp. 1350, 1351, sec. 319.

Champlain, at 871.

In *Lampe*, the defendant was charged with forgery contrary to Wis. Stat. § 943.38(1). *Lampe*, 26 Wis.2d at 648. Among other things, Wis. Stat. § 943.38(1) requires a falsely made or altered writing “so that it purports to have been made *by another*, . . .” *Id.*, at 649. The information alleged the check was “falsely purported to have been made by Emery Walker, contrary to sec. 943.38 (1) of the statutes . . .” *Id.* *Lampe* argued the information failed to allege a crime because it did not allege “Emery Walker” was “another” person. “Emery Walker” could have been a fictitious or assumed name. *Id.*, at 650.

The court agreed with *Lampe* on the legal standards. If the “insufficiency” of the complaint “is of such a nature that no crime known to law has been alleged the defect is jurisdictional and is not waived by the plea.” *Id.*, at 648. Moreover, *Lampe*’s argument went “beyond a technical insufficiency of an information charging the crime and raises the question of whether the information charges any offense. If the defendant is correct that no offense is charged then the court had no jurisdiction to proceed to judgment.” *Id.* Nonetheless, the court rejected *Lampe*’s argument on the grounds that it didn’t matter whether “Emery Walker” was fictitious or not, as long as there was an intent to defraud. *Id.*, at 650. The information, therefore, *did* allege a

crime known to law. While the defendant's argument was ultimately rejected, the decision illustrates how the factual allegations were vital to whether a charging document was sufficient to bestow subject matter jurisdiction in a particular case.

Another Wisconsin case refers to the factual allegations necessary to confer jurisdiction as "jurisdictional facts." *State v. Bratrud*, 204 Wis.2d 445, 555 N.W.2d 662 (Ct. App. 1996). As in *Lampe*, Bratrud had entered a no contest plea. On appeal, he claimed the circuit court lacked subject matter jurisdiction because the information relied on a disputed fact, namely, whether the crime was committed in Wisconsin. Not surprisingly, the court of appeals rejected Bratrud's argument because whether disputed or not, the information alleged that the crime occurred in Wisconsin. *Id.* at 451. By pleading no contest Bratrud admitted, for jurisdictional purposes, "all the facts which are well-pleaded..." *Id.*, at 450. The circuit court thus "adjudicated" the necessary "jurisdictional facts when it accepted the plea and convicted Bratrud." *Id.*, at 451.

The requirement that all statutory elements be plead was somewhat qualified in *State v. Petrone*, 161 Wis.2d 530, 468 N.W.2d 676 (1991). Petrone was charged and convicted of three counts of sexual exploitation of children, contrary to Wis. Stat. § 940.203(2) (1987-88). On appeal, Petrone argued the complaint and information failed to allege scienter, a necessary element of the offense.⁴ Wis. Stat. § 940.203(2) (1987-88) does not contain scienter as an element, although the court agreed with the parties that scienter is a

⁴ *Petrone* referenced but did not expressly overrule *State v. Schneider*, 60 Wis.2d 563, 567, 211 N.W.2d 630 (1973), although it would be hard to reconcile the two cases. In *Schneider*, the defendant was charged with possession for sale of obscene material contrary to Wis. Stat. §944.21(1)(a). The complaint alleged that he "did feloniously have in his possession for sale obscene pictures..." A jury convicted. On appeal, Schneider argued the complaint failed to confer criminal jurisdiction because the offense requires scienter and the complaint failed to allege it. The attorney general confessed error, agreeing that "feloniously" did not equate to "intentionally." The court agreed, finding that "feloniously" did mean not "intentionally," and therefore the complaint failed to allege an "offense known to law." *Id.*, at 567. The proceedings, therefore, were "void ab initio." The judgment and sentence was vacated. *Id.*

constitutionally required. The jury was instructed on scienter. The court concluded the charging documents were not deficient and therefore jurisdiction was not lost. It saved the charging documents by announcing a “single rule” that would cover “all criminal cases in which a pleading fails to set forth all the elements of the crime...” *Id.*, at 557-58. A missing legal element is not fatal if: (1) the charging documents include “a correct citation to the applicable substantive criminal statute”; and, (2) the defendant cannot show he was prejudiced in any way. *Id.*, at 554, 557-58.

