STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No.: 16 AP 366

EAU CLAIRE COUNTY SHERIFF'S DEPARTMENT,

Plaintiff-Respondent,

vs.

DUANE D. COLLIER,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JANUARY 8, 2016 IN THE CIRCUIT COURT
FOR EAU CLAIRE COUNTY, BRANCH 1,
THE HONORABLE BRIAN H. WRIGHT PRESIDING.

Respectfully submitted,

DUANE D. COLLIER,
Defendant-Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. The circuit court did not have competency to hear a civil operating while intoxicated ticket where there was a prior ticket within the statutory counting period.

II. The County did not have the authority to prosecute the defendant, as it was required that the State charge him with a criminal offense.

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Duane Collier, previously known as Duane Dukeson Mansour, received a ticket for a violation of Wis. Stat. §346.63(1)(a) for an incident that occurred on May 27, 1992. (1) He was adjudicated guilty later that same year and penalized with a forfeiture and license suspension. (1:2) The prosecution was under the authority of the County of Eau Claire; the ticket was written by the Eau Claire County Sheriff's Department and prosecuted by the County. (1) The ticket was written for a first offense operating while under the influence of an intoxicant violation, and the penalties imposed were for a first offense violation. However, Mr. Collier had previously been ticketed for operating while intoxicated for an offense that occurred in 1991, and he was convicted February 5, 1992, in the State of Minnesota. (3:attachment, p. 3) Consequently, pursuant to Wis. Stat. § 343.307(1)(d), Mr. Collier should have been charged with a crime for second offense driving under the influence of an intoxicant, as he had the previous conviction; and should have been prosecuted by the State of Wisconsin and not the County of Eau Claire.

Mr. Collier filed a Motion to Vacate, dated June 26, 2015, requesting the Court vacate the conviction. (3) The County of Eau Claire opposed, arguing that a circuit court is never without subject matter jurisdiction, and the issue only reached competency. (6) The motion to vacate, briefing and oral argument in this case all occurred prior to the recently issued decision in ***City of Eau Claire v. Melissa M. Booth***, therefore, the issue of competency decided by the Wisconsin Supreme Court in that case were not addressed in the trial court. 2016 WI 65.

After briefing and oral argument, the trial court denied the Motion to Vacate. (10) The trial court distinguished the facts from ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). (12:21-22) The trial court did not make any specific finding that the circuit court lacked competency but did find that the prior conviction should be counted. (12:26)

The trial court stated:

> In other words, there's very little discretion given to prosecutors and, essentially, no discretion given to prosecutors when it comes to the number of previous offenses. There is the legislative, I think, directive and judicial policy of creating uniformity throughout the state when it comes to operating-while-intoxicated offenses.

(12:25)

The trial court ultimately ruled: "So I will for the reasons that I have stated as well as the analysis in ***Narvestad***, find that the prior Wisconsin conviction should be counted under the Wisconsin statutes even though it was prosecuted back in 1992 as a first when it should have been a second." (12:26)

Mr. Collier then filed this appeal. (11)

ARGUMENT

The motion to vacate in this matter was raised, briefed and argued prior to the decision in ***City of Eau Claire v. Melissa M. Booth***, 2016 WI 65. That decision withdrew some language from the decision in ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). That decision specifically withdrew the language that states a circuit court does not have subject matter jurisdiction over an OWI improperly charged as civil when it should be charged as a criminal offense. However, it did not overrule ***Rohner*** and specifically left intact the holding "that the state has exclusive jurisdiction over a second offense for drunk driving." ***Booth*** at ¶15. Nor does that decision alter the confirmation of state policy to strictly enforce drunk driving laws. ***Id.***

Collier argues, first, that the circuit court did not have competency to hear the civil OWI ticket filed by the County against him and, second, that the County did not have the authority to prosecute him as it was required that the State charge him with a criminal offense.

