STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP000931-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACI L. KOLLROSS,

Defendant-Appellant.

On Permissive Appeal from an Order Entered in the Milwaukee County Circuit Court, the Honorable Jean M. Kies presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

The State alleges that Ms. Kollross committed the criminal offense of second-offense operating while intoxicated (OWI) on May 28, 2011. It filed the summons and criminal complaint initiating this prosecution on February 6, 2015. Is this prosecution barred under Wisconsin's three-year statute of limitations for misdemeanors?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is statutorily ineligible for publication. Wis. Stat. § 809.23(1)(b)4. However, this Court may, on its own motion, convert this appeal to a three-judge panel and then issue a published decision. As this Court has twice addressed this same issue—with the same outcome—in two prior unpublished opinions, Ms. Kollross believes this would advance the development of the law on this issue.

While Ms. Kollross does not request oral argument, she welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

On February 6, 2015, the State of Wisconsin filed a summons and complaint charging Ms. Kollross with second-offense OWI contrary to Wis. Stat. § 346.63(1)(a). (2:1-2).

Counsel filed a motion to dismiss, asserting that this prosecution was barred under Wis. Stat. § 939.74(1). (48:1). That motion was denied in a written order. (56); (App. 101).

This appeal followed. (60).

STATEMENT OF RELEVANT FACTS

Underlying Offense

On May 28, 2011, Officer Todd Clementi of the West Allis Police Department was dispatched to a reported accident. (2:3). He spoke with Ms. Kollross, the driver, and concluded that she was likely intoxicated. (2:3). Following roadside sobriety testing, she was arrested and conveyed to a nearby medical center for an evidentiary test of her blood. (2:3). That test revealed the presence of oxycodone, cyclobenzaprine, and alprazolam. (2:3).

Procedural History

This matter was initially prosecuted in the City of West Allis Municipal Court as a first offense. (2:3). Ms. Kollross made an initial appearance there on July 18, 2011. (2:3). Following her conviction, Ms.

Kollross appealed to the Milwaukee County Circuit Court pursuant to Wis. Stat. § 800.14(1). (2:3).

The City of West Allis failed to timely produce its witnesses for the scheduled circuit court trial, however, and the matter was subsequently dismissed without prejudice on April 17, 2013. (59:6).

Thereafter, the citation was reissued and, following a motion for substitution of the municipal court judge under Wis. Stat. § 800.05(1), the matter was assigned to the Wauwatosa Municipal Court. (2:3).

While this matter was pending, Ms. Kollross was arrested in Washington County for a second first-offense OWI. (59:6). She was convicted on July 11, 2014. (2:3). As a result, the Wauwatosa Municipal Court dismissed this matter for lack of subject matter jurisdiction. (2:3).

The matter was reissued as a criminal offense in Milwaukee County Circuit Court on February 6, 2015. (2). Thereafter, counsel filed a dispositive motion to dismiss. (48).

Motion to Dismiss

Following counsel's motion to dismiss, the State filed a written response. (50:1). The response asserts that "The statute of limitations was tolled on this case while it was pending in court." (50:1). The circuit court, the Honorable Jean M. Kies, held a hearing on the motion. (64); (App. 102).

At that hearing, Ms. Kollross relied on the plain statutory language of Wis. Stat. § 939.74(3). (64:5); (App. 106). The State claimed that Ms. Kollross may have attempted to deliberately delay her case in order to evade responsibility. (64:5); (App. 106). They argued that the purpose of the statute of limitations "is to protect the accused from having to defend himself against charges of remote misconduct." (64:6); (App. 107). They argued that this purpose was not at issue in this case. (64:6); (App. 107).

The circuit court held that this prosecution had been tolled by the filing of a municipal court citation, as that document is either a "summons" for the purposes of Wis. Stat. § 939.74(3) or is otherwise analogous thereto. (64:10); (App. 111). It did not find that Ms. Kollross had deliberately delayed this prosecution. (64:11); (App. 112). It asserted, however, that "the legislature intends to encourage the vigorous prosecution of offenses concerning OWI" and that it was therefore not persuaded that dismissing this case would be the "right outcome." (64:11-12); (App. 112-113). In its view, "The law is set up that you can't avoid prosecution just because there is delay in defending the case." (64:12); (App. 113).

This permissive appeal followed. (60).

SUMMARY OF ARGUMENT

As the language of the statute is clear, this Court should reverse the circuit court and hold that this prosecution is barred under the statute of limitations.

ARGUMENT

I. Prosecution of this misdemeanor offense is barred by Wis. Stat. § 939.74(3).

A. Legal principles and standard of review.

A prosecution for a misdemeanor offense is untimely unless it is commenced "within 3 years after the commission thereof." Wis. Stat. § 939.74(1). The circuit court may not exercise personal jurisdiction over a defendant once the statute of limitations has expired. *State v. Jennings*, 2003 WI 10, ¶ 15, 259 Wis. 2d 523, 657 N.W.2d 393.

However, "the time […] during which a prosecution against the same actor for the same act was pending shall not be included." Wis. Stat. § 939.74(3). "A prosecution is pending when a warrant or summons has been issued, an indictment has been found, or an information has been filed." *Id*.

