STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2018AP000931-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TRACI L. KOLLROSS,

Defendant-Appellant.

ON PERMISSIVE APPEAL FROM AN ORDER ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEAN M. KIES, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is the statute of limitations for an OWI 2nd tolled by the time a municipal prosecution for the same offense is pending in municipal court, during the time that the criminal court lacked competence and personal jurisdiction to hear the matter?

The circuit court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

City of West Allis police officers were dispatched on May 28, 2011 at approximately 10:33 AM to investigate a traffic accident reported to have occurred near the 10000 block of West Oklahoma Avenue in the City of West Allis, Milwaukee County, Wisconsin. (R2:3). Once on scene, officers investigated the accident and determined that Defendant-Appellant Kollross, the driver of one of the three vehicles involved in the traffic accident, was probably intoxicated. (R2:3). Kollross was arrested and conveyed to Aurora West Allis Medical Center where a phlebotomist obtained an evidentiary sample of her blood. (R2:3). That evidentiary sample was later analyzed by a Wisconsin State Laboratory of Hygiene chemist who reported that Kollross's blood contained oxycodone, cyclobenzaprine, and alprazolam. (R2:3). Kollross was cited for operating a motor vehicle while under the influence of an intoxicant (OWI) 1st offense.[1]

Kollross made her initial appearance on those citations in West Allis Municipal court on July 8, 2011 (R50:1; R64:8). Kollross appealed the matter to the circuit court. (R50:1; R64:8)[2]. The matters were set for trial in the circuit court on April 13, 2014, but the City of West Allis was unable to proceed, and the matters were dismissed. (R64:7-8). The citations were reissued, and prosecution was reinitiated in Wauwatosa municipal court. (R64:7-8).

In the interim, on January 26, 2012, while the May 28, 2011 OWI 1st / PAC 1st citations were pending, Kollross was arrested for a second OWI 1st in Washington County. (R50:2). Kollross pled guilty to the Washington County OWI 1st on July 11, 2014 (R50:1; R2:2). As a result of that Washington County conviction for OWI 1st, the West Allis citations, still pending in municipal court, were dismissed in favor of a criminal prosecution. (R64:8). On February 5, 2015, the Milwaukee County District Attorney's Office issued a Criminal Complaint charging the May 28, 2011 as a criminal OWI 2nd offense,

[1] Contrary to sec. 346.63(1)(a) or a local ordinance in conformity therewith.

[2] The record is not explicit, but, from the fact of the appeal, the State infers that Kolross was convicted of the OWI 1st in municipal court. *See*, Wis. Stats. § 800.14.

contrary to Wis. Stat. § 346.63(1)(a), in Milwaukee County Circuit court. (R2).

On January 5, 2018, Kollross filed a Motion to Dismiss the OWI 2nd complaint, alleging that the commencement of her criminal prosecution was not timely and thus barred under Wis. Stat. § 939.74(1). (R48:1-2). The Circuit court, the Honorable Jean M. Kies presiding, denied that motion from the bench on April 3, 2018, ruling that the West Allis citations issued to Kollross were "analogous to" a "warrant or summons" and thus tolled the statute of limitations pursuant to Wis. Stat. § 939.74(3). (R64:12-13). The circuit court entered a written order denying Kollross's Motion to Dismiss on May 7, 2018. (R56).

Kollross petitioned this Court for leave to appeal the circuit court's decision. This Court granted Kollross's petition, and this appeal follows.

STANDARD OF REVIEW

Whether the time limitation expired prior to the commencement of the criminal action requires an interpretation of the relevant statutes. *State v. Slaughte*r, 200 Wis. 2d 190, 196, 546 N.W.2d 490, 493 (Ct. App. 1995). This is a question of law that the appellate court reviews de novo. *State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904, 908 (1998).

ARGUMENT

I. The Statute of Limitations for prosecuting Kollross for OWI 2nd should be tolled by the time the same matter was being prosecuted in municipal court.

This Court should affirm the circuit court's May 7, 2018 order denying Kollross's motion to dismiss because a literal reading of Section 939.74(3) here would produce an absurd result clearly at odds with the legislature's intent: such a reading would permit Kollross to avoid altogether any accountability for her 2011 OWI offense.

A. A Literal Reading of Wis. Stat. § 939.74 Leads To An Absurd Result, In That It Would Preclude Kollross's Prosecution For Criminal OWI

Personal jurisdiction over a particular criminal defendant requires compliance with the criminal statute of limitations. 2003 WI 10 ¶ 15, 259 Wis. 2d 523, 657 N.W.2d 393, (citing *State v. Pohlhammer*, 78 Wis. 2d 516, 523, 254 N.W.2d 478 (1977)). Although it is an important and well-recognized principle of criminal procedure, the criminal statute of limitations "is *not* a fundamental right" and is instead "subject to the control of the legislature." *Jennings*, 259 Wis. 2d 523, ¶ 15. (emphasis in the original). In *John v. State*, the Wisconsin Supreme Court explained:

> The criminal statutes of limitations serve a number of functions but the primary purpose is to protect the accused from having to defend himself against charges of remote misconduct. A corollary purpose is to ensure that criminal prosecutions will be based on evidence that is of recent origin. It also assures that law enforcement officials will act promptly to investigate and prosecute criminal activity. This helps to preserve the integrity of the decision making process in the trial of criminal cases.

259 Wis. 2d 523 (quoting *John v. State*, 96 Wis. 2d 183, 194, 291 N.W.2d 502, 507 (1980)).

In Wisconsin, criminal prosecutions generally must be commenced within either six years of the commission date of the offense if the offense is a felony or three years if it is a misdemeanor. Wis. Stat. § 939.74(1). However, the statute of limitations is tolled by any time during which the defendant was not publicly a resident within this state or during which a prosecution against the defendant for the same act was pending. Wis. Stat. § 939.74(3). Under Wis. Stat. § 939.74(3), a prosecution is deemed "pending" for the purposes of the statute of limitations when a warrant or a summons has been issued, an indictment has been found, or an information has been filed. *Id.*

The question here is whether a prosecution for properly issued municipal citation for OWI 1st, later terminated and revived as a criminal prosecution for OWI 2nd because the defendant was convicted of a different OWI 1st while matter

was being prosecuted in municipal court, constitutes a pending prosecution which would toll the statute of limitations. Below and on appeal, Kollross argues that it does not, that because no warrant or summons was issued, no indictment found, and no information filed relative to the municipal prosecution. The State concedes that a literal reading of Wis. Stat. § 939.74(3) supports Kollross's position. However, a "literal reading of a statute may be rejected if it would lead to an absurd or unreasonable result that does not reflect the legislature's intent." *State v. Jennings*, 2003 WI 10 ¶ 11, 259 Wis. 2d 523, 657 N.W.2d 393.

When tasked with interpreting the meaning of a statute, the primary goal of any reviewing court is to "discern the legislature's intent." *Jennings*, 259 Wis. 2d 523, ¶ 11 (citing *Miller v. Wal-Mart Stores*, 219 Wis. 2d 250, 271, 580 N.W.2d 233 (1998)). When a literal reading or interpretation of a statute "produces absurd or unreasonable results, or results that are clearly at odds with the legislatures' intent," reviewing courts become tasked with providing "'some alternative meaning' to the words." *Id.* (citations omitted).

In *Jennings*, the Court was asked to resolve the ambiguity between the language in § 939.74 that a prosecution is not pending until warrant or a summons has been issued, an indictment has been found, or an information has been filed, and that of Wis. Stats §§ 967.05(1) and 968.02(2), which provided a prosecution would be commenced by the filing of a criminal complaint. Finding that a literal reading of § 939.74 would be at odds with the legislature's intent, the Court found that the filing of a criminal complaint, sans summons or warrant, constituted the commencement of a prosecution which tolled the statute of limitations. *Jennings*, 259 Wis. 2d 523, ¶¶23, 27.

In *Jennings*, the defendant was accused of felony sexual assault, for an event that occurred on December 5, 1992. The State filed a criminal complaint on December 4, 1998, one day before the statute of limitations was to expire. The State obtained an order to produce Jennings from prison to court the next day, but Jennings arrived too late for the initial appearance to be held; instead, the initial appearance was held on December 6, six years and one day after the offense. Jennings

filed a motion to dismiss, alleging that the statute of limitations under Wis. Stat. § 939.74(1) had expired. He argued that the prosecution had not commenced within the six-year statute of limitations because no warrant or summons had been issued, no indictment found, or information filed, as of December 5, 1998, within six years of the assault. The trial court denied that motion, and Jennings pled no contest to an amended felony charge. Post-conviction, Jennings renewed his motion; the circuit court denied the motion again, and Jennings appealed.

The court of appeals reversed, accepting the ambiguity between Wis. Stat. § 939.74(1) and the other statutes, but concluding that neither a complaint nor an order to produce can substitute for the requirement of a warrant or summons under § 939.74(1). *Jennings*, 259 Wis. 2d 523, ¶ 10.

The Supreme Court reversed, finding that the filing of a criminal complaint against an incarcerated defendant met the requirements to toll the statute of limitations. *Jennings*, 259 Wis. 2d 523, ¶ 27.

To reach that conclusion, the Court reviewed the legislative history of Section 939.74(1), to "discern the legislature's intent" with respect to the statute. *See Jennings*, ¶¶ 15-20. The Court noted that,

> The criminal statutes of limitations serve a number of functions but the primary purpose is to protect the accused from having to defend himself against charges of remote misconduct. A corollary purpose is to ensure that criminal prosecutions will be based on evidence that is of recent origin. It also assures that law enforcement officials will act promptly to investigate and prosecute criminal activity. This helps to preserve the integrity of the decision-making process in the trial of criminal cases.

Jennings, 259 Wis. 2d 523, ¶15 (citing *John v. State*, 96 Wis.2d 183, 194, 291 N.W.2d 502 1980).

The Court observed that Wisconsin's criminal statute of limitations was originally enacted as part of Wisconsin's criminal code in 1849. *Jennings*, 259 Wis. 2d 523, ¶ 16. It noted that in 1943, the legislature clarified that "[a] prosecution shall be deemed to be commenced . . . from the taking of the

earliest action authorized by law to initiate criminal proceedings . . . ." *Id.* (quoting § 3, ch. 51, Laws of 1943) (emphasis in the original). Finally, the Court found that although Wis. Stat. § 939.74(1),

> has been amended and revised several times from its inception, the legislative history of the statute does not indicate any intent to fundamentally change the point at which the statute of limitations for crimes begins to toll (i.e., the earliest action for initiating criminal proceedings)."

Jennings, 259 Wis. 2d 523, ¶18.

While the *Jennings* court limited its decision to situations where the complaint was filed against a defendant already in custody, the rule that the filing of a criminal complaint, standing alone, is sufficient to commence a prosecution and to toll the statute of limitations has since been extended to non-incarcerated defendants. *State v, Elverman*, 2015 WI App 91, ¶¶35-35, 366 Wis. 2d 169, 873 N.W.2d 528.

Neither *Jennings* nor *Elverman* is directly on point, but they stand for several propositions which should control here. First, the filing of a warrant, summons, indictment or information is not necessary for a prosecution to be pending, such that the statute of limitations is tolled. Second, Wis. Stat. § 939.74(3) is not to be read literally, when such a reading would produce "absurd or unreasonable results." *Jennings,* 259 Wis. 2d 523 ¶ 11.

Under the circumstances that exist here, a literal reading of § 939.74(4) would lead to precisely the type of absurd or unreasonable result that the *Jennings* court worked to avoid. Kollross was cited for the instant OWI 1st on May 28, 2011. A literal reading of § 939.74(4) would provide that—because no warrant, summons, indictment or information was filed for a municipal citation—the criminal statute of limitations ran on May 28, 2014. The problem with that interpretation is that there was no cause of action for a criminal prosecution as of that date; it was not until July 11, 2014, when Kollross was convicted of the Washington County OWI 1st that there was a predicate OWI within five years which would trigger criminal liability. Until then, the State was precluded from charging

Kollross in the circuit court. In essence, a strict reading of Wis. Stat. 939.74 would hold that the statute of limitations expired before criminal liability could accrue.

This would not be true in all municipal OWI prosecutions. But, here, where Kollross had been cited for a second OWI 1st while the original case was pending, Kollross had the ability to manipulate the point at which criminal liability would accrue. A strict reading of Wis. Stat. § 939.74 would allow Kollross to entirely escape liability for the earlier conduct: by choosing to plead guilty to the later OWI 1st first, and by timing that plea at a point which was more than three years from the date of the first citation, Kollross could delay the point at which a criminal complaint could be filed until after the statute of limitations had expired. Such is an absurd result.