I. Standard of Review

Where a case requires statutory interpretation and application to undisputed facts, that is a question of law subject to *de novo* review. ***Jackson County v. State Dept. of Natural Resources***, 2006 WI 96, ¶10, 293 Wis. 2d 497, 717 N.W.2d 713, citing ***Tahtinen v. MSI Ins. Co.***, 122 Wis. 2d 158, 166, 361 N.W.2d 673 (1985). Appellant believes all material facts are undisputed, and this matter is subject to review *de novo*, although the appellate court may benefit from the analysis of the previous court's decision. ***Id.*** citing to ***State v. Cole***, 2003 WI 59, ¶12, 262 Wis. 2d 167, 663 N.W.2d 700.

II. The circuit court lacked competency to enter a civil judgment of conviction for a first offense OWI that factually should have been charged as a crime.

Wis. Stat.§346.65(2) establishes an escalating scheme for violation of the drunk driving statute. This allows the State to punish those with multiple offenses more harshly than those without prior offenses. Wis. Stat. §346.65(2)(am)2 states that if the total countable offenses within a 10-year period equals 2, then a driver shall be imprisoned for not less than 5 days nor more than 6 months. The Wisconsin Supreme Court interpreted this statute in ***County of***

Walworth v. Rohner in 1982 and has issued a new opinion withdrawing some language and discussing the difference between lack of subject matter jurisdiction versus lack of competency. 108 Wis. 2d 713, 324 N.W.2d 682 (1982) and ***City of Eau Claire v. Melissa M. Booth***, 2016 WI 65.

Similar to the facts in ***Booth***, here Collier was issued a ticket for a first offense OWI; but he had a prior conviction for OWI within the statutory counting period, and he should have been charged criminally. The court in ***Booth*** held that under those factual circumstances, the circuit court lost competency over the OWI. ***Id.*** at ¶24. Consequently, the circuit court lost competency over Collier's OWI as well.

According to ***Booth***, finding a lack of competency does not end the matter. ***Id***. at ¶25. Upon a finding that the trial court lacked competency, it must then be determined whether the challenge to the entry of the judgment has been waived by the defendant or not. Here, Collier argues the judgment is void under Wis. Stat. §806.07(1)(d) and, therefore, requests the civil forfeiture against him be vacated. Under that statutory provision, there is no required time period in which a request to vacate the void forfeiture must be made. ***Neyland v. Vorwald,*** 124 Wis. 2d 85, 368 N.W.2d 648 (1985).

Because the trial court did not have competency to hear the civil forfeiture ticket again Collier, that judgment is void. There is no evidence in the record that Collier knew the court lacked competency at any point. In fact, the law in Wisconsin had been considered well-settled on this matter and, under ***Rohner***, the forfeiture proceeding would have been declared void for lack of subject matter jurisdiction. Only recently has the issue begun to be framed in terms of competency. Until 2013 when a series of unpublished decisions were issued by the Court of Appeals[1] (the majority of which upheld ***Rohner***), there was no question that the procedure that applied in this factual situation was to vacate the forfeiture proceeding for lack of subject matter jurisdiction. Therefore, to hold Collier responsible for not challenging the competency of the court to proceed in his case, when even an experienced attorney would not have raised that issue, would violate due process. There is no evidence that Collier was represented by an attorney in this matter until he filed the motion to vacate in June of

[1] ***State v. Navrestad***, 364 Wis. 2d 759, 869 N.W.2d 170 (Ct. App. 2015) (holding ***Mikrut*** effectively overturned ***Rohner***); ***City of Stevens Point v. Lowery***, 361 Wis. 2d 285, 862 N.W.2d 619 (Ct. App. 2015) (vacating a prior conviction based on ***Rohner***); ***State v. Strohman,*** 361 Wis. 2d 286, 862 N.W.2d 619 (Ct. App. 2015) (following ***Rohner***); ***Clark County v. Potts,*** 347 Wis. 2d 551, 830 N.W.2d 723 (Ct. App. 2013) (following ***Rohner***); ***State v. Krahn***, 346 Wis. 2d 280, 827 N.W.2d 930 (Ct. App. 2013) (following ***Rohner***) all unpublished but citable per Wis. Stat. Rule 809.23(3)