In order to determine whether the statute of limitations had expired before this criminal prosecution was commenced, this Court must independently interpret the governing statute, Wis. Stat. § 939.74(1). *Jennings*, 2003 WI 10, ¶ 11.

B. The issuance of a municipal citation cannot toll the criminal statute of limitations.

1. Only the timely initiation of a criminal action tolls the criminal statute of limitations.

Wis. Stat. § 939.74—denoted as the "criminal statute of limitations" by the Wisconsin Supreme Court, *see Jennings*, 2003 WI 10, ¶ 15—is embedded within the criminal code, under subsection five, which articulates the "Rights of the Accused." It places substantive limits on when a criminal prosecution can be commenced. This legislative check on the power of the prosecutor "helps to preserve the integrity of the decision making process in the trial of criminal cases." *John v. State*, 96 Wis. 2d 183, 194, 291 N.W.2d 502 (1980).

As the statute's primary goal is to ensure that the State acts promptly in bringing forth criminal charges against a defendant, "the statute of limitations begins to toll with the earliest action to commence criminal proceedings." *Jennings*, 2003 WI 10, ¶ 22. The statute lists three ways that a prosecution may be commenced: the issuance of a warrant or summons, the finding of an indictment, or the filing of an information. Wis. Stat. § 939.74(3). The Wisconsin Supreme Court has also found that a criminal prosecution is commenced when a criminal complaint is filed against an in-custody criminal defendant. *Jennings*, 2003 WI 10, ¶ 27.

In this case, the circuit court found that the criminal statute of limitations was tolled by the issuance of a municipal citation or "ticket." (64:12); (App. 113). It asserted that a municipal citation is "analogous to the summons and complaint as would be the same in a criminal case." (64:13); (App. 114).

However, the plain language of the statute does not include the issuance of a municipal citation within sub. (3) for the simple reason that the only "prosecution" contemplated within the *criminal* statute of limitations is a prosecution for a criminal offense—not a forfeiture offense under the jurisdiction of a municipal court. As the Wisconsin Supreme Court has held, the statute's history evinces a plain intent that it is the "earliest action for initiating criminal proceedings" which tolls the statute of limitations. *Jennings*, 2003 WI 10, ¶ 18. A ticket filed in municipal court is in no way "analogous" to a summons, warrant, information, indictment, or complaint for the simple reason that it is not intended to initiate criminal proceedings.

2. Prior persuasive authority.

Notably, this Court has already considered and rejected the circuit court's conclusion on two prior occasions. While neither case resulted in a published decision, both cases are citable persuasive authority under Wis. Stat. § 809.23(3)(b). And, while neither case is binding on this Court, the reasoning is sound. Accordingly, this Court should follow their guidance in resolving this matter.

In *State v. Faber*, Appeal No. 2010AP2324-CR, unpublished slip op. (Wis. Ct. App. March 23, 2011), this Court confronted a closely analogous fact pattern. (App. 122). In that case, the defendant was charged with two first offenses by the City of Delavan in 2005 and 2006. *Id*., ¶ 1. (App. 123). For reasons unexplained, the City "lost track" of these citations. *Id*. Following additional, valid, convictions for further OWI offenses, the State charged the defendant with two counts of fourth-offense OWI in 2010. *Id*., ¶ 3 (App. 123).

Under the statutory scheme then in existence, these were misdemeanor offenses. *Id*., ¶ 4. (App. 124). The defendant filed a motion to dismiss under Wis. Stat. § 939.74(1). *Id*. (App. 124). The State opposed, arguing that the statute of limitations was tolled while these matters pended in municipal court. *Id*., ¶ 8. (App. 126). The circuit court granted the defendant's motion to dismiss. *Id*., ¶ 5. (App. 124). The State renewed its arguments on appeal. *Id*. (App. 124).

This Court affirmed the circuit court order granting the defendant's motion to dismiss. *Id*., ¶ 8. (App. 126). It began by reaffirming the policy interests at stake, affirming that "Statutes of limitations demand that law enforcement officials act promptly to investigate and prosecute criminal activity, which helps to preserve the integrity of the decision-making process in criminal trials." *Id*., ¶ 7. (App. 125). "While the State has a strong interest in punishing repeat drunk drivers, it also has a

statutory obligation to prosecute cases within the relevant statute of limitations." *Id*. (App. 125).

Turning to the statute, this Court found that the statute intended the initiation of a *criminal* case to toll the three-year statute of limitations. *Id*., ¶8. (App. 126). However, "an OWI-first offense is a forfeiture action and thus is not a criminal proceeding." *Id*., ¶ 9. (App. 126). This Court found that the tolling provision in Wis. Stat. § 939.74(3) did not apply to the prior municipal prosecutions. *Id*. (App. 126).