It is also absurd, because the municipal statutes of limitations are tolled by the prosecution of the municipal action, *see*, Wis. Stat. § 893.13(2), in the manner that criminal statutes of limitations are tolled by Wis. Stat. § 939.74. To hold that the municipal prosecution does not toll the criminal statute of limitations under these circumstances would essentially reward a defendant for committing new illegal activity. Consider the following hypotheticals:

1. John Doe is cited for OWI 1st on May 28, 2011. The prosecution continues in municipal court until July 11, 2014, at which time it is dismissed because an officer fails to appear at trial. The statute of limitations for the civil OWI offense is tolled under Wis. Stat. § 893.13(2) for the time the case has been pending, so the municipal prosecutor reinitiates the prosecution, and Doe is later convicted at trial. Here, the re-instituted prosecution and conviction are proper, and he is held accountable for his conduct.

2. John Doe is cited for OWI 2nd on May 28, 2011. The criminal prosecution continues in circuit court until July 11, 2014, at which time it is dismissed because an officer fails to appear at trial. The statute of limitations for the

criminal OWI offense is tolled under Wis. Stat. § 939.74(3) for the time the case has been pending in the circuit court, so the assistant district attorney reissues the case, and Doe is later convicted at trial. Here, the re-instituted prosecution and conviction are proper, and he is held accountable for his conduct.

3. John Doe is cited for OWI 1st on May 28, 2011. The prosecution continues in municipal court until July 11, 2014, at which time it is dismissed because Doe has committed, and been convicted of, an intervening OWI 1st offense, depriving the municipal court of competence and jurisdiction over the case. The literal reading of § 939.74 urged by Kollross would insulate Doe from prosecution for the original OWI.

This result is inapposite with the clear legislative intent that there be vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, *see*, Wis. Stat. § 967.055(1)(a);[3] and with the State's significant interest in keeping its highways safe and free from the carnage drunk drivers may inflict. *See State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986).

Given that a strict reading of § 939.74 "would lead to an absurd or unreasonable result that does not reflect the legislature's intent," this Court should reject it, and instead

[3] That statute provides,

1) Intent. (a) The legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, controlled substance and controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a prohibited alcohol concentration, as defined in s. 340.01(46m), offenses concerning the operation of motor vehicles by persons with a detectable amount of a restricted controlled substance in his or her blood, and offenses concerning the operation of commercial motor vehicles by persons with an alcohol concentration of 0.04 or more.

provide "'some alternative meaning' to the words." *Jennings*, 259 Wis. 2d 523, ¶ 11. The reasonable alternative, consistent with legislative history and legislative intent, is that a municipal uniform traffic citation—while not a summons or complaint—is sufficiently analogous to a summons and complaint to toll the criminal statute of limitations for the period that the citation actively is being prosecuted in municipal court. That interpretation is consistent with legislative intent and the purposes of the statutes of limitations, while ensuring that the defendant is on notice of the prosecution and of the claims raised.

B. The Unpublished Case Law On Which Kollross Relies Is Distinguishable From The Case At Bar

In support of her argument that the statute of limitations is not tolled by the municipal prosecution, Kollross relies on two unpublished cases decided in this Court. (Brief of Defendant-Appellant, p. 7-10). While both cases held that the statute of limitations was not tolled, neither is analogous to the facts in Kollross's case.

Kollross relies, first, on *State v. Faber*, No 2010AP2324-CR, unpublished slip op. (WI App. Mar. 23, 2011). (App. 101-106). There, the defendant was cited for one OWI 1st offense in November 2005, and a second OWI 1st offense in February 2006, before the 2005 matter had been adjudicated in municipal court. *Id*. at ¶ 2. The parties entered into an agreement to hold open the 2006 citation, pending disposition on the earlier 2005 matter. The City of Delevan "apparently lost track" of both civil OWI cases, and did not prosecute either one. It was not until 2010, after Faber had been arrested for OWI-related offenses three more times in 2007 and 2008, and then convicted of those offenses, that the District Attorney's Office became aware of the 2005 and 2006 events and charged them criminally. *Id*. at ¶ 3. Faber then filed a motion to dismiss both charges, on the grounds that the criminal statute of limitations precluded his prosecution. *Id*. at ¶ 4. The trial court agreed, and the court of appeals affirmed, holding that the tolling provisions of Wis. Stat. § 939.94(3) relating to a pending prosecution applied only to criminal actions, because the criminal court did not have personal jurisdiction over the

defendant while the municipal prosecution was pending. *Id.* ¶ 9.

