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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2015AP001838-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
TIMOTHY A. GIESE,
Defendant-Appellant.

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

On Appeal from the Brown County Circuit Court,
the Honorable Thomas J. Walsh presiding
Trial Court Case No. 09CT1159

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ISSUE PRESENTED

Is a criminal conviction for a second offense OWI void for lack of subject matter jurisdiction, where the prior OWI conviction had occurred more than 10 years earlier and the second offense should have been non-criminal?

The circuit court ruled it was not void, as circuit courts have subject matter jurisdiction over both criminal and civil OWI offenses.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin believes this is a one-judge case, in which the arguments can be adequately addressed in briefing and can be decided by straightforward application of law to the facts. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

The facts in this case are not contested, and the Court may accept the facts as set forth by Giese.

ARGUMENT

THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION OVER GIESE'S OWI CASE REGARDLESS OF WHETHER THE CHARGE WAS CRIMINAL OR CIVIL

A. Standard of Review.

The question of whether a circuit court has subject matter jurisdiction is a question of law. *State v. Schroeder*, 224 Wis.2d 706, 711, 593 N.W.2d 76, 79 (Ct. App. 1999). “The party claiming that a judgment is void for lack of subject matter jurisdiction has the burden of proving subject matter jurisdiction did not exist.” *State ex rel. R.G. v. W.M.B.*, 159 Wis. 2d 662, 668, 465 N.W.2d 221, 224 (Ct. App. 1990).

B. A circuit court is never without subject matter jurisdiction.

“Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over ‘all matters civil and criminal.’” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis.2d 76, 82, 681 N.W.2d 190, 192, quoting Wis. Const. art. VII, § 8. “Accordingly, a circuit court is **never** without subject matter jurisdiction.” *Id.* (emphasis added).

Wisconsin Courts have articulated instances where subject matter jurisdiction is implicated “as otherwise provided at law.” Wis. Const. art VII, § 8. “Federal law may confer exclusive jurisdiction over certain subject matters to the federal courts, precluding state court jurisdiction in those areas by operation of the Supremacy Clause.” *Mikrut*, 2004 WI 79 at ¶ 8, n. 2. Additionally, a facially unconstitutional statute is null and void, and the Court lacks subject matter jurisdiction to act under the statute. *In re Commitment of Bush*, 2005 WI 103 at ¶ 17, 283 Wis.2d 90, 103-104, 699 N.W.2d 80, 87. “If a statute is unconstitutional on its face, any action premised upon that statute fails to present any civil or criminal matter in the first instance.” *Id.*

None of these examples would apply to the case at hand. Regardless of whether Giese was charged with a criminal or civil offense of operating while intoxicated, there is no doubt that the circuit court had jurisdiction over this type of offense.

C. The concept of *criminal* subject matter jurisdiction does not render Giese's OWI conviction void.

Giese argues that the circuit court lacked criminal subject matter jurisdiction, and thus the conviction was void. Giese cites numerous cases to support this position,¹ but none are analogous to the issue before this court. For example, some of the cases cited by Giese actually dealt with the issue of whether scienter needed to be alleged in the complaint or information.²

While Giese does cite some cases that called into question whether the underlying complaints or informations sufficiently set forth all the elements of the offenses charged,³ those cases are not applicable to Giese's

¹ If one attempts to follow Giese's argument by actually reading the cases he cites and quotes, it is rather difficult to follow along as there are at least 15 errors in his brief where cases are not cited accurately or correctly, and quotes not cited correctly or attributed to the correct case. The most glaring of these errors is Giese's repeated quotes from and citations to *State v. Dreske*, 88 Wis.2d 60, 276 N.W.2d 324 (Ct. App. 1979), for which he gives pinpoint citations of pages 27-30, even though, obviously, the case started at page 60 in the Wisconsin Reporter and page 324 in the North West Reporter.

² *State v. Schneider*, 60 Wis.2d 563, 211 N.W.2d 630 (1973), dealt with a charge of possession for sale of obscene material, and whether the complaint sufficiently alleged scienter. *State v. Petrone*, 161 Wis.2d 530, 468 N.W.2d 676 (1991), dealt with a charge of sexual exploitation of children, and whether the complaint and information needed to specifically allege scienter.

