COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2016AP366

EAU CLAIRE COUNTY SHERIFF'S DEPARTMENT,

Plaintiff-Respondent

v.

DUANE D. COLLIER,

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.

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

I. Did Duane Collier forfeit his right to challenge the competency of the circuit court that entered a civil judgment of conviction on an OWI-1st offense that should have been charged as a criminal OWI-2nd offense?

II. Can an OWI-1st offense conviction that should have been charged as a criminal OWI-2nd offense be vacated on the basis of the County's lack of authority to prosecute the matter as a civil offense?

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issue presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

STATEMENT OF CASE AND FACTS

The County agrees with Statement of the Case and Facts as put forth in Collier's brief. The County would add the following facts:

On November 25, 2009, Collier pled guilty to OWI-3rd Offense in Eau Claire County Case No. 09CT294 (12:12-13). Collier was charged on March 29, 2012 in Dane County Case No. 12CF569 with Operating While Intoxicated-4th Offense Within Five Years. (12:12-13). The 2009 Eau Claire County case and the pending Dane County case included the 1992 Eau Claire County OWI conviction as a prior countable offense for sentence enhancement purposes (12:14). On June 30, 2015, Collier filed a Motion to Vacate his 1992 Eau Claire County OWI conviction (3).

ARGUMENT

On June 30, 2015, Collier filed a Motion to Vacate his July 14, 1992 Eau Claire County conviction for OWI-1st offense, a civil judgment. Collier stated that because he had previously been convicted of an OWI-1st offense in Minnesota on February 5, 1992, the Eau Claire County OWI charge should have been prosecuted as a criminal offense, rather than a civil forfeiture, pursuant to Wisconsin's prior countable offenses statute, § 346.65(2)(a). Collier now argues that the Eau Claire County Circuit Court lacked competency to enter a civil judgment of conviction against him for a first offense OWI that should have been

charged as a second offense OWI. Collier subsequently argues that Eau Claire County did not have authority to prosecute him as it was required that the State charge him with a criminal offense.

The County argues that Collier has forfeited his right to challenge the circuit court's competency. Challenges to a court's competency are forfeited if not timely raised in the circuit court. ***City of Eau Claire v. Melissa M. Booth***, 2016 WI 65. Collier forfeited his right to challenge the circuit court's competency through his twenty-three (23) year delay in bringing his motion, during which time he acquired two additional criminal OWI's.

The County admits that Collier should have been charged criminally for his 1992 OWI and would have been had the County been aware of Collier's prior Minnesota OWI conviction. The County argues there is no legal authority to vacate a mischarged OWI when the prosecuting entity is unaware of a defendant's prior OWI offense or offenses. Collier attempts to rely upon ***County of Walworth v. Rohner*** in support of his argument; however, the facts of Collier's case are wholly unlike ***Rohner.*** 108 Wis. 2d 713, 324 N.W.2d 682 (1982). In ***Rohner,*** the State chose to prosecute Rohner for a civil OWI first offense knowing full well that Rohner had a prior countable offense. ***Rohner*** at 108 Wis. 2d at 715. Without any evidence to suggest that Eau Claire County was aware of Collier's prior Minnesota OWI conviction in 1992, there is no legal authority to vacate his

mischarged or improperly cited OWI on the basis of the County's "lack of authority."

I. Standard of Review

Where facts are uncontested, the question of whether a circuit court has lost competency or lacks jurisdiction is a question of law to be reviewed *de novo*. ***Village of Trempealeau v. Mikrut***, 2004 WI ¶79. The party claiming that a judgment is void for lack of subject matter jurisdiction has the burden of proving subject matter did not exist. ***State ex rel. R.G. v. W.M.B.***, 159 Wis. 2d 662, 668, 465 N.W.2d 221 (Ct. App. 1990).

