STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CITY OF CEDARBURG,

Plaintiff-Appellant,

v.

Court of Appeals case nos.:
2018AP001129

RIES B. HANSEN,

Defendant-Respondent.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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

Andrew Mishlove
State Bar Number: 1015053

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Statement of the Case

On April 3, 2003, Ries Hansen, the defendant-respondent (Hansen) was arrested in Florida for DUI.[1] Later that year, he entered a guilty plea *in abstentia*, and was convicted.

On May 22, 2005, Hansen was arrested by the City of Cedarburg Police Department for OWI. Municipal citations were issued, Hansen was prosecuted by the plaintiff-appellant City of Cedarburg (the City) and convicted by the Mid-Moraine Municipal Court.[2]

The validity of the 2005 judgment of the municipal court is the issue before this court.

In 2016, Hansen was arrested and charged with OWI 3rd in Ozaukee County, case number 2016CM000830. In that case, Hansen collaterally attacked the 2005 judgment of the Mid-Moraine Municipal Court. The

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[1] We will refer to Wisconsin operating a motor vehicle while under the influence of an intoxicant by the term OWI; while the Florida charge of driving under the influence of an intoxicant is referred to as DUI.

[2] Hansen believes that the matter was later reviewed by the Ozaukee County District Attorney, who declined to prosecute that matter as a criminal offense due to a lack of clarity in the records. We have been unable to confirm whether that occurred. Hansen repeated this point throughout the proceedings. The City of Cedarburg disagrees, and stresses that this is a case of an "unknown" out-of-state conviction. The City refers to R:9-7, a document that they submitted by affidavit; but that document is incomplete and inconclusive. There has been no other evidence offered in the case to support either party's position.

circuit court held that the municipal court judgment was void for lack of subject-matter jurisdiction. Subsequent to that holding, Hansen informed the circuit court that the matter required a direct attack in the Mid-Moraine Municipal Court. Hansen, therefore, brought a motion to vacate the judgment in the municipal court. Hansen argued that the municipal court lacked subject matter jurisdiction, pursuant to *County of Walworth v. Rohner,* 108 Wis.2d 713, 324 N.W.2d 682 (1982), and hence, the judgment was void.

The municipal court held that *Rohner* was overruled by *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis.2d 595. The municipal court, therefore, held that the error in charging a criminal case in a municipal court affected only the competency, but not the jurisdiction of the court.

Hansen appealed the holding of the municipal court to the circuit court. Thus, the validity of the 2005 judgment of the municipal court was before the circuit court for the second time, the latter time on a direct attack, with the City as the adverse party. The circuit court again held that the municipal court judgment was void, for lack of subject-matter jurisdiction. The City appeals.

Argument

The principal issue before this court is whether subject matter jurisdiction is conferred solely by the charging document, or whether subject-matter jurisdiction is, in part, a function of the underlying facts of the case. *Rohner* held that the court must look to the facts of the case to determine whether a matter is criminal, and that criminal jurisdiction resides only in a criminal court. Of course, *Rohner* held that the court should look to the legal facts of a defendant's countable record, but not the facts of the incident itself. If, in an OWI case, a defendant has countable prior offenses, then the matter may not be prosecuted as a civil offense, as a civil court lacks subject matter jurisdiction over criminal conduct.

Rohner, however, failed to consider one issue: circuit courts are courts of general subject matter jurisdiction, able to hear civil and criminal cases. Thus, in *Booth*, *supra,* the court clarified that whether an OWI case is heard as a civil or criminal matter in circuit court, is an issue of competency, not jurisdiction. The problem with *Rohner* is that it failed to recognize that circuit courts are courts of general subject matter jurisdiction, with constitutional authority to act in cases involving municipal ordinances as well as state statutes. *Booth* correctly clarified that

Rohner does not apply to cases commenced in circuit court. The City asks this court to extend *Booth* to municipal court judgments.

The City argues that the holding of *Booth, supra*, applies to proceedings improperly commenced in municipal court. *Booth* held that since circuit courts are courts of general subject matter jurisdiction, they do have jurisdiction over municipal ordinance violations. Under *Booth*, erroneously charging a criminal OWI as a civil offense affects the competency of a circuit court, but not jurisdiction. Competency is defined as the statutory authority of a court to act in a matter in which it has jurisdiction. The City, however, is mistaken. *Booth* applies only to cases commenced in circuit court. Neither the language of *Booth* nor (more importantly) the reasoning of *Booth* applies to actions improperly commenced in municipal court. The City implicitly concedes as much when it implored this court to "extend" *Booth.*

In *Rohner*, the court held that only the state has jurisdiction over criminal matters:

> "The principal issue raised is whether a second offense for drunk driving within a five-year period is exclusively within the province of the state for prosecution. On an examination of the state traffic regulations, we conclude that the state has exclusive jurisdiction over a second offense for drunk driving."
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> *Rohner, supra* 108 Wis.2d at 713.

Allowing Municipal Courts Jurisdiction Over Criminal Matters Would Violate the Policy of Enforcement of Drunken Driving Laws

It is important to look at the reasoning of *Rohner*, which was left intact by *Booth*, insofar as it applies to municipal courts. *Rohner* was based on both public policy and jurisprudence.

Rohner emphasized that if municipalities were allowed to exercise jurisdiction over OWI cases that are second offenses, it would subvert the policy of effective enforcement of OWI laws. Municipalities should not have the authority to prosecute criminal incidents. The City downplays the importance of this policy, arguing that prosecutors would not "cherry-pick" cases. The City's statement notwithstanding, *Rohner* was based on this important policy consideration:

> The legislative goal of providing uniform traffic enforcement would be subverted if local governments were allowed to punish second offenders with first offense penalties. Thus, the revision in the language of sec. 349.06, Stats., clearly demonstrates that the legislature intended to remove from local jurisdiction traffic regulations that require criminal penalties.

> This interpretation is in accord with the state's policy of strict enforcement of the drunk driving laws. In *State v. Neitzel*, 95 Wis. 2d 191, 193-94, 289 N.W.2d 828 (1980), we recognized that the clear policy of sec. 346.63(1), Stats., is to facilitate the identification of drunken drivers and to remove them from the highways. In *State v. Banks*, 105 Wