STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2015AP1838-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY A. GIESE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

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

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ARGUMENT

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

The State does not dispute the complaint's failure to allege a criminal offense. Indeed, it argues the 2009 OWI conviction should be amended to a civil offense. (State's Brief, p. 8). Nonetheless, it argues the judgment of conviction is not void because the complaint alleged an "offense" known to law. The complaint alleged an "offense" known to law because it alleged the two required elements of Wis. Stat. § 346.63(1): "(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." See *State v. McAllister*, 107 Wis.2d 532, 535, 319 N.W.2d 865, 867 (1982). The penalty provisions under Wis. Stat. § 346.65 "are entirely independent of the provision that defines the offense", citing *State v. Banks*, 105 Wis.2d 32, 42, 313 N.W.2d 67, 71 (1981). (State's Brief, pp. 5-6). Apart from the conduct of operating a motor vehicle while under the influence of an intoxicant, "**[n]othing more need be proven to sustain a judgment of conviction against a motorist**." (emphasis original). (State's Brief, p. 6).[1]

Consequently, it doesn't matter whether the OWI "offense" alleged is civil or criminal: "Whether this OWI is a criminal offense or a civil offense, the complaint still set forth the elements of OWI, an offense known to law, and the circuit court therefore still had subject matter jurisdiction." (State's Brief, p. 5). Because none of the cases Geise cites involve an "offense" that can be either civil or criminal, they are "not applicable" to Geise's argument. (State's Brief, p. 4-5).

First, the State's assertion it need only prove the two elements contained in Wis. Stat. § 346.63(1) "**to sustain a judgment of conviction against a motorist**" merely begs the question. (emphasis original). (State's Brief, p. 6). If by "conviction" the State means a civil forfeiture, the statement is true. If by "conviction" the State

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1 The State complains in a footnote (State's Brief, p. 4, n. 1) that Giese's brief-in-chief contains "at least 15" citation errors. The State does not describe them, with the exception of *State v. Dreske*, 88 Wis.2d 60, 276 N.W.2d 324 (Ct. App. 1979). The *Dreske* page citations on page 8-9 of Giese's brief are from the LEXIS citation, 1979 Wisc. App. LEXIS 2630. Appellate counsel mistook them for the Wisconsin Reporter page numbers. The LEXIS pages cited, 27-30, are pages are 79-81 in the Wisconsin Reporter.

Appellate counsel has reviewed every other citation he made in Geise's brief and found two other errors. On page 10 of his brief he cites "*Champlain*, at 871." The correct page number is 754. At the bottom of page 13 he cites "*State v. Toliver*, 2014 WI 85, ¶37, 356 Wis.2d 642, 851 N.W.2d 251." The citation is correct, although specific reference to the quoted footnote (note 13) contained in ¶37 was omitted. Appellate counsel apologizes for any confusion or inconvenience this may have caused.

means a criminal conviction with criminal penalties, a prior qualifying offense must be proven in addition to the elements contained in Wis. Stat. § 346.63(1). See Wis. Stat. § 346.65(2)(am)2 (2007-2008). The State does not dispute a prior qualifying offense was neither alleged nor proven. In fact, the State argues the "most appropriate way to handle this situation would have been to amend the 2009 OWI conviction to a non-criminal offense…."[2] (State's Brief, p. 8).

Second, the State fails to cite any legal authority which supports its contention that a circuit court obtains both civil and criminal jurisdiction when an OWI complaint only satisfies the two elements contained in Wis. Stat. § 346.63(1). The State's reliance on *State v. Bush*, 2005 WI 103, ¶18, 283 Wis.2d 90, 699 N.W.2d 80 is difficult to understand. *Bush* observed that "[i]f 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." (emphasis original). *Id*., at ¶18; (State's Brief, p. 5). *Bush* merely observed that an "offense" can be either civil or criminal, and that in either case, the complaint must state an offense known to law. It does not stand for the proposition that a complaint which states a "civil" "offense" confers criminal jurisdiction.

A crime is "conduct which is prohibited by state law ***and*** *punishable by fine or imprisonment or both.*" (Emphasis added) Wis. Stat. §939.12. The case law is clear that a pleading sufficient to confer *criminal* jurisdiction and impose *criminal* penalties must allege a *criminal* offense. See *State v. Lampe*, 26 Wis. 2d 646, 648, 133 N. W. 2d 349 (1965) (complaint must allege "*a crime* known to law" in order to confer criminal jurisdiction (emphasis added)). Further, a pleading does not adequately allege a crime by merely reciting the statutory elements but must also plead facts that would satisfy those elements. See *Dreske*, at 79-81. Whether a qualified prior offense is an "element" of a criminal OWI, a "jurisdictional fact", a statutory "factor" or something else, the bottom line is that the complaint failed to allege a

2 The State fails to articulate how, exactly, this could be done. Giese is no longer under sentence and therefore would have no remedy pursuant to Wis. Stat. §974.06.

criminal offense known to law because without the prior offense, criminal penalties could not be imposed.