2015. There is no evidence that Collier knew or should have even known that this conviction was subject to challenge due to the procedural history. To hold a *pro se* defendant to a standard that the prosecution could not meet (as it incorrectly charged the case) would be a violation of due process. ***Lambert v. People of the State of California***, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice.") Judgments entered contrary to due process are void. ***Neylan*** at 95, citing to ***Wengerd v. Rhinehart***, 114 Wis. 2d 575, 587, 338 N.W.2d 861, 868 (Ct. App. 1983).

As opposed to the findings made by the Court in ***Booth***, there is no indication that either Collier attempted to "play fast and loose with the court system." ***Booth*** at ¶25. That simply did not happen in this case. The County incorrectly brought a forfeiture action against Collier. However, there is no evidence that Collier knew or should have known that there was a procedural problem with their actions. Nor is there evidence that Collier was even present when the forfeiture was entered against him. There was no requirement in place that he personally attend such a court appearance, because the statute allows for default against him for non-appearance. There is, thus, no evidence that Collier was ever aware that he could have

challenged the competency of the court over the forfeiture proceeding. The court proceeded without competency; therefore, the judgment is void. Under Wis. Stat. §806.07(1)(d), that void judgment is not subject to the reasonable time requirement. Under the circumstances here, the judgment must be vacated.

III. The County did not have the authority to prosecute Collier, as it was required that the State charge him with a criminal offense.

In ***Rohner***, the Wisconsin Supreme Court framed the principal issue as whether a second offense drunk driving within the counting period (which was five years in 1982 at the time of that decision, but is currently ten years for a second offense) is exclusively within the province of the State for prosecution. ***Id.*** at 716. That ruling survives ***Booth***. 2016 WI 65 at ¶15. The ruling was that the state has exclusive jurisdiction over a second offense for drunk driving. ***Id.*** That decision looks to the legislative language and intent, holding "that the legislature intended that a second offense for drunk driving be exclusively within the province of the state." ***Id.*** at 717. Further, that decision discusses the use of the word "shall" as mandatory and not permissive in nature holding that "[i]f the legislature had intended that the imposition of criminal penalties be

discretionary it would have used permissive rather than mandatory language." ***Id.*** at 718. Because the legislature required a second or subsequent offense to be brought as a criminal proceeding, and because in Wisconsin only the State has the power to enact and prosecute crimes, the county was without authority to cite the defendant under a county ordinance. Counties are given power and authority only by legislative grant and, further, if the legislature has expressly withdrawn power, the County cannot act. ***Jackson County v. State Dep't. of Nat. Resources,*** 2006 WI 96, ¶16, 293 Wis. 2d 497, 717 N.W.2d 713.

There is further evidence of legislative intent that criminal penalties be required for a second offense in legislative history. Looking to the 1971 revision of the Vehicle Code and the State's policy of strict enforcement of laws intended to curb drunk driving, the ***Rohner*** Court determined the change was intended to remove from local governments the power to regulate conduct which is criminal under state law. ***Id.*** at 719. The Court in ***Rohner*** then ultimately ruled based on the mandatory language of the statute, legislative history, and policy that the State has exclusive authority to prosecute second offenses for drunk driving. ***Id.*** at 722. The legislature has expressly withdrawn the power of the municipality to

act in the arena, and any action is thus without legal effect. ***Jackson County v. State. Dep't. of Nat. Resources***, 2006 WI at ¶20.

