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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT III**

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**Appellate Case No. 2017AP1111**

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**ST. CROIX COUNTY,**

Plaintiff-Respondent,

-vs-

**KIMBERLY L. SEVERSON,**

Defendant-Appellant.

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**APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, BRANCH I, THE HONORABLE ERIC J. LUNDELL PRESIDING, TRIAL COURT CASE NO. 2001-TR-879**

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# BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**United States Constitution**



**Wisconsin Constitution**



**Wisconsin Statutes**



**United States Supreme Court Cases**

**Wisconsin Supreme Court Cases**

## STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT WAS WITHOUT COMPETENCY TO ENTER A CIVIL JUDGMENT AGAINST MS. SEVERSON FOR OPERATING WHILE INTOXICATED—FIRST OFFENSE IN 2001 WHEN, DUE TO A PRIOR CONVICTION, THE CHARGE SHOULD HAVE BEEN ISSUED CRIMINALLY AS AN OPERATING WHILE INTOXICATED—SECOND OFFENSE?

> Trial Court Answered: NO. The trial court concluded that pursuant to *County of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, the passage of time between Ms. Severson's conviction in the St. Croix County matter and her filing of a motion directly attacking the same barred any action regarding the St. Croix judgment as untimely filed.

## STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents but a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature which can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

## STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the question of law before the Court herein is well settled, and therefore, publication would do little, if anything, to enhance the relevant body of law.

## STATEMENT OF THE FACTS AND CASE

Given that the nature of the issue raised herein is purely legal and does not turn upon the specific facts underlying the violations themselves, but rather turns upon the fact of conviction alone, Ms. Severson believes it is both more expeditious and convenient to submit a combined "Statement of the Facts and Case" in lieu of separating the two from one another. What follows, therefore, is Ms. Severson's combined statement of the same.

On February 10, 2001, Ms. Severson was charged in St. Croix County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—First Offense, contrary to Wis. Stat. § 346.63(1)(a). (R4 at 1.)

After she was charged with the aforesaid violation, Ms. Severson was convicted on February 27, 2001, for an operating while intoxicated offense which occurred in Polk County, Wisconsin. Polk County Circuit Court Case No. 01-TR-156. (R2 at 2.)

Ms. Severson entered a plea of No Contest to the charge of Operating a Motor Vehicle While Intoxicated—First Offense in St. Croix County on March 7, 2001, *after* her conviction in Polk County. (R4 at 1.) The circuit court ordered Ms. Severson to pay a fine plus court costs totaling $846.50; complete an alcohol and other drug assessment and comply with any driver safety program ordered as a result thereof; and finally, ordered her operating privilege suspended. (Wisconsin Circuit Court Access Program Case No. 2001-TR-879.)

Several years later, Ms. Severson was charged in Eau Claire County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Seventh Offense. (*Id*. at Case No. 2016-CF-650.) Unlike her St. Croix County case, Ms. Severson retained private counsel to represent her. Ms. Severson's counsel filed a direct attack on the St. Croix County conviction on the ground that

the St. Croix County Circuit Court was without competency to proceed against her on the 2001 violation as a first offender given that she already had a prior conviction for operating while intoxicated on her driver record from February 27, 2001. (R2.) When levying her direct attack on the St. Croix conviction, however, Ms. Severson did not solely frame her challenge as one exclusively related to the court's competency to proceed against her for a first offense operating while intoxicated violation. (R4 at 2-5.) Rather, she averred that her Sixth Amendment Right to Counsel was violated because being treated as a first offense, the circuit court would not have engaged in the appropriate colloquy regarding the waiver of her right to counsel under the Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. *Id.* Regrettably, because of the age of her St. Croix County case, the court file had not been maintained, and thus, there was no "paper trail" which could establish what, if anything, was exchanged between the circuit court and Ms. Severson at the time of her conviction regarding her right to counsel. (R4 at 4.)

A hearing was held on counsel's motion on March 17, 1017. (R19.) After written and oral argument, the circuit court concluded that sixteen years of elapsed time between the filing of the direct attack on her St. Croix County conviction and the entry of the judgment therein precluded consideration of the challenge as untimely under *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. (R6 at 2.)

By Notice of Appeal dated and filed with this Court on August 17, 2017, Ms. Severson initiated this appeal from the St. Croix County Circuit Court's adverse judgment. (R7.)