The State's reliance on *State v. McAllister*, 107 Wis.2d 532, 319 N.W.2d 865 (1982) is also misplaced. The issue in *McAllister* was whether a prior qualifying offense was an element of Wis. Stat. § 346.63(1) to the extent its existence had to be determined by a jury. The Court held it was not an element that had to be submitted to the jury. Nonetheless, it acknowledged, citing *Dahlgren v. State*, 163 Wis. 141, 144, 157 N.W. 531 (1916), that a:

> [p]rior conviction *is an essential element of the charge in the information* in order to secure the punishment provided for in case of a second offense and must be alleged in the information….

(Emphasis added) *McAllister*, at 537.

An analogous situation arises when a violation of Wis. Stat. § 346.63(1) results in a felony. In *State v. Lindholm*, 2000 WI App 225, 239 Wis.2d 167, 619 N.W.2d 267 (2000), the "State alleged that [Lindholm] had two previous OMVWI convictions and a passenger younger than sixteen in his car at the time he was stopped…." *Lindholm*, at ¶2. These "factors" made the OWI "a felony under Wis. Stat. § 346.65(2)(f)…." *Lindholm*, at ¶3. Because "the crime was charged as a felony", Lindholm was entitled to a preliminary hearing. *Id*., at ¶¶2, 5. The State presented proof of intoxication and a stipulation to the passenger's age, but was unable to locate the prior judgments of conviction. Rather, it presented a certified abstract of Lindholm's DOT driving record showing 1991 and 1997 offenses. The circuit court found the proof insufficient, denied bind over, dismissed the felony charge, and ordered that a misdemeanor charge be filed in its place.[3] The State appealed. The court of appeals reversed, holding that a certified DOT record was sufficient to support probable cause at a preliminary hearing. *Id.*, at ¶¶ 2-4, 10. While the prior

3 A first offense OWI becomes a criminal misdemeanor when the State alleges a less than sixteen-year-old passenger in addition to the elements of Wis. Stat. § 346.63(1). See Wis. Stat. § 346.65(2)(f)1.

convictions were not an "element" of the offense, "probable cause for the number of prior convictions had to be established at the preliminary hearing because it changed the status of the offense to that of a felony;…." *Lindholm*, at ¶6.

While *Lindholm* addresses a different issue, it demonstrates the State's burden of both alleging and proving whatever additional "factors" are required under Wis. Stat. § 346.65 when criminal penalties are sought. Lindholm could not have been convicted of a felony offense had the State not alleged prior qualifying convictions. In this case, the State failed to allege a *criminal* offense known to law when it failed to allege a qualifying prior offense *in addition to* the elements contained in Wis. Stat. § 346.63(1).

The State's premise is further flawed in that it fails to explain how criminal penalties could be imposed in an OWI action commenced solely on the two elements contained in Wis. Stat. § 346.63(1), without violating due process. A criminal defendant has a due process right to be informed of the nature and cause of the accusation. *State v. Conner*, 2011 WI 8, ¶20, 331 Wis.2d 352, 795 N.W.2d 750. The defendant must be able to determine whether the complaint "states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." *Id*., at ¶20, citing *Holesome v. State*, 40 Wis.2d 95, 161 N.W.2d 283 (1968). See also *Conner*, at ¶21, citing *Fink v. City of Milwaukee*, 17 Wis. 26 (1863) ("…the facts and circumstances which constitute the offense…must be stated with such certainty and precision that *the defendant may be able to judge whether they constitute an indictable offense or not*,…." (emphasis added)). A complaint based solely on the two elements of Wis. Stat. § 346.63(1) would not give a defendant notice he is facing a criminal charge with criminal penalties.

As the complaint failed to allege a qualifying prior offense or any other "factor" under Wis. Stat. § 346.65 which would elevate the "offense" to a criminal violation, it failed to allege a crime known to law. As a result, the circuit court did not have authority to enter a

criminal judgment or impose criminal penalties. The judgment of conviction is void and should be vacated.

CONCLUSION

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

Respectfully submitted this 15th day of February, 2016.

MILLER APPELLATE PRACTICE, LLC

By_____

Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Form and Length

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:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 2486 words.

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 s. 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 15th day of February, 2016.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this --- day of February, 2016.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022

CERTIFICATION OF MAILING

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 February 16th, 2016. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 16th day of February, 2016.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780