II. Duane Collier forfeited his right to challenge the competency of the circuit court that entered a civil judgment of conviction on an OWI-1st offense that should have been charged as a criminal OWI-2nd offense

Collier initially argued to the trial court that pursuant to ***Rohner***, the Eau Claire County Circuit Court lacked subject matter jurisdiction in 1992 to convict him of a civil forfeiture OWI-1st offense when that offense should have been a criminal second offense given his prior Minnesota OWI. ***Rohner***, 108 Wis. 2d 713. The State initially argued that "a circuit court is never without subject matter jurisdiction" ***Mikrut***, 273 Wis. 2d 76, ¶1. Collier was unsuccessful in vacating the conviction and filed an appeal.

During the pendency of the appeal, the Wisconsin Supreme Court issued an opinion in ***City of Eau Claire v. Melissa M. Booth***, 2016 WI 65, addressing the

very same fact pattern and issue brought forth by Collier. Booth was convicted of an OWI first offense in Minnesota in 1990. ***Booth***, 2016 WI 65, ¶2. She was then convicted of a civil forfeiture OWI-1st offense in Eau Claire County Circuit Court in 1992. ***Id.*** Booth was mischarged in 1992 because the City Attorney's Office did not discover her prior countable OWI offense from Minnesota, and she failed to disclose it. ***Id.*** at ¶16. Twenty-two (22) years later, while facing her seventh offense OWI, Booth filed a motion to reopen and vacate the 1992 conviction, claiming that "because the 1992 OWI should have been charged as a criminal second offense OWI, the circuit court must void her 1992 judgment for lack of subject matter jurisdiction. ***Id.*** at ¶13.

The Wisconsin Supreme Court in ***Booth*** held that a circuit court retains subject matter jurisdiction when it enters a civil judgment of conviction for a first offense OWI that should have been charged criminally as a second offense OWI due to a prior countable OWI conviction. ***Id.*** at ¶26. However, the Court held that mischarging an OWI affects the circuit court's competency, not its subject matter jurisdiction. ***Id.*** at ¶14. With respect to Booth, the Court held that the circuit court lacked competency to enter a civil judgment of conviction in her mischarged 1992 OWI. ***Id.*** at ¶26. The Court held that challenges to a court's competency are forfeited if not timely raised in the circuit court. ***Id.*** at ¶25. Booth forfeited her challenge to the circuit court's competency when she failed to raise any objection to the first offense OWI charge in the original 1992 action. ***Id.*** at ¶26. Booth's

twenty-two (22) year delay in raising the issue suggested "an attempt to play fast and loose with the court system, which is something the Court frowns upon." ***Id.*** at ¶25.

The facts of Collier's case are uncannily similar to those in ***Booth***. Both individuals were convicted of a civil forfeiture OWI-1st offense in Eau Claire County in 1992. Both individuals had a prior OWI conviction in Minnesota. Neither the City of Eau Claire in ***Booth*** nor Eau Claire County in Collier's case discovered the prior Minnesota conviction. Both individuals brought a motion to vacate their 1992 Eau Claire County OWI-1st offense conviction claiming the circuit court lacked subject matter jurisdiction.

Like in ***Booth***, the Eau Claire County circuit court in Collier's case did not lack subject matter jurisdiction in 1992. It lacked competency to convict him of a civil forfeiture OWI-1st offense that factually should have been a second offense. However, just like Booth forfeited her right to challenge the circuit court's lack of competency by failing to raise the challenge in a timely fashion, so too has Collier forfeited his right to challenge the circuit court's competency. Collier waited twenty-three (23) years before bringing a motion to vacate his 1992 conviction; Booth waited twenty-two (22) years. Additionally, both Booth and Collier were embroiled in pending OWI-related trouble at the time of bringing their motion to vacate. Booth was facing a seventh offense OWI and Collier is currently facing a fourth offense OWI within five years. Both the considerable

delay in raising the issue and the conspicuous timing of the motion undoubtedly led the Court in ***Booth*** to find that Booth had "attempted to play fast and loose with the court system." ***Id.*** at ¶25. The same can be said for Collier.