## STANDARD OF REVIEW ON APPEAL

This appeal presents a single question of law applied to an undisputed set of facts. As such, this Court applies constitutional principles to the facts of the case, and in so doing, reviews the facts and the law independent of the circuit court. *See State v. Klessig*,

211 Wis. 2d 194, 204, 564 N.W.2d 716 (1997); *State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

## ARGUMENT

### I. MS. SEVERSON'S ST. CROIX COUNTY OPERATING WHILE INTOXICATED OFFENSE SHOULD HAVE BEEN ADJUDGED VOID BECAUSE (1) THE CIRCUIT COURT LACKED COMPETENCY TO ENTER A JUDGMENT AGAINST HER FOR A FIRST OFFENSE VIOLATION, AND (2) HAD THE CASE BEEN PROPERLY CHARGED, MS. SEVERSON HAD A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL WHICH RIGHT WAS THWARTED BY VIRTUE OF THE ERRONEOUS CHARGING DECISION.

#### *A. Wisconsin's Graduated Penalty Scheme for Operating While Intoxicated Violations Controls on the Issue of "Competency" to Enter a Particular Judgment.*

At the time of her conviction for operating a motor vehicle while intoxicated [hereinafter "OWI"] in St. Croix County, Ms. Severson had already been convicted of an OWI offense on February 27, 2001, in Polk County. (R4 at 1; Polk County Circuit Court Case No. 01-TR-156.) Pursuant to Wis. Stat. § 346.65(2)(b), had the St. Croix County matter been charged correctly, Ms. Severson should have been arraigned on a *second*-offense OWI.

That the St. Croix violation should have been charged as a second, or criminal, offense stems directly from Wisconsin Statute § 346.65(2) which sets forth a graduated penalty scheme for violations of Wisconsin's drunk driving law. Under § 346.65(2)(a), an OWI–First Offense is a civil violation punishable by a forfeiture and driver's license suspension. Any subsequent OWI conviction, however, is a criminal offense punishable by a fine, driver's license revocation, and a term of confinement. Wis. Stat. § 346.65(2)(b-e).

Under Wisconsin's graduated OWI penalty structure, the penalty provisions are *mandatory* and incrementally more severe with each subsequent offense. *Id.*; *see also*, *State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981). A circuit court that fails to follow a statutory mandate loses competency to proceed when the mandate "is central to the statutory scheme of which it is a part." *City of Eau Claire v. Booth*, 2016 WI 65, ¶21, 370 Wis. 2d 595, 882 N.W.2d 738. "The central concept underlying the mandatory OWI escalating penalty scheme set forth in Wis. Stat. § 346.65(2)(am) is exposure to progressively more severe penalties for each subsequent OWI conviction as the number of countable convictions increases." *Id.* It is worth emphasizing that this scheme is "central" not only to the notion of progressive punishment for increasingly aggravated offenses, but it is also central to two more jurisprudential concepts, namely: (1) the court's competency to proceed against a defendant for a particular violation; and (2) the attachment of the constitutional right to counsel.

### *B. Under Wisconsin's Penalty Scheme, the St. Croix Circuit Court Was Without Competency to Treat Ms. Severson's Case as a First Offense.*

In *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), *modified in part by City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, the Wisconsin Supreme Court addressed an issue directly on point with that presented herein. *Rohner* involved a circumstance in which the defendant had been charged with a first-offense OWI violation despite the fact that he had a prior drunk driving conviction which would have acted as a penalty enhancer to make the pending charge a second offense. *Rohner*, 108 Wis. 2d at 715. Rohner moved to dismiss the erroneously charged violation on the ground that the circuit court lacked subject matter jurisdiction over him for that offense. *Id.*

In rejecting Rohner's argument, the circuit court held that the prosecutor was vested with the discretion to determine how Rohner would be charged, and therefore, the court retained subject

matter jurisdiction. *Id*. The Wisconsin Supreme Court disagreed and reversed the lower court, holding that the court in fact lacked competency[1] to proceed when the offense was erroneously charged under § 346.65. *Id*.

This exact set of circumstances is present in Ms. Severson's case. Given the clear and unequivocal holding of the *Rohner* court as modified by the decision in *Booth*, there is no doubt whatsoever—and it cannot reasonably be argued otherwise—that the St. Croix County Circuit Court was without competency to proceed against Ms. Severson in 2001 for a first-offense OWI violation. The only question which remains is whether her attempt to directly attack the same should have failed under *Booth*, or alternatively, whether *Booth* is distinguishable. In order to best effectuate an answer to the issue presented by her appeal, it is first necessary to examine in its entirety the exact claim she raised. This analysis must begin with her claim that she was unconstitutionally deprived of her right to counsel under the Sixth Amendment to the U.S. Constitution and Article I, § 7 of the Wisconsin Constitution.

