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.

REPLY BRIEF 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

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: SARAH M. SCHMEISER
State Bar No. 1037381
TRACEY A. WOOD
State Bar No. 1020766

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The County concedes the court lacked competency in the 1992 case against Mr. Collier for operating while intoxicated as a first offense, as he should have been charged with a second offense operating while intoxicated. (Respondent's brief, p. 3, 6). The County argues that Mr. Collier waived his right to challenge competency because of the passage of time since the charge was improperly brought in 1992. The parties agree that the determination of whether a circuit court has lost competency is a question of law which is reviewed *de novo*. (Respondent's brief, p. 4; Defendant's brief, p. 12). Because there is no argument that the court had competency, the question is whether Mr. Collier waived his right to bring a challenge based on the court's lack of competency. Further, the County is the party claiming there was waiver of the right to challenge competency. Where one party is the proponent of an argument that the other has waived a right to a challenge, the burden to show waiver by a preponderance of the evidence is on that party. Consequently, the burden of proof to show a waiver of the right is on the County. ***Garvy v. Blatchford Calif. Meal Co.***, 119 F.2d 973 (7th Circ. 1941).

In ***Village of Trempealeau v. Mikrut***, the Court specifically held that simply filing an answer without reserving jurisdictional objections does not waive the right to challenge competency. 2004 WI 74, ¶28, 273 Wis. 2d 76, 681 N.W.2d 190. The Court held that the common law waiver rule applied, and waiver would be found if the jurisdictional challenge was first raised on appeal. ***Id.*** at ¶29. In that case, the parties had extensively litigated the case for a lengthy period of time in circuit court. Only after adverse findings by the circuit court on all litigation did Mikrut later raise the circuit court's competency. ***Id.*** at ¶31**.** The facts here are not similar because there was no litigation in circuit court until 2015 when Mr. Collier brought a challenge in circuit court to the validity of the proceeding. Further, the County had to concede that while the ticket was issued in 1992, the County has no proof that Mr. Collier even knew of the prior offense until 2009. (Respondent's brief p. 8). Further, there is no evidence that Mr. Collier knew he could challenge the 1992 ticket until informed by counsel in 2015 and the challenge itself was raised at that time.

I. The passage of time alone is not sufficient to waive competency where there is no evidence of knowledge.

The County conceded the court lacked competency to hear the case but argued that because so much time has passed, Mr. Collier has waived his right to challenge that issue. In the ***City of Eau Claire v. Booth,*** the Court held the extensive delay in raising the issue suggested an attempt to game the court system. 2016 WI 65, ¶ 25, 370 Wis. 2d 595, 882 N.W.2d 738. Here, however, there are no facts to support such a claim. The County would have had to at least introduce evidence in the trial court that Mr. Collier was previously aware of the ticket and the available challenge to the ticket to raise an inference that he was attempting to "play fast and loose with the court system." Id. No such evidence exists here.

There is no evidence that Mr. Collier was aware of the right to challenge competency or that he intentionally relinquished that right. The waiver rule is discussed in ***Mikrut*** as a common law rule that serves several important objectives – specifically allowing the court to correct errors because any error is raised in circuit court, permitting a fair opportunity to all parties to address an objection, and requiring attorneys to diligently prepare a case. ***Mikrut*** at ¶16, *quoting* ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727. None of those objectives are furthered where a ticket is

issued, a default judgment is entered, and no litigation or opportunity for objection is present.

The judgment here is void, and Mr. Collier requests the civil forfeiture be vacated pursuant to Wis. Stat. § 806.07(1)(d). There is no specified time limit within which a request to vacate a void forfeiture must be made. ***Neyland v. Vorwald***, 124 Wis. 2d 85, 368 N.W.2d 648 (1985). The purposes of the waiver rule are not furthered by holding a *pro se* defendant to a standard higher than that of an experienced attorney. Due process requires that a defendant have notice and an opportunity to respond. ***Lambert v. People of the State of California***, 355 U.S. 225 (1957). That has not been shown here.

II. The facts in this case are not distinguished from *County of Walworth v. Rohner*.

The County argues that this case is similar to ***Booth*** and not to ***Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). However, that argument is premised on the fact that the prosecutor in ***Rohner*** knew that Mr. Rohner had a prior offense for operating while intoxicated and chose to proceed on a first offense even though it should have been charged as a second offense. ***Id.*** at 715. In ***Booth***, however, the prosecutor did not know of the prior offense. Here the County presented no evidence that the prosecutor did not know about the

prior offense. If the distinction between this matter and ***Rohner*** centers on the knowledge of the prosecutor, there is no evidence of any distinction on this record. Both cases must be treated similarly because there is lack of proof as to knowledge of the prosecutor. The underlying court files were destroyed and Mr. Collier cannot reconstruct what was in the court file. The County has not introduced any file or evidence that the prosecutor was not aware of Mr. Collier's prior offense. Thus, it may be assumed the prosecution was aware of that prior offense and proceeded as a first offense anyway.

The County responds that because Mr. Collier moved to vacate the conviction, it is the defendant's burden to show the County was aware of the conviction. (Respondent's brief p. 11). However, here the County has conceded that the court lacked competency. The County is the proponent arguing that Mr. Collier waived his opportunity to challenge competency. Consequently, Mr. Collier is not the party with the burden. The County wants this Court to find there was a waiver of the competency challenge because the County had to concede there was no competency and therefore has the burden. The County has provided no evidence upon which to base a waiver finding other than the simple fact that 22 years have passed since the issuance of the ticket and judgment.

However, the County had to concede the only evidence it can point to of knowledge of the prior conviction is from 2009. Further, the fact that Mr. Collier knew about the existence of the prior conviction in 2009 does not show knowledge that a potential challenge existed. Because the County has the burden, and there is no evidence to support a distinction between the situation in ***Rohner*** and that of Mr. Collier, there is insufficient proof of waiver of the challenge. The circuit court decision merely held that the prior offense should be counted against Mr. Collier even though it was prosecuted as a first offense when it should have been a second offense. (12:26)

The County made no response to Mr. Collier's argument that had he been charged with a crime instead of a civil forfeiture, he would have had the right to an attorney, the right to a jury trial and the State would have had to prove the charge beyond reasonable doubt. Failure to respond to argument on appeal deems the argument conceded. ***Charlois Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 79 N.W.2d 493 (Ct. App. 1979). Because this was charged as a civil forfeiture Mr. Collier did not have those rights, and the County had a much lesser burden to meet for conviction – in fact allowing a default judgment to be entered without proof of guilt. Therefore, the County also obtained a material advantage in ticketing Mr. Collier with a forfeiture rather

than charging him with a crime. This weighs against a single inference that Mr. Collier is attempting to "game the system" when it was the County which received a benefit from its mischarging a civil ordinance instead of properly charging a criminal offense.

CONCLUSION

For the reasons stated in this Reply and defendant's original Brief, the judgment of the trial court should be reversed, and this action be remanded to that court, with directions that the court grant the defendant-appellant's motion to vacate the conviction.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

DUANE D. COLLIER, Defendant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: _____
SARAH M. SCHMEISER
State Bar No. 1037381

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

CERTIFICATION

I certify that this reply 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 1888 words.

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

Dated: November 10, 2016.

Signed,

_____

SARAH M. SCHMEISER
State Bar No. 1037381