In this matter, it is undisputed that Collier had a conviction in Minnesota that should have been counted under Wis. Stat. §346.65(2)(a) in February of 1992. (3:attachment, p. 3) Collier was subsequently cited by the County for civil operating while intoxicated in Wisconsin and convicted in July of 1992. (Id.) As no court or prosecution file exists for the 1992 Wisconsin conviction, the only information available to the parties in that case is the handwritten ticket and what is contained in Collier's Wisconsin driver record. (1; 3) Under Wisconsin law of 1992 and today, it was required that Collier be charged by the State with a criminal second offense operating while intoxicated charge. However, he was cited by the County and convicted of first offense operating while intoxicated. It is easy to speculate that the computer systems that allow for communication across states currently were not in place in 1992 and the County was unaware of the Minnesota prior offense; however, there was no proof that was the case in the record. The prosecution did not allege that the County did not know of Collier's prior. What the County knew is an unknown.

What is known is that at the time the County did not have authority in this case because the County has no discretion to charge under a county ordinance when there is criminal jurisdiction for an OWI charge. The Supreme Court so held in ***Rohner***, and that language remains unreversed. That is the proposition fully laid out in ***Rohner***. In fact, in ***Rohner***, the Court clearly lists the reasons why jurisdiction resides in the state alone, citing to Wis. Stat. §346.65(2)(a) and the use of the mandatory word "shall," the reasoning in prior case law and the legislative intent, concluding that the State has exclusive jurisdiction over a second offense for drunk driving. ***Rohner*** at 716. Therefore, the County was without subject matter jurisdiction. ***Clark County v. Potts*** overturned a circuit court decision declining to vacate a judgment in a similar situation. 347 Wis. 2d 551 (Ct. App. 2013) (unpublished but citable per Wis. Stat. Rule 809.23(3)). ***Potts*** rejected the claim that the request to vacate the conviction was untimely and cited to ***Neylan v. Vorwald***, 124 Wis. 2d 85, 368 N.W.2d 648 (1985) for the proposition that a motion to vacate a void judgment can be made at any time.

The County argued in the trial court that Collier should not receive the benefit of the County's mistake. However, it did not punish Collier for a criminal offense in 1992. Had the State

instituted a criminal proceeding, Collier would have had the right to an attorney even if he could not afford one. He would have had the absolute right to a jury trial, and the State would have had to prove the charge against him beyond a reasonable doubt. Instead, the County cited him with a traffic ticket and could even have asked for a default judgment to be entered without Collier being present. The County's mistake could well cut both ways; perhaps there was an ironclad defense that any attorney could have recognized at the time but which Collier did not raise because it was a civil traffic ticket. We simply cannot reconstruct the circumstances now and neither can the County. The County cannot say it would have been as easy to convict him of a criminal charge as a traffic citation, as the burdens and procedures are far different.

In 1992, the County cited Collier for a first offense drunk driving, and he was convicted of that offense. At that time, the County did not seek to use the Minnesota prior conviction against him. However, now the question is whether both the Minnesota and 1992 Wisconsin prior convictions are valid prior convictions on Collier's driver record even though when the County cited Collier, it wrongly cited him for civil first offense and did not use the Minnesota prior conviction against him.

The statutes and case law cited in ***Rohner*** have not substantially changed since that time. The specific, on-point reasoning in that case is good law and should be applied to this case. In ***Kett v. Cmty. Credit Plan, Inc.***, the Court held that statutory authority based on legislative intent can create an exception to the general rule that a defect in venue does not affect the validity of a judgment. 222 Wis. 2d 117, 129, 586 N.W. 2d 68, 74 (Ct. App. 1998) *aff'd.* 228 Wis. 2d 1, 596 N.W.2d 786 (1999). ***Rohner*** and caselaw following, including ***Booth***, have held that the legislature, in enacting the counting statute for OWI cases, requires that all second and subsequent offenses under that statute be brought as criminal charges. Therefore, the County could not bring an action against Collier for a civil forfeiture. Any action taken in such a matter is without legal effect. ***Jackson County v. State Dep't. of Nat. Resources*** at ¶20.