Here, unlike in *Faber*, however, the City Attorney never lost track of or failed to prosecute the underlying OWI 1st. Instead, the case was actively prosecuted and actively litigated during its pendency in municipal court, up to the point where the municipal court lost competence and jurisdiction over the matter. It was only at that point—one induced by Kollross's guilty plea to a different OWI—that the municipal prosecution was terminated.

Kollross also relies on *State v. Strohman,* 2014AP1265-CR, unpublished slip op. (WI App. Feb. 3, 2015). (App. 107-116). There, the defendant was prosecuted and convicted of OWI 1st in Green Bay municipal court, notwithstanding that he had a qualifying prior OWI-related conviction in 1999 in Illinois. *Id*, ¶ 2. (App. 108). In 2013, Strohman moved to vacate the Green Bay municipal conviction, on the grounds that it was null and void under *Walworth Cnty. v. Rohner,* 108 Wis. 2d 713, 716, 324 N.W.2d 682 (1982) and *City of Kenosha v. Jensen,* 184 Wis. 2d 91, 99, 516 N.W.2d 4 (Ct. App. 1994) *Id*, ¶ 3. (App. 108). The municipal court agreed and vacated the conviction. Thereafter in 2013, the State charged the 2005 event as a criminal 2nd offense OWI. Strohman moved to dismiss on the grounds that the three year statute of limitations had expired. The State argued that Strohman had had a duty to disclose his prior is conviction, and his failure to do estopped him from raising a statute of limitations defense. *Id*. ¶ 4. The trial court denied Strohman's motion and post-conviction, and he appealed.

The court of appeals reversed. In doing so, the court rejected the State's contention that Strohman's failure to disclose the prior conviction was a misrepresentation, which would provide relief from the statute of limitations.[4] The court also relied on Faber's reasoning that the tolling provisions in Wis. Stat. § 939.94(3) relating to a pending prosecution applied only to criminal actions Id. ¶¶10-11. (App. 111). The *Strohman* court also drew on the holding in *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994), writing,

[4] *See, State v. Dielke*, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945.

> in *Jensen*, we adopted the State's argument that, 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.* Thus, *Jensen* held the State may criminally prosecute such offenses regardless of whether a municipal forfeiture judgment for that same offense has been vacated. *Id.* at 98–99, 516 N.W.2d 4. These holdings generate two important conclusions here. 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. 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.

Strohman, 2014AP1265, unpublished slip op. (WI App. Feb. 3, 2015), ¶ 17. (App. 115)

That language highlights the distinction between Strohman and the instant case and gives support to the State's position that prosecution here should not be barred. Here, the State did not "always ha[ve] [the] right to bring the criminal prosecution at issue;" that right did not accrue until July 11, 2014. And here, the governing law actually prevented the State "from timely bringing the criminal prosecution at issue." *Strohman*, 2014AP001265, unpublished slip op. (WI App. Feb. 3, 2015), ¶ 17. (App. 115)

Kollross could not have been charged and could not have been convicted of a second-offense OWI prior to July 11, 2014, because—prior to that date—there was no first offense conviction on her record. Before that, the circuit court would have lacked the competency to proceed to judgment in a criminal prosecution. *See City of Eau Claire v. Booth*, 2016 WI 65, ¶ 21, 370 Wis. 2d 595, 882 N.W.2d 738. The earliest action authorized by law to have commenced criminal proceedings against Kollross would have been July 11, 2014—a date more than three years removed from the commission of the May 28, 2011 offense at issue here.

CONCLUSION

The State's significant interest in highway safety is "best served when those who drive while intoxicated are prosecuted and others are thereby deterred from driving while intoxicated." *Nordness*, 128 Wis. 2d at 33, 381 N.W.2d at 307. A literal reading of Wis. Stat. § 939.74 which would allow Kollross to manipulate a municipal prosecution to avoid liability for intoxicated driving is an unreasonable result that does not reflect legislative intent.

For these reasons, this Court should affirm the circuit court's May 7, 2018 order denying Kollross's motion to dismiss.

Dated this _____ day of November, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,128.

_____ _____

Date William G. Davidson
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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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

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