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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

City of Cedarburg,
Plaintiff-Appellant,

v.

Appeal No. 18-AP-1129

Ries B. Hansen,
Defendant-Respondent.

*ON APPEAL FROM A DECISION AND ORDER ENTERED BY
THE OZAUKEE COUNTY CIRCUIT COURT
THE HONORABLE PAUL V. MALLOY, PRESIDING*

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

Hansen was cited for and convicted of first offense OWI in municipal court in 2005. Hansen should have been charged with second offense OWI, but the City was not aware that Hansen had been convicted of OWI in Florida in 2003. Did the municipal court lack subject matter jurisdiction, or did the municipal court lack competency?

The municipal court determined that it had subject matter jurisdiction, but lacked competency.

The circuit court determined that the municipal court lacked subject matter jurisdiction.

This Court should rule that the municipal court had subject matter jurisdiction, but lacked competency.

STATEMENT ON PUBLICATION

The City requests that the decision in this case be published. This appeal involves an issue of first impression of statewide importance. Specifically, this appeal will decide whether municipal courts are bound by *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, which analyzed the same situation (an OWI erroneously “undercharged” as a first offense) occurring in a circuit court.

To that end, the City has previously filed a motion for a 3-judge panel as required by Wis. Stat. § 809.41(1).

STATEMENT ON ORAL ARGUMENT

The City requests oral argument. Subject matter jurisdiction and court competency, especially as applied to municipal courts, are sufficiently complex to make oral argument worthwhile.

STATEMENT OF FACTS

On April 13, 2003, police in West Palm Beach, Florida arrested Hansen on suspicion of driving under the influence, contrary to Fla. Stat. § 316.193(1). (R. 9:1.) Hansen was criminally charged on April 24, 2003 in the County Court for the 15th Judicial Circuit, Palm Beach County, Florida. (R. 9:2.) Hansen, represented by counsel, entered a guilty plea *in absentia* on November 20, 2003. (R. 9:3-5.) On November 24, 2003, the court accepted the guilty plea and found Hansen guilty¹. (R. 9:6.)

On May 22, 2005, the Cedarburg Police Department arrested Hansen on suspicion of Operating While Under the Influence of an Intoxicant (“OWI”). (R. 10:3-4, A-App. 135-136.) Cedarburg police accessed and printed Hansen’s Wisconsin driving record that day, but the record did not reflect Hansen’s Florida arrest or conviction. (R. 9:7.) That day, the Cedarburg officer issued Hansen citations, under City of Cedarburg Municipal Code § 10-1-1(a) adopting Wis.

¹ By challenging the Cedarburg municipal court conviction, Hansen implicitly concedes the validity of the Florida conviction and its status as a countable prior conviction under Wis. Stat. § 343.307(1)(d).

Stats. §§ 346.63(1)(a)-(b), alleging first offense OWI and Operating With a Prohibited Alcohol Concentration (“PAC”). (R. 10:3-4, A-App. 135-136.) The citations were returnable to the Mid-Moraine Municipal Court. (*Id.*) Hansen, by his attorney, entered a not guilty plea, but shortly thereafter reached an agreement with the Cedarburg City Attorney² to plead guilty to the OWI citation. (R. 10:6, 10:1, A-App. 137.) On July 5, 2005, the municipal court approved the stipulation, imposed a forfeiture and driver’s license revocation, and ordered intoxicated driver assessment and completion of a driver safety plan. (R. 10:1-2, A-App. 137.)

On June 20, 2016, Hansen was arrested by the Grafton Police Department on suspicion of OWI. (R. 8.) The Ozaukee County District Attorney filed a criminal complaint, charging Hansen with third-offense OWI and PAC. Ozaukee County Case No. 16-CM-830³.

STATEMENT OF THE CASE

On February 9, 2017, Hansen filed a Motion to Vacate Judgment in the municipal court. (R. 11:7-8, A-App. 138-139.) The Mid-Moraine Municipal Court, the Hon. Steven M. Cain presiding, ordered the parties to submit briefs, and after briefing held a hearing on the

² The City and Hansen were each represented by different law firms and attorneys in 2005 than in the present matter.