If this were not so, then an erroneously issued citation for operating while intoxicated as a first offense would be a valid action, contrary to statutory authority and legislative intent. Further, if the error were discovered after the close of the case, the prosecutor could not simply declare the erroneous judgment void and properly bring a prosecution for a criminal charge. That is the power the

prosecution has if the erroneous civil case can be challenged but which would be removed if this procedure were declared to be a valid legal action. So, while it seems contrary to public policy to allow a drunk driver to "escape" prosecution for a prior offense, the legislative intent is actually furthered by ensuring that prosecution can be properly brought. If a prior offense in these circumstances is challenged and thrown out, a prosecutor may properly pursue that charge criminally if the conviction is valid. In a case such as ***Rohner,*** a ruling that there was a valid proceeding would mean that the prosecutor would be precluded from proceeding against the offender criminally and would be stuck with only the civil ramifications of a first offense. The legislature's scheme for escalating penalties against repeat drunk drivers would thus be thwarted. Therefore, the fact that ***Rohner*** held that legislative intent and statutory authority led to a ruling that judgment was void furthers the legislative intent to aggressively and properly prosecute those accused of drunk driving.

Wis. Stat. § 346.65 establishes an escalating penalty scheme for those convicted of drunk driving under Wis. Stat. § 346.63. The language used is mandatory, and subsequent case law has emphasized the requirement that any second offense within the

counting period of Wis. Stat. § 346.65 be brought by the State as a criminal offense. See: ***City of Lodi v. Hine***, 107 Wis. 2d 118, 122-23, 318 N.W.2d 383 (1982) ***State v. Banks***, 105 Wis. 2d 32, 39, 313 N.W.2d 67 (1981). The power to regulate criminal conduct was removed from local governments and can only be exercised by the State. ***Rohner*** at 719. Nothing in ***Booth*** has overruled the statutes and policy applicable to that analysis as outlined in ***Rohner***. Nor has there been a policy shift to either return criminal jurisdiction to municipalities or to allow a person with a prior offense within the counting period to be pursued civilly, rather than as a criminal offender, when accused again of drunk driving.

The prosecutor has the burden to properly bring a charge. In this very limited circumstance, where the legislature has determined it is most important to be able to prosecute alleged drunk drivers with escalating penalties and criminal charges for higher level offenses, if the prosecutor does not meet his or her duty and burden to properly bring a charge, the action is without legal effect. This is a rare occurrence. Currently the computerization of records, the sharing of data between states and the overall easy access to information means that prosecutors are generally easily able to

determine how many prior offenses for drunk driving, if any, are on a driver's record.

Because Wisconsin law mandates looking back to January 1, 1989, to determine what prior convictions are countable, old convictions are brought into the analysis. That does not change the burden on the prosecutor to properly bring charges. Again, legislative intent and policy is to keep all prior convictions for drunk driving on the driver record and hold them against a driver in an escalating scheme. This policy is strengthened by the ability to bring in out-of-state convictions currently, even when they were not previously used against a person because of the lack of information. However, a prosecutor cannot choose to use those prior offenses or not at his or her discretion. The law mandates that the prior conviction be counted properly. This results in more prior offenses being used against the driver and tougher escalating penalties. On rare occasions, it also has the effect of requiring a judgment be declared void when the case was improperly charged. Only when the date of the incident is outside the statute of limitations will that result in a potential prior offense not counting against a driver.

CONCLUSION

For the above reasons, Mr. Collier respectfully requests this Court reverse the decision of the trial court, and declare the conviction void, because the circuit court did not have competency to hear the civil OWI ticket and because the County did not have the authority to prosecute him, as it was required that the State charge him with a criminal offense.

Dated at Madison, Wisconsin, August 17, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,905 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: August 17, 2016.

Signed,

BY: _____

SARAH M. SCHMEISER
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CERTIFICATION

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 § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: August 17, 2016.

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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: August 17, 2016.

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TABLE OF CONTENTS