### *C. Ms. Severson's Constitutional Right To Be Represented by Counsel Was Frustrated in This Case Due to the Fact That It Had Erroneously Been Mischarged as a Civil, Non-Criminal, Violation.*

If Ms. Severson had properly been charged with an OWI–Second Offense, which is a *criminal* violation, she would have been *constitutionally* afforded several due process rights which are not typically guaranteed by either the Federal or Wisconsin Constitutions in a purely civil case, including: the right to counsel; the right to put the prosecution to a more stringent burden of proof; the right to be tried by a jury of twelve peers; the right to a unanimous verdict; *et al*..

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[1] When it issued its decision, the *Rohner* court employed the term "subject matter jurisdiction" to describe what the circuit court lacked with respect to the mischarging of the OWI offense. Subsequently in *Booth*, however, the supreme court left its reasoning and holding in *Rohner* undisturbed, but modified the decision to replace the "subject matter jurisdiction" terminology with the concept of "competency."

In this case, Ms. Severson focused upon her Sixth Amendment Right to Counsel being thwarted by virtue of the mischarged offense because Wisconsin jurisprudence has clearly delineated that such challenges are permissible after the fact of conviction. For example, under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), direct attacks upon convictions are permitted in those circumstances in which an aggrieved defendant argues that his or her Sixth Amendment Right to Counsel has been denied or improperly waived. *Id*. at 205-07.

The right to counsel is of such a fundamental nature that an accused is permitted to challenge a prior criminal conviction based solely upon such an allegation without the need to assert a jurisdictional or competency argument. *See generally, Klessig*, 211 Wis. 2d 194; *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528. Typically, when a court of appellate jurisdiction reviews a claimed violation of the right to counsel, it reviews the record from the court below to determine whether there was a valid plea colloquy regarding a waiver of the right, including a review of a Waiver of Right to Attorney form. *Klessig*, 211 Wis. 2d at 201. Regrettably in this case, however, the record has not been preserved and there is no access to such information. (R.4 at 4.) It is necessary, therefore, to examine Ms. Severson's claim in a light which is most favorable to her because it is only by so examining the case that proper recognition and deference is given to this most fundamental and cherished right. The United States Supreme Court described the solemnity and significance of the right to counsel this way:

> [The right to the aid of counsel] is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . . The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence irrelevant to the

> issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Powell v. Alabama*, 287 U.S. 45, 67-69 (1932)(citations omitted).

There can be little doubt that when an offense is not properly charged as a criminal violation—to which Sixth Amendment protections would attach—the right to have advice of counsel is upset. In the St. Croix County case, a review and investigation of the facts may have led counsel to advise Ms. Severson that a trial by jury was warranted, or counsel may have advised that significant legal issues existed in the case which warranted a motion hearing, or a better disposition may have been achieved through the skilled and experienced negotiation of an attorney. Because she was denied her constitutional right to counsel, these questions will never be answered. Despite the finality inherent in that notion, the lack of competency on the part of the St. Croix County Circuit Court to enter a first-offense judgment against Ms. Severson affords her grounds for reopening the matter under *Klessig* because she would not have enjoyed the constitutional right to counsel in a civil, non-criminal case, nor would the circuit court have been required to engage her in the relevant colloquy regarding her waiver of the same if her election to proceed without counsel was a deliberate one. At a minimum, given that the St. Croix County case was charged as a first offense, all concerned parties and this Court can be certain of one thing, namely: she was never advised of her right to an attorney, or her right to the appointment of one if she could not afford it, because this right only attaches, and is only affirmatively expressed by the court, if the OWI charge is a second or subsequent offense. Thus, Ms. Severson's right to counsel was violated.

## II. MS. SEVERSON'S CHALLENGE IS NOT BARRED AS UNTIMELY UNDER *CITY OF EAU CLAIRE v. BOOTH*, 2016 WI 65, 370 Wis. 2D 595, 882 N.W.2D 738.

When it denied Ms. Severson's motion directly attacking her St. Croix County conviction, it relied exclusively upon *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 21, 370 Wis. 2d 595, 882 N.W.2d 738, for the proposition that Ms. Severson's challenge was untimely and therefore precluded. The lower court's reasoning is, however, in error when the concerns raised by the *Booth* court are more closely examined as they are hereunder.