Petrone is distinguishable on several grounds.

First, *Petrone* does not address “jurisdictional facts” but statutory elements, and therefore has no bearing the problem here—i.e. the lack of any factual allegation that satisfies Wis. Stat. § 346.65(2)(am)2. Indeed, the complaint alleged a 20-year-old prior offense when a 10-year-old or less prior offense was necessary to support a criminal charge. The complaint not only failed to allege any facts which supported a criminal charge, it affirmatively alleged facts that contradict one.

Second, the complaint in this case did not include a “correct citation” to the applicable criminal statute. While it’s true the substantive “offenses” under Wis. Stats. §§ 346.63(1)(a) & (b) pertain to either a civil or criminal violation, the reference to Wis. Stat. § 346.65(2)(am)2 and the criminal penalties contained therein are what make the charge criminal. Citation to Wis. Stat. § 346.65(2)(am)2 is clearly not correct because no criminal statute applied to these allegations.

Third, *Petrone*’s rule does not apply if the defendant can show prejudice from the omission. In this case, Giese was clearly prejudiced when he entered a plea to, and was convicted of, a totally unsupported criminal charge.

Petrone did not modify the essential requirement that a charging document must allege a crime, both factually and legally, in order for

the circuit court to obtain criminal subject matter jurisdiction. In fact, the Wisconsin Supreme Court cited both *Lampe* and *Champlain* with approval nearly ten years after *Petrone* was decided. See *Bush*, 2005 WI 103 at ¶¶16, 18.

In this case, the criminal complaint failed to confer criminal subject matter jurisdiction when it failed to allege a prior qualifying offense. Giese's March 22, 2009, OWI was not criminal offense unless, at a minimum, the "the total number of suspensions, revocations, and other convictions counted under s. 343.307(1) *within a 10-year period, equal 2,....*" (Emphasis added). Wis. Stat. § 346.65(2)(am)2 (2007-2008) (A:9): Anything less constituted a civil forfeiture. Wis. Stat. § 346.65(2)(am)1 (2007-2008) (A:9); see also Wis. Stat. § 939.12 (conduct punishable only by a forfeiture is not a crime).

Here the complaint alleged one prior offense which occurred on "12/18/1989 with offense date(s) of 12/04/1989...." (1:2; A:7). As the 1989 conviction predated charging in this case by nearly 20 years, the complaint, on its face, failed to allege a criminal offense. In other words, alleging the operation of a motor vehicle on a highway while under the influence of an intoxicant with a 20-year-old prior offense was not a *crime* known to law. By failing to allege a crime known to law, the circuit court never obtained criminal subject matter jurisdiction. As the circuit court never obtained criminal subject matter jurisdiction, it lacked authority to enter a judgment of conviction. The judgement of conviction is therefore void as a matter of law.

The trial court's analysis should be rejected as it confuses plenary subject matter jurisdiction with authority to act in a particular case. A circuit court with general "subject matter jurisdiction" may still lack the "competency" (or specific authority) to render a valid order or judgment of conviction. The circuit court's confusion is not surprising, as Wisconsin courts have continued to misapply these concepts. See *State v. Toliver*, 2014 WI 85, ¶37, 356 Wis. 2d 642, 851 N.W.2d 251, Abrahamson, dissenting ("Substantial confusion exists in the case law on the meaning of the terms "jurisdiction," "subject matter

jurisdiction," "jurisdictional error," and "competence" of the courts. The jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is 'murky at best.' [citations omitted]." What is clear is that the "criminal subject matter jurisdiction" necessary to act in a particular case is conferred by a criminal complaint that alleges a crime and not, as the circuit court contends, a civil "offense." *Bush*, 2005 WI 103 at ¶¶16, 18. As the complaint fails to allege a crime, the conviction is void.

CONCLUSION

Giese's conviction for OWI second should be reversed and vacated.

Respectfully submitted this 23rd day of November, 2015.

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

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Dated this 23rd day of November, 2015.

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As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on November 23rd, 2015. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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APPENDIX OF DEFENDANT-APPELLANT

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