³ The criminal prosecution for Hansen’s 2016 arrest is open but essentially “on hold” pending the outcome of this appeal.

motion. (R. 11:1-2.) The municipal court rendered an oral decision denying Hansen’s motion. (R. 31, A-App. 116-134.)

Hansen appealed the municipal court’s decision to the circuit court. (R. 15.) The parties again submitted briefs. (R. 18-21.) The circuit court issued a written decision and order reversing the municipal court’s decision. (R. 22, A-App. 101-105.) The City appeals from the circuit court’s decision and order. (R. 26.)

ARGUMENT

I. AN OWI UNDERCHARGED DUE TO AN UNKNOWN PRIOR CONVICTION IMPLICATES THE MUNICIPAL COURT’S COMPETENCY, NOT ITS SUBJECT-MATTER JURISDICTION

Municipal courts have subject matter jurisdiction over any “action arising under the ordinances of the municipality.” WIS. CONST. art. VII, § 14. A municipal court has competency to exercise that jurisdiction only when the statutory requirements of the particular case before it have been met. When presented with a traffic citation alleging first-offense OWI, a municipal court has subject matter jurisdiction. If the facts of that particular offense do not meet the statutory requirements for a first-offense OWI—such as here, where the offense is “undercharged” due to an unknown prior conviction—the municipal court lacks competency. Therefore, this court should reverse the circuit court.

Standard of Review

Whether a court has subject matter jurisdiction or competency is a question of law, which appellate courts are to determine independently. *Booth*, 2016 WI 65 at ¶ 6, *citing Village of Trempealeau v. Mikrut*, 2004 WI 79 ¶ 7, 273 Wis. 2d 76, 681 N.W.2d 190.

Subject Matter Jurisdiction vs. Competency

In its simplest terms, subject matter jurisdiction “refers to the power of a court to decide certain types of actions.” *Booth* at ¶ 7, *quoting State v. Smith*, 2005 WI 104 ¶ 18, 283 Wis. 2d 57, 699 N.W.2d 508. Court competency, on the other hand, is a question of whether a court can adjudicate a particular case. *State v. Starks*, 2013 WI 69 ¶ 36, 349 Wis. 2d 274, 833 N.W.2d 146. Put into more technical terms, a court’s “ability to exercise the subject matter jurisdiction vested in it by the constitution may be affected by noncompliance with statutory requirements pertaining to the invocation of that jurisdiction in individual cases.” *Booth* at ¶ 7.

Municipal courts are part of the unified court system set forth by the Wisconsin Constitution:

The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court...and a municipal court if authorized by the legislature under section 14.

WIS. CONST. art. VII, § 2. The Wisconsin Constitution vests each court with powers to adjudicate certain types of actions. Circuit courts have a plenary grant of subject matter jurisdiction over virtually any original action:

Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law.

WIS. CONST. art. VII, § 8.

Municipal courts also derive their jurisdiction from the Wisconsin Constitution, but which is limited in scope:

The legislature may by law authorize each city, village and town to establish a municipal court. All municipal court shall have uniform jurisdiction limited to actions and proceedings arising under ordinances of the municipality in which established.

WIS. CONST. art. VII, § 14. Of course, the legislature has, pursuant to this constitutional authority, allowed municipalities to create municipal courts. Wis. Stats. §§ 755.01, *et seq.*

The supreme court clarified how the concepts of subject matter jurisdiction and court competency apply to circuit courts in *Village of Trempealeau v. Mikrut*. *Mikrut* emphasized that a circuit court is never without subject matter jurisdiction, because circuit courts have “general original subject matter jurisdiction over all matters civil and criminal...”. *Mikrut*, 2004 WI 79 at ¶ 1. On the other hand, “a failure to comply with a statutory mandate pertaining to the

exercise of subject matter jurisdiction may result in a loss of the circuit court’s competency to adjudicate the particular case before the court.” *Id.* at ¶ 9. “Only when the failure to abide by a statutory mandate is ‘central to the statutory scheme’ of which it is a part will the circuit court’s competency to proceed be implicated.” *Id.* at ¶ 10, quoting *In re Bollig*, 222 Wis. 2d 558, 567-68, 587 N.W.2d 908 (Ct. App. 1998).