³ *State v. Dreske*, 88 Wis.2d 60, 276 N.W.2d 324 (Ct. App. 1979) (whether the facts alleged met the elements required for a violation of the Campaign Financing Act); *Champlain v. State*, 53 Wis.2d 751, 193 N.W.2d 751(1972) (whether the information

case, as the underlying complaint in Giese's case *did* set forth the elements for an offense known to law. "If a complaint fails to state an offense known at law, **no matter civil or criminal** is before the court, resulting in the court being without jurisdiction in the first instance." *Bush*, 2005 WI 103, ¶ 18 (emphasis added).

However the complaint in Giese's case did set forth the elements for an operating while intoxicated offense. There are two elements for the offense of OWI: (1) that person operated a motor vehicle on a highway, and (2) that at the time of such operation, the person was under the influence of an intoxicant. Both of these elements were set forth in the complaint in this case, and were supported by the facts set forth therein. Whether this OWI is a criminal offense or a civil offense, the complaint still set properly forth the elements of OWI, an offense known to law, and the circuit court therefore still had subject matter jurisdiction.

supported a charged offense of armed robbery, where the facts did not allege any force or imminent use of force in taking the property); *State v. Lampe*, 26 Wis.2d 646, 133 N.W.2d 349 (1965) (whether the facts alleged in the complaint supported the charged offense of forgery).

Giese argues that there should have been an additional element, to wit: failing to allege a prior qualifying OWI offense. However, the case law does not support this argument.

“Section 346.63(1), Stats., defines the offense of driving while intoxicated; it does not state the sentencing penalty and it does not state the term of revocation. The penalty provisions, sec. 346.65, Stats., are entirely independent of the provision that defines the offense.” *State v. Banks*, 105 Wis.2d 32, 42, 313 N.W.2d 67, 71 (1981), agreeing with the legal analysis set forth in an Attorney General’s opinion. “The conduct prohibited by sec. 346.63(1), Stats., consists of (1) driving or operating a motor vehicle, and (2) doing so while under the influence of an intoxicant. It is the conduct of operating a motor vehicle while under the influence of an intoxicant which is prohibited by sec. 346.63(1). **Nothing more need be proven to sustain a judgment of conviction against a motorist.** These were the two elements of the offense contained in the jury instruction, and the jury was therefore properly instructed.” *State v. McAllister*, 107 Wis.2d 532, 535, 319 N.W.2d 865, 867 (1982) (emphasis added).

What Giese claims to be an additional element is pertinent only to the penalties for the charged offense, not the elements needed to confer jurisdiction over him for the offense of OWI. “The penalties for violation of OMVWI are contained in sec. 346.65(2), Stats. Repeated violations are subject to increasingly harsher penalties. This graduated penalty structure is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense, *i.e.*, the prohibited conduct, but rather goes only to the question of punishment.” *Id.* at 538. In addition, the Wisconsin Supreme Court ruled in *McAllister* “that **the fact of a prior violation, civil or criminal, is not an element of the crime of OMVWI** either in the ordinary sense of the meaning of the word element, *i.e.*, the incidents of conduct giving rise to the prosecution, **or in the constitutional sense.**” *Id.* (emphasis added). “The defendant argues that since he cannot be convicted of this crime unless there has been a previous civil or criminal conviction of the same offense, the previous conviction is an element of the offense and must be proven beyond a reasonable doubt to the jury. We reject that argument and rule that the previous conviction of sec. 346.63(1), Stats., whether civil or criminal, **is not an element of the offense.**” *Id.* (emphasis added).

D. Giese's interpretation would be contrary to the legislative purpose of Wisconsin's OWI laws.

To require an additional element in the complaint, thus allowing Giese to void his 2009 OWI conviction would allow a convicted drunken driver to avoid the long term consequence of that conviction, *i.e.*, the cumulative counting of the convictions. This would be inconsistent with Wisconsin jurisprudence that concludes that drunk driving laws “must be construed to further the legislative purpose.” *State v. Neitzel*, 95 Wis.2d 191, 193, 289 N.W.2d 828, 830 (1980).

The most appropriate way to handle this situation would have been to amend the 2009 OWI conviction to a non-criminal offense, as both the State and circuit court offered to do. But Giese rejected that resolution. Therefore, the criminal conviction for a second offense OWI should remain in effect.

CONCLUSION

For the above reasons, the State of Wisconsin respectfully requests that this court uphold Timothy A. Giese's conviction for OWI, and deny his appeal.

Respectfully submitted this _____ day of January, 2016.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1582 words, including footnotes.

There is no appendix attached to this brief as any items that would have been included were included in the Defendant-Appellant's appendix.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 28th day of January, 2016.

Signed:

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