There is simply no meaningful way to distinguish ***Booth*** from Collier's case. Yet, Collier asserts that he should not be held responsible for his twenty-three (23) year delay in bringing a challenge to the circuit court's competency because, "there is no evidence in the record that Collier knew the court lacked competency at any point." (App. Brief at 15). However, ***Booth*** did not articulate a "knowledge" requirement in order for someone to forfeit their right to challenge a circuit court's competency. According to ***Booth***, challenges to court competency are forfeited if not timely raised in the circuit court, and Booth forfeited the challenge through her twenty-two (22) year delay in bringing the motion. ***Id***. at ¶25. Collier actually waited longer than Booth, twenty-three (23) years, to challenge competency.

There appears to be some attempt to insinuate that Collier was not present in the Eau Claire County Circuit Court in 1992 when the OWI civil forfeiture conviction was entered against him and, therefore, "there is no evidence that Collier knew or should have known that there was a procedural problem with their actions." (App. Brief at 15) In other words, Collier insinuates that he could not have raised an objection to the mischarged OWI first offense if he was absent at the original 1992 action. Collier's insinuation falls flat because he pled to a

criminal OWI-3rd offense in Eau Claire in 2009. (12:12-13) This dispels any possibility that Collier was defaulted in 1992 and then remained oblivious to the existence of that conviction for the next twenty-three years. By pleading and being sentenced to an OWI-3rd offense in 2009, it is clear that Collier was fully aware of his record containing two prior OWI convictions. But again, Collier's knowledge, or lack thereof, concerning his 1992 Eau Claire OWI conviction is an unnecessary component of the forfeiture analysis set forth by ***Booth***.

III. Eau Claire County's lack of authority to prosecute Collier for an OWI-1st offense, that should have been charged as an OWI-2nd offense, does not create a basis to vacate the OWI-1st conviction.

Collier argues that only the State of Wisconsin has the power to enact and prosecute crimes; therefore, Eau Claire County was without authority to cite and prosecute Collier under a county ordinance. (App. Brief at 17) Collier attempts to use language in ***Rohner*** out of context in order to justify this argument, and in order to vacate his 1992 OWI conviction. Specifically, Collier argues that according to ***Booth***, ***Rohner*** still stands for the proposition that the State has exclusive jurisdiction over a second offense drunk driving. ***Id***. at ¶15.

Following the ***Booth*** decision, ***Rohner*** cannot be interpreted or applied without considering the facts of that particular case. In ***Rohner***, the prosecutor had actual knowledge that Rohner had an underlying countable OWI offense. ***Rohner***, 198 Wis. 2d at 715. When the trial indicated it would assess costs against the State for filing an untimely criminal complaint, the prosecutor chose to

prosecute Rohner for a civil ordinance OWI. ***Id.*** The trial court in ***Rohner*** explicitly stated that it had "jurisdiction" to hear the Rohner matter as an ordinance violation, and that the district attorney had the discretion to charge Rohner with the ordinance violation or the State criminal statute. ***Id.*** The Wisconsin Supreme Court in ***Rohner*** held that when a defendant has a countable prior OWI offense, State Statute § 346.65(2)(a) directs that a subsequent offense be charged as a crime; if the subsequent offense is incorrectly charged as a first offense ordinance violation, the circuit court lacks "subject matter jurisdiction" to hear it. ***Rohner***, 108 Wis. 2d at 713.

Rohner remains, at its heart, a case about abusing prosecutorial discretion. A prosecutor shall not knowingly pursue an OWI case as a first offense if the State is aware of a prior countable OWI offense. ***Booth*** has now withdrawn the language from ***Rohner*** regarding a circuit court's lack of subject matter jurisdiction to hear a mischarged OWI. ***Booth***, 2016 WI 65 at ¶15. However, ***Booth*** specifically proclaimed that "our decision to withdraw such language leaves intact ***Rohner's*** holding "that the State has exclusive jurisdiction over a second offense for drunk driving." ***Id***. This pronouncement by ***Booth*** is an acknowledgment that there is still no discretion afforded to prosecutors to choose between charging a civil first or a criminal second offense OWI when there is existing knowledge of a prior OWI conviction. To this effect ***Booth*** goes on to

state, "nothing in our decision today alters ***Rohner's*** confirmation of our state's policy to strictly enforce drunk driving laws. ***Id***.