First, in reaching its ultimate conclusion, the *Booth* court admonished the parties that when it came to challenging a court's competency rather than its jurisdiction, there does not exist a definitive, specifically delineated, or unequivocal number of weeks, months, or years which, when passed, bar a competency challenge. Rather, relying on *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, the *Booth* court observed that a "reviewing court has inherent authority to disregard a [forfeiture] and address a competency argument in appropriate cases" *regardless* of the time which has passed. *Mikrut*, 2004 WI at ¶ 38. In emphasizing its point that no "hard and fast" rule exists which bars competency challenges after a certain period of time has expired, the *Booth* court even went so far as to identify what these alternative avenues may be procedurally. *Booth*, 2016 WI 65, ¶ 11. The *Booth* court noted that Wis. Stat. §§ 751.06, 752.35, and 806.07(1)(h) each provided independent grounds without express time limits which could act as a basis for a challenge to a previously entered judgment if a court determines that a competency challenge is untimely. *Booth*, 2016 WI 65, ¶ 11.

Second, there was only one challenge raised by the appellant in *Booth*, namely whether the circuit court lacked subject matter jurisdiction as a result of mischarging the offense at issue therein. *Booth*, 2016 WI 65, ¶¶ 1, 22. This narrow framing of the issue in *Booth* is inapposite to the issues raised by Ms. Severson in that she posited not only that a competency issue existed in her case due to the failure of the plaintiff to properly charge her, *but additionally*, she raised an issue related to the unconstitutional depravation of her Sixth Amendment Right to Counsel due to the mischarging as well. (R4 at 2-5.) This *is* a distinction *with* a difference.

Third, the County of St. Croix will likely rely on *Booth* for the proposition that Ms. Severson's fifteen-year delay in raising the issues herein is fatal to Ms. Severson's position. While there is a fifteen-year delay between Ms. Severson's St. Croix conviction and her challenge in the instant case, it is still seven (7) years shy of the twenty-two (22) year delay in *Booth*. While it may yet appear to be a significant delay, it must also be acknowledged that a *seven-year* difference between the facts of *Booth* and this case is, itself, significant. Likewise, such a position does not account for the fact that as a lay person, it is extraordinarily unlikely that Ms. Severson would ever have divined that such an issue exists in her case. Insofar as the intervening cases in which she was represented by counsel may be considered as contributing to an impermissible delay in raising the issue which she now raises, this Court should consider two relevant points, namely: (1) defense counsel throughout Wisconsin have varying skill levels and degrees of legal acumen and there is no guarantee that what is known and understood by one attorney is known and understood by all; and (2) Ms. Severson's constitutional rights should not be frustrated or denied because she happened to retain counsel in this matter who had the skill and acumen to know and understand the law well-enough to levy the type of challenge raised herein.

Fourth, the *Booth* court raised a concern that Booth had raised the jurisdictional issue in an effort "to play fast and loose with the court system." *Booth*, 2016 WI 65, § 25. While this may have been a concern for the *Booth* court, this case is distinguishable as the same concern does not lie herein. As explained above, Ms. Severson, lacking any legal acumen, could not have known that there existed any issue related to competency with which she could "play around." It was not until her most recent counsel, in exercising his due diligence to "zealously assert" defenses on his client's behalf, discovered the issue that it was first, and immediately, raised. *See* SCR Chap. 20: Preamble, at ¶ 2. If this Court concludes that the issue should have previously been raised, it would basically be punishing her for the failures and shortcomings of prior counsel. Such an outcome should not rest easily with this Court as it is the paramount responsibility of the criminal justice system to ensure that *justice* is not foiled by

elevating form over substance as would be the case if this Court barred her from raising the right to counsel and competency issues based upon the performance of incompetent counsel.

For all of the foregoing reasons, it is Ms. Severson's position that *Booth* does not act to bar her claim herein, and therefore, the circuit court erred in relying on *Booth* to do just that.

## CONCLUSION

Because the St. Croix County Circuit Court lacked competency to enter a judgment against Ms. Severson for Operating a Motor Vehicle While Under the Influence of an Intoxicant as a First Offense due to the fact that she had a prior conviction on her record at the time arising out of a Polk County violation, the lower court in this case should have vacated that judgment instead of precluding the same under *City of Eau Claire v. Booth.* The concerns raised by the court in *Booth* do not lie in the instant matter, therefore, *Booth* is neither instructive nor applicable, and for this reason, the lower court erred in its judgment.

Dated this _____ day of November, 2017.

Respectfully submitted:

**MELOWSKI & ASSOCIATES, LLC**

By:_____

**Dennis M. Melowski**
State Bar No. 1021187
Attorneys for Defendant-Appellant

## CERTIFICATION

I hereby 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. The text is 13 point type and the length of the brief is 3,578 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) 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 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on November 15, 2017. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this _____ day of November, 2017.

**MELOWSKI & ASSOCIATES, LLC**

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**STATE OF WISCONSIN**
**COURT OF APPEALS**
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# APPENDIX

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Table of Contents