City of Eau Claire v. Booth

Booth applied *Mikrut* to facts nearly identical to the facts of this appeal. In *Booth*, the defendant was convicted of OWI in Minnesota in 1990. *Booth* at ¶ 2. In 1992, Eau Claire—unaware of the earlier Minnesota conviction—charged and convicted Booth of first offense OWI. *Id.* In 2014, Booth moved to vacate the 1992 Eau Claire conviction, arguing that the circuit court lacked subject matter jurisdiction over a citation for first offense OWI that should have been charged as a criminal second offense. *Booth* at ¶ 2. Eau Claire does not have a municipal court, so the erroneous first offense conviction in *Booth* was handled in circuit court. *Id.*

The *Booth* court held that the circuit court had subject matter jurisdiction over the first-offense OWI citation “[b]ased on the Wisconsin Constitution’s broad grant of subject matter jurisdiction to circuit courts” as well as the clarification between jurisdiction and competency provided by *Mikrut*. *Booth* at ¶ 19. *Booth* held that although the circuit court had jurisdiction, the circuit court lacked

competency “because mischarging a second-offense OWI as a first-offense OWI results in a failure to abide by mandatory OWI penalties central to the escalating penalty scheme” found in Wis. Stat. § 346.65(2)(am). *Id.* at ¶ 22. The court reasoned that the “escalating penalty scheme is frustrated if an OWI is mischarged as a civil first offense rather than a criminal second offense due to an undiscovered prior countable offense.” *Id.* at ¶ 24.

A judgment that is entered when a court lacks jurisdiction is void, and a void judgment may be challenged at any time. *Neyland v. Vorwald*, 124 Wis. 2d 85, 368 N.W.2d 648 (1985). However, challenges to court competency can be forfeited if not raised in a timely manner. *Booth* at ¶ 21, *citing Mikrut* at ¶ 38. The *Booth* court held that the 22 year gap between her 1992 conviction and her 2014 challenge “suggests an attempt to play fast and loose with the court system, which is something this court frowns upon,” and therefore *Booth* had forfeited any challenge to the circuit court’s competency. *Booth* at ¶ 25.

This court should hold that the reasoning of *Mikrut* and *Booth* applies equally to municipal courts when distinguishing between subject matter jurisdiction and court competency in the context of a mischarged OWI. Although municipal courts do not have a broad grant of subject matter jurisdiction over any type of matter, municipal courts do have a constitutional grant of subject matter jurisdiction over matters “arising under the ordinances of the

municipality.” WIS. CONST. art. VII, § 14. So, for example, a municipal court would lack subject matter jurisdiction over a small claims action, a divorce petition, or a criminal complaint. None of those types of actions “aris[e] out of the ordinances of the municipality.”

On the other hand, a municipal court most certainly does have subject matter jurisdiction over a traffic citation alleging a violation of a municipal ordinance adopting the state traffic code. *Booth* and *Mikrut* inform us that subject matter jurisdiction refers to a court’s ability to hear a particular type of case. A municipal traffic citation is the type of matter that falls within the municipal court’s constitutional grant of jurisdiction. Therefore, the municipal court had subject matter jurisdiction over the citations issued to Hansen.

Unlike subject matter jurisdiction, competency is an inquiry into the facts of a particular matter to determine whether those facts permit the court to exercise its authority in conjunction with the applicable statutory scheme. As *Booth* emphasized, in the OWI context the statutory scheme is the progressive OWI penalties the legislature has enacted to ensure that repeat drunk drivers face progressively stiffer penalties. *Booth* at ¶ 24, Wis. Stat. § 346.65(2)(am). When that statutory scheme has not been complied with in a particular case—such as when a factually second offense OWI is mischarged as a first offense due to an unknown prior

offense—the municipal court lacks competency to act, just as *Booth* holds a circuit court would lack competency. *Booth* at ¶ 24.