A similar issue was presented to this Court in *State v. Strohman*, Appeal No. 2014AP1265-CR, unpublished slip op. (Wis. Ct. App. February 3, 2015). (App. 128). In that case, the defendant was charged with and convicted of a first-offense OWI in Green Bay Municipal Court in 2005. *Id*., ¶ 3. (App. 129). However, the defendant had been previously convicted of an OWI offense in Illinois several years earlier. *Id*. (App. 129). As a result, the municipal court granted the defendant's motion to vacate the conviction for first-offense OWI, finding that it was legally void. *Id*. (App. 129).

The State initiated a criminal prosecution for second-offense OWI in 2013. *Id*., ¶ 4. (App. 129). The defendant moved to dismiss, citing the three-year statute of limitations in Wis. Stat. § 939.74(1). *Id*. (App. 130). The State argued that the statute of limitations had been tolled, beginning with the initiation of the municipal court prosecution until the time that the defendant's motion to vacate was

granted. *Id*., ¶ 7. (App. 131). The circuit court denied the defense motion. *Id*., ¶ 4. (App. 130).

This Court reversed, holding that a prosecution for a civil forfeiture "cannot constitute a pending prosecution under Wis. Stat. § 939.74(3) because no warrant, summons, indictment, or information was involved." *Id*., ¶ 9. (App. 132). Given the legislature's choice of language, this Court found that "only criminal prosecutions are contemplated" and that "[t]his makes sense, given that the statute's concern is with timely establishing a circuit court's jurisdiction over a criminal defendant." *Id*. (App. 132). In reaching that conclusion, this Court relied on its prior reasoning in *Faber*. *Id*. (App. 132).

This Court also relied on its published decision in *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994) in reaching this decision. *Id*., ¶ 17. (App. 136). Under *Jensen*, "because an offense that is actually a qualified second (or greater) OWI offense can only be criminally prosecuted, any municipal proceeding regarding such an offense is 'null and void[,]' with any such municipal judgment "having no force or effect, [such that] it is as if it never took place.'" *Id*. (quoting *Jensen*, 184 Wis. 2d at 99) (formatting in original). (App. 136). That holding leads to two important conclusions:

- "First, if Strohman's civil forfeiture judgment was null and void, such that the State always had a right to bring the criminal prosecution at issue, then the applicable statute of limitations for such

a prosecution governs without regard to the municipal proceedings." *Id*. (App. 136).

- "Second, and related, contrary to the State's central premise, neither Strohman nor the governing law ever prevented the State from timely bringing the criminal prosecution at issue." *Id*. (App. 136).

Thus, applying the statute of limitations to a municipal prosecution would therefore generate an illogical result in cases where an earlier municipal conviction was wrongly entered: a legal nullity cannot toll a later circuit court prosecution. *Id.* (App. 136).

3. Applied to Ms. Kollross' case.

Here, the State has claimed that the statute of limitations was tolled by Ms. Kollross' earlier municipal prosecution. However, as the foregoing illustrates, the statute does not allow tolling in this circumstance. As this Court has previously concluded, the statute plainly references the initiation of a separate criminal prosecution. There is nothing in the plain text of the statute which suggests that the legislature intended the issuance of a municipal citation to stand on the same ground as those events triggering a criminal case. The circuit court was therefore mistaken to hold that the issuance of a municipal citation tolled the statute of limitations. A municipal citation does not initiate a criminal prosecution.

Further, any argument that Ms. Kollross has "game[d] the system" or that this case represents intentional delay on her part is unsupported by record evidence. (50:3; 64:4-5); (App. 105-106). In fact, the circuit court has already asserted that it was "not ascribing any sort of ill intent or any ill behavior upon Ms. Kollross." (64:11); (App. 112). Moreover, the State has never seriously developed any claim of estoppel in the court below and the case law does not provide clear guidance as to how that doctrine is to be applied to criminal cases.[1] In any case, it is unclear what actions Ms. Kollross may have taken which would justify a departure from the strict statutory guidance in Wis. Stat. § 939.74(1). Contrary to the State's assertions in the trial court, the evidence is clear that Ms. Kollross has consistently used the legal mechanisms which are available to her in order to lawfully defend herself against these allegations. It is also clear that, if anyone is to be blamed for failing to timely resolve the matter, it should be the City of West Allis. According to the representations of counsel in his petition for leave to appeal, a timely civil prosecution was dismissed when the City failed to procure witnesses for a scheduled trial date. (59:6).

In this case, the State will likely rely on policy arguments—that it is somehow unjust for the State to lose its ability to prosecute this OWI under these

[1] Thus, while the State attempted to invoke estoppel in *Strohman*, this Court was skeptical of the claim and did not seriously consider the inadequately briefed argument in its analysis. *Strohman*, No. 2014AP1265-CR, ¶ 16. (App. 135).

circumstances. However, this Court has already addressed these arguments in *Faber* and *Strohman*, asserting that the interest in prosecuting OWIs is balanced by the interest in ensuring that the State complies with the applicable statute of limitations.

In sum, it is clear that this prosecution is barred by the statute of limitations. This Court should therefore reverse the ruling of the circuit court.

CONCLUSION

Ms. Kollross respectfully requests that this Court reverse the ruling of the circuit court denying the motion to dismiss.

Dated this 23rd day of August, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 2,527 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of August, 2018.

Signed:

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 23rd day of August, 2018.

Signed:

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