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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

A. The "absurdity doctrine" is inapplicable to this case.

1. Legal background.

The State concedes that a literal reading of the statute's plain language supports Ms. Kollross' position on appeal. (State's Br. at 5). This is a significant concession because that plain meaning is presumptively controlling. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. ("Thus, we have repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'") In order to get around this result, the State urges this Court to disregard the plain language of the statute in order to avoid what they claim is an "absurd and unreasonable result." (State's Br. at 5).

Because invocation of the absurdity doctrine requires this Court to rewrite an otherwise explicit legislative directive, the Wisconsin Supreme Court has made it clear that this doctrine should be cautiously reserved for only the most egregious and clear-cut cases. *See Teschendorf v. State Farm Ins. Companies*, 2006 WI 89, ¶ 15, 293 Wis. 2d 123, 135 N.W.2d 258. ("Because our purpose in these situations is grounded in open disbelief of what a

statute appears to require, we are bound to limit our off-statute investigations to obvious aberrations.") A policy of judicial restraint is also consistent with "deference and respect of the judiciary for the policy choices of other branches of government." *Force ex rel. Welcenbach v. American Family Mut. Ins. Co.*, 2014 WI 82, ¶ 143, 256 Wis. 2d 582, 850 N.W.2d 866 (Prosser, J., concurring). This policy of restraint allows judges to find a sensible middle ground between "judicial activism and judicial paralysis." *Id.*, ¶ 144 (Prosser, J., concurring).[1] Thus, this Court must distinguish between merely "odd" and genuinely "absurd" outcomes. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). In the former case, it is up to the legislature—and not the Courts—to impose a "fix." *Id.*

Accordingly a party asking the Court to ignore plain statutory language must surmount an intentionally stringent legal hurdle. Principled application of the absurdity doctrine requires proof that the plain language interpretation "produces absurd results and defies both common sense and the fundamental purpose of [the statute and its context.]" *Teschendorf*, 2006 WI 89, ¶ 43. A plain language interpretation should only be rejected when it would "render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of

[1] For further insight as to the potential political ramifications of a judicial branch over reliant on the absurdity doctrine, see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

the statute." *State v. Grunke*, 2008 WI 82, ¶ 31, 311 Wis. 2d 439, 752 N.W.2d 769.[2]

Importantly, truly absurd results must also be "much more than undesirable results." *Force*, 2014 WI 82, ¶ 145 (Prosser, J., concurring); *see also City of Kaukana v. Vill. Of Harrison*, 2015 WI App 73, ¶ 9, 365 Wis. 2d 181, 870 N.W.2d 680. ("The fact that the legislature allows a statutory process that the Challengers dislike does not make the process 'unreasonable and unthinkable.')

2. The State's "absurdity" arguments are unpersuasive.

The State argues that a municipal prosecution not being allowed to toll a criminal prosecution for the purpose of Wis. Stat. § 939.74(3) is an absurd or unreasonable result. (State's Br. at 5). In support, they rely heavily on *State v. Jennings*, 2003 WI 10, 259 Wis. 2d 523, 657 N.W.2d 393. The case is not helpful to their cause.

In that case, the Wisconsin Supreme Court specifically held that the purpose of the statute was to ensure the timely prosecution of criminal allegations. *Id*., ¶ 15. As such, the statute adopts a straightforward tolling provision which is logically consistent with that purpose—the otherwise strict

[2] The Wisconsin Supreme Court has also defined an unreasonable interpretation as "one that yields absurd results […] or contravenes the statute's manifest purpose." *State v. Ziegler*, 2012 WI 73, ¶ 43, 342 Wis. 2d 256, 816 N.W.2d 238.

statute of limitations for criminal actions is tolled by the timely initiation of a criminal prosecution. *Id.*, ¶¶ 16-20. Thus, the legislature clearly intended the "earliest action authorized by law to initiate criminal proceedings" to trigger the statute's tolling provision. *Id.*, ¶16. The statute therefore lists three specific triggering events—the issuance of a warrant or summons, the finding of an indictment, or the filing of an information. Wis. Stat. § 939.74(1).[3]

The problem in *Jennings*, however, was that criminal statutes enacted *after* § 939.74 clearly specified that the filing of a criminal complaint—an option not appearing in the enumerated list—was a proper means of initiating a criminal action. *Id.*, ¶ 21. Thus, there was no meaningful dispute that the State had clearly initiated a criminal action against the in-custody defendant by filing a criminal complaint, calendaring an initial appearance, and obtaining an order to produce the defendant for that hearing. *Jennings*, 2003 WI 10, ¶ 5. The Wisconsin Supreme

[3] Both sub. 1 and sub. 3 have identical language regarding the definition of a prosecution and therefore should be interpreted identically. Here, Ms. Kollross' prosecution is presumptively barred by Wis. Stat. § 939.74(1), as it was not commenced within the statutory period. The central question for this Court is whether the prior municipal prosecution brings the case within the tolling language in Wis. Stat. § 939.74(3). (64:9-10). (One could also take the philosophical position that there has only ever been one "prosecution," and therefore look to Wis. Stat. § 939.74(1) but, again, the interpretive question remains the same—does a municipal citation toll the statute of limitations?)

Court wisely held that it would be absurd, in this instance, to hold that the otherwise valid initiation of a criminal action was insufficient to toll the statute of limitations simply because the causal mechanism to selected by the State to initiate that criminal action did not appear in Wis. Stat. § 939.74(1). *Id*. Such an outcome would contradict the express intention of the statute at issue, which was that the statute of limitations for criminal cases should be tolled with the "earliest action authorized by law to initiate criminal proceedings." *Id*., ¶ 16. And, because the filing of a criminal complaint is a legally sufficient means of initiating a criminal case, the State is correct that this rule applies equally to out-of-custody criminal defendants. *State v. Elverman*, 2015 WI App 91, ¶ 36, 366 Wis. 2d 169, 873 N.W.2d 528.

Jennings therefore supports Ms. Kollross' argument—that in order for the tolling provision to go into effect, there needs to be some action initiating a criminal case. Because a ticket issued for a municipal court appearance does not initiate a criminal case, both *Jennings* and *Elverman* are inapplicable here.

Ignoring that reading, the State claims to derive two lessons from these cases. First, they argue that "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." (State's Br. at 7). While these are not necessary conditions in light of both *Jennings* and *Elverham*, the authorities cited make clear that the

initiation of a criminal prosecution *is* such a necessary condition. The State does not seriously develop any argument which would place this municipal ticket on the same footing as the mechanisms used to initiate a criminal case. That oversight—along with their overbroad reading of *Jennings* and *Elverham*—is a glaring defect.

Second, the State claims that Ms. Kollross' reading of the statute "would lead to precisely the type of absurd or unreasonable result that the *Jennings* court worked to avoid." (State's Br. at 7). However, the State misunderstands the *Jennings* court. *Jennings* involves a fundamental inconsistency: A statute intended to accommodate the timely initiation of a criminal case which, if read literally, would not encompass the timely initiation of the criminal case at issue in *Jennings*. This case involves no timely initiation of a criminal case and, therefore, the State's assertion is therefore plainly off base.

Eventually, the State's outcome-determinative concern becomes clear: They believe the absurd result at issue to be their inability to prosecute Ms. Kollross for a criminal OWI in this particular case. (State's Br. at 7). However, just because a party dislikes an outcome does not mean that the outcome at issue is absurd. *Vill. Of Harrison*, 2015 WI App 73, ¶ 9. Instead, the State must persuade the Court that the outcome at issue is unreasonable and unthinkable, the type of outcome which would engender "disbelief" and therefore allow the reviewing Court to abandon

its usual restraint. *Teschendorf*, 2006 WI 89, ¶ 15. The State has not done so. While the State may be frustrated by the unusual circumstances of this case, that alone does not counsel in favor of abandoning judicial restraint and rewriting the words of the legislature.[4]

Meanwhile, a general purpose desire to harshly prosecute OWIs and deter drunken-driving should not override the clear limitations imposed by the legislature in § 939.74. While the State is correct that the legislature intends OWI offenses to be vigorously prosecuted, this Court already rejected an argument reliant on the general statement of policy in Wis. Stat. § 967.055(1)(a) in *State v. Faber*, Appeal No. 2010AP2324-CR, ¶ 7, unpublished slip op. (Wis. Ct. App. March 23, 2011). In *Faber*, this Court correctly held that the legislature's specific instructions in Wis. Stat. § 939.74 should not be jettisoned in favor of a general statement of policy found elsewhere in the statutes. *Id*. ("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.")[5]

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[4] This Court should also be mindful that its interpretation of this statute will apply to more than just this case. This too counsels in favor of judicial restraint.

[5] More to the point, the two legislative commands are not inconsistent—they are mutually compatible goals for the efficient and just administration of our criminal justice system.

It is also worth pointing out that the legislature is more than capable of expressing when certain crimes are to be exempted from the general statute of limitations given the number of exceptions listed in § 939.74. Accordingly, if a "fix" is needed—and Ms. Kollross does not concede there is—then this situation falls squarely into one which can be readily addressed by legislative action, and not judicial interference.[6]

The State claims that Ms. Kollross' urged-for holding is also absurd in light of the tolling provision for municipal cases in Wis. Stat. § 893.13(2). (State's Br. at 8). The State argues that, because there is a municipal tolling statute, then the criminal tolling statute should also apply to municipal cases. (State's Br. at 8). This argument makes little sense and is frankly hard to parse. In any case, the fact that there is a tolling provision applicable to municipal cases does not weaken Ms. Kollross' argument. It may even strengthen it—after all, the existence of separate tolling provisions is yet another signal that a judicial rewrite combining these separate legislative dictates may be unwise and unwarranted.

Finally, Ms. Kollross wishes to briefly address the State's concerns about hypothetical scenarios and vague allegations of gamesmanship on Ms. Kollross'

[6] Not to mention that the entire complication at issue—as with many of the complications adherent to OWI cases—stems from the legislature's continued insistence on a mixed civil and criminal OWI prosecution scheme.

part. (State's Br. at 8-9). Again, just because the statute works "odd" results in some small subset of cases, that is not enough to rise to the level of a truly "absurd" result under the case law discussed above. More to the point, Ms. Kollross does take exception with the State's vaguely stated allegations of gamesmanship. The circuit court has already made a finding of fact—not explicitly challenged on appeal—that Ms. Kollross has done no such thing. (64:11). More fundamentally, the State's insinuation is troubling, as this case involves a defendant who has consistently utilized those legal mechanisms available to her in order to contest a state-sponsored deprivation first of her property (in the form of a municipal judgment for money) and then her liberty (via a criminal action) as well as attendant reputational harm.

It is unclear why or how these actions should be held against her, especially when she has a right of appeal under the law. Wis. Stat. § 800.14(1). She exercised that right. Delays attendant to that process—including the failure of the municipality to timely prosecute the ticket—are in part responsible for taking this case outside the statute of limitations.[7] In light of those facts, the State's

[7] In fact, this entire situation could have been avoided at numerous points by more efficient State action. For starters, the City of West Allis had an opportunity to obtain a judgment against Ms. Kollross in 2013 if it had simply produced its witnesses. (59:6). And, more efficient coordination between law enforcement and local prosecutorial agencies within the greater (continued)

arguments should not seriously distract this Court from its duty to impartially interpret the statute for all litigants—and not just for the benefit of a party aggrieved by what it perceives as unfortunate circumstances.

Because the State's urged-for departure from plain language is not warranted—and because Ms. Kollross' reading is not inconsistent with the manifest purpose of the statute—this Court should accept her reading on appeal and therefore reverse the ruling of the circuit court.

B. The State is incorrect that the authority cited by Ms. Kollross is not on point.

Here, the fundamental issue at play is this Court's independent interpretation of Wis. Stat. § 939.74(3). This is a straightforward issue of law which is not dependent on the facts of this particular case. Nor is it dependent on the facts of the unpublished but citable cases discussed by both parties. The State, without ever saying so directly, believes that this Court got it wrong in both cases. However, when confronted with this persuasive authority, it expends considerable energy distinguishing the facts in two prior cases from this Court—thereby implying that whether a municipal

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Milwaukee area (in this case, the City of Wauwatosa and Washington County) may have allowed the State to resolve her cases without necessarily causing the procedural complications that later ensued.

citation tolls the criminal statute of limitations is a hyper-fact dependent inquiry. In so doing, the State is explicitly asking this Court to create a potential conflict potentially necessitating further review.

However, because both cases analyzed the statute correctly—discerning a clear intent that it is the initiation of a criminal case, and not the initiation of a municipal prosecution that tolls the statute of limitations—their persuasive analysis should influence the outcome of this case. The cases are well-reasoned and thorough. They are, in a word, persuasive.

Accordingly, this Court should follow their lead and hold that the statute of limitations in this case was not tolled by the issuance of a municipal citation.

CONCLUSION

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

Dated this 20th day of November, 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 2,561 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 20th day of November, 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 20th day of November, 2018.

Signed:

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APPENDIX

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