Challenges to competency are forfeited if not timely raised. *Booth* at ¶ 11, *citing Mikrut* at ¶¶ 30, 38. In *Booth*, the court held that a 22 year delay between conviction and challenge was untimely and constituted a forfeiture. *Booth* at ¶ 25. Here, Hansen waited 11 years, 7 months, and 4 days after he was convicted of the OWI offense in question before seeking to have the conviction vacated. One decade’s worth of delay is no better than two, especially considering that the misdemeanor statute of limitations barred the State from charging Hansen with second offense OWI after three years. Wis. Stat. § 939.74(1).

The defect in this case should be viewed as one of competency, not of subject matter jurisdiction. Because Hansen failed to timely object to the municipal court’s lack of competency, this Court should determine that Hansen has forfeited the objection.

***Booth* withdrew language from *Rohner*, and by extension *Jensen*,
that couch this issue as one of subject matter jurisdiction**

In reaching its decision, *Booth* explicitly withdrew language from a 1982 case addressing the treatment of “undercharged” OWI convictions: *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). In *Rohner*, a second offense OWI was tried as a first offense. *Id.* at 715. The trial court determined “that the district

attorney had the prosecutorial discretion to charge [the OWI] either under the ordinance violation or the state statute.” *Id.* The *Rohner* court, relying on the progressive penalty scheme for drunk driving, reversed, holding that “only the state has the power to enact and prosecute crimes” and, therefore, the circuit court was “without jurisdiction” to proceed with a first offense prosecution on what should have been a second offense. *Id.* at 718. The *Rohner* court states its interpretation was designed to further the policy of “strict enforcement of the drunk driving laws” that “would be subverted if local governments were allowed to punish second offenders with first offense penalties.” *Id.* at 720-21.

Although *Rohner* dealt with an “undercharged” OWI, it is factually distinguishable from this case and from *Booth*. As the *Booth* court noted, *Rohner* “did not appear to involve an unknown out-of-state prior OWI conviction.” *Booth* at ¶ 13 n.6. Unlike Hansen, Rohner’s objection was timely: he raised the issue during the pendency of the improperly charged offense. *Id.* Accordingly, the State was still within the statute of limitations to properly charge the defendant with the criminal offense. *Rohner* at 722.

Perhaps most importantly, *Rohner* was decided well before the line of cases, culminating in *Mikrut*, that refined and clarified the difference between subject matter jurisdiction and court competency. *Booth* at ¶ 14, citing *Xcel Energy Servs. Inc. v. LIRC*, 2013 WI 64 ¶ 27 n.8, 349 Wis. 2d 234, 833 N.W.2d 665. Thus, *Booth*

not only set forth the holding discussed *supra*, but also withdrew language from *Rohner* and “any other case” that analyzes a mischarged OWI in terms of subject matter jurisdiction:

We harmonize the conflicting language in *Rohner* and *Mikrut* and determine that mischarging an OWI affects competency, not subject matter jurisdiction. At the time we decided *Rohner*, our case law did not clearly distinguish between the concepts of subject matter jurisdiction and competency...As a result, the proper characterization of the circuit court's deficiency in *Rohner* was loss of circuit court competency to proceed to judgment rather than negation of subject matter jurisdiction. Accordingly, we withdraw any language from *Rohner* and any other case that suggests otherwise.

Booth at ¶ 14 (emphasis added; citations omitted.)

Only one published case has discussed *Rohner* in the context of municipal courts: *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994). In *Jensen*, the defendant was convicted of first offense OWI, but the City determined soon after the conviction that the case should have been charged as a second offense. *Id.* at 93-94. To remedy the error, the City filed a motion in municipal court to vacate the first offense conviction. *Id.* at 94. *Jensen*, in an attempt to prevent the case from being re-filed as a second offense, argued that Wis. Stat. § 800.115 allowed only the defendant, and not the City, to seek relief from a judgment. The *Jensen* court agreed with respect to the wording of § 800.115, but ultimately concluded on constitutional principles that “a municipal court has the inherent

authority to vacate a void judgment.” *Id.* at 98. In support for the proposition that a mischarged OWI results in a “void judgment,” the court cited *Rohner*: “[A] municipal court does not have subject matter jurisdiction to try and convict a criminal operating while intoxicated. Any such action is null and void. See [*Rohner* at 722.]” *Jensen* at 99.