Collier has plucked ***Rohner's*** remaining holding away from its facts in an attempt to create a legal basis for vacating his 1992 conviction. Collier argues that because Eau Claire County lacked authority to prosecute him for the 1992 conviction, the surviving language in ***Rohner*** merits vacating his judgment based on the County's lack of authority.

There are two significant roadblocks to Collier's argument. First, the Wisconsin Supreme Court just issued earlier this year their decision in ***Booth***, a case that nearly mimics the facts of Collier, and the Court deliberately did not provide an avenue for an individual with a mischarged OWI conviction to vacate his conviction based on the prosecuting entity's lack of authority. The ***Booth*** Court fully addressed the matter of a mischarged OWI by indicating that it is an issue involving the circuit court's competency. ***Id.*** at ¶14. Specifically, the circuit court was found to lack competency in Booth's mischarged conviction; however, she was found to have forfeited her ability to challenge the circuit court's lack of competency for failing to raise the issue in a timely manner. ***Id.*** at ¶25. There is no language in ***Booth*** indicating that Booth could still vacate a mischarged OWI by attacking the prosecuting entity, the City of Eau Claire, for lack of authority. The Court did not find fault with the City of Eau Claire for

mischarging an OWI when it did not have knowledge of that person's prior OWI conviction. In other words, there was no silver lining for Booth in the ***Booth*** case.

In ***Booth,*** the Court proclaims that "our decision to withdraw such language leaves intact ***Rohner's*** holding 'that the State has exclusive jurisdiction over a second offense for drunk driving'." ***Id***. If the Court intended that language to be used as a mechanism to attack the "lack of authority" of the prosecuting entity in cases like that of Booth or Collier, then the ***Booth*** decision would be rendered worthless. There needs to exist a distinction between situations like those in ***Rohner*** and those of Booth and Collier in order for ***Booth*** to remain pertinent. The distinction involves the prosecuting entity's knowledge or lack thereof of a defendant's prior OWI offense or offenses. In ***Rohner***, the prosecutor had knowledge of the defendant's prior countable OWI yet chose to prosecute the matter as a non-criminal OWI first offense. ***Rohner***, 198 Wis. 2d at 715. In ***Booth*** and as in the instant case, there is no evidence whatsoever that the prosecuting entity in either matter was aware of the defendant's prior Minnesota OWI conviction. To disregard this distinguishing fact would allow defendants to use ***Rohner*** to vacate judgments of mischarged OWIs in situations where the prosecuting entity had no knowledge that it was mischarging an OWI.

With the importance of the ***Rohner*** distinction established, the second roadblock for Collier is that there is no evidence that the County of Eau Claire in 1992 was aware of his prior Minnesota conviction. Collier argues that "What the

County knew is an unknown." (App. Brief at 18). Collier cannot speculate what the County knew in order to justify vacating his mischarged conviction. The burden of proof in a motion to vacate a conviction is on Collier, the moving party. ***State ex rel. R.G. v. W.M.B.***, 159 Wis. 2d 662, 668, 465 N.W.2d 221 (Ct. App. 1990). Collier has provided no proof at all that the County knew of his prior Minnesota conviction or that the County chose to prosecute him for an OWI first offense despite knowing about his prior conviction. For this reason, Collier may not use ***Rohner*** as a basis to vacate his mischarged OWI conviction.

CONCLUSION

For the reasons stated above, the County of Eau Claire respectfully requests this Court affirm the decision of the trial court.

Dated this 17th day of October, 2016.

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 12 pages and 2,798 words.

Dated this 17th day of October, 2016.

_____

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