This Court should hold that *Jensen*’s statement concerning municipal courts lacking jurisdiction is no longer good law⁴, as *Booth* withdrew the language in *Rohner* and “any other case that suggests” a mischarged OWI is to be assessed as a defect in subject matter jurisdiction. *Jensen* did not go any further than citing *Rohner* in analyzing the issue; indeed, the central question of *Jensen* was not whether the municipal court had jurisdiction or competency, but whether a municipal court could vacate an erroneous first offense conviction in a timely manner based on the City’s request to do so.

Nothing in the City’s position here is intended to abrogate the policy rationale of *Rohner*, which is that prosecutors should not have

⁴ The City contends that the *Booth* court’s statement of withdrawal from *Rohner* “and any other case” is sufficient to reach *Jensen*, as *Jensen* relied solely on *Rohner* for its reasoning on this issue. The City recognizes that only the Supreme Court has the authority to overrule, modify, or withdraw language from previous Court of Appeals decisions. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). To the extent that the *Booth* court’s withdrawal of the *Rohner* language is read as only pertaining to circuit courts, the City argues that Supreme Court review is warranted to directly withdraw this language from *Jensen*.

discretion to cherry-pick whether a particular OWI event is handled criminally or civilly. In other words, whether an offense is civil or criminal should not be a plea-bargaining tool; it is a matter of counting. But neither *Booth* nor this case involve a misapplication of prosecutorial discretion. The reality is that when dealing with interstate reporting of OWI offenses, sometimes across multiple states, it is unfortunately common for a countable prior offense from another state to go unknown to police, prosecutors, and the trial court. When that happens, a defendant should not benefit twice from his or her lack of candor about the existence of a countable prior offense: the first time in the earlier offense being “undercharged,” and a second time years later when the defendant attempts to avoid a successively greater penalty by having the earlier case wiped from the slate.

Our legislature has been clear that it “intends to encourage the vigorous prosecution” of drunk drivers. Wis. Stat. § 967.055(1)(a). That policy is frustrated when defendants game the system by waiting for years before raising a challenge to an old conviction. When prior offenses go unnoticed—and the defendant doesn’t timely raise the issue—this Court should not permit a defendant to “sandbag” both the municipality and the State in order to escape appropriate punishment twice.

This Court should hold that the rationale and holding of *Booth* applies to municipal courts. Therefore, this Court should reverse the circuit court.

**Extending the *Booth* rationale to municipal courts
will harmonize the case law**

Applying *Booth* to municipal courts will harmonize the case law between municipal and circuit courts as applied to this relatively common factual scenario. If left unharmonized, defendants in this scenario will encounter vastly different results based on the vagaries of which law enforcement agency conducted the traffic stop and which communities have elected to form or join a municipal court. For example, a defendant who was arrested by the State Patrol, a county sheriff's office, or local police in a community without a municipal court will not be able to vacate an old mischarged OWI conviction, because the circuit court conviction is subject to the competency analysis set forth in *Booth*. If Hansen prevails, a defendant whose old mischarged conviction happens to have been in a municipal court would forever be able to attack the conviction as void, even when it was the defendant's own lack of candor and dilatory tactics that contributed to the municipality not timely discovering the defendant's prior conviction so that the defendant could be charged appropriately. This Court should not permit municipal courts to be a safe haven for such tactics.

CONCLUSION

The Wisconsin Constitution vests municipal courts with subject matter jurisdiction over actions arising under municipal ordinances. When the facts of a particular municipal citation do not support the court's exercise of that jurisdiction, the municipal court lacks competency. An OWI mischarged as a first offense due to an unknown prior offense is within the municipal court's subject matter jurisdiction, but the municipal court lacks competency. Hansen's nearly 12 year delay constitutes a forfeiture of any objection to court competency. Therefore, the municipal court properly denied Hansen's motion to vacate his 2005 OWI conviction.

This Court should reverse the circuit court's order and remand this matter to the circuit court with directions to affirm the municipal court decision and remand to the municipal court in turn.

Respectfully submitted August 15, 2018.

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FORM AND LENGTH CERTIFICATION

Wis. Stat. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)-(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,620 words.

ELECTRONIC BRIEF CERTIFICATION

Wis. Stat. § 809.19(12)(f)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated August 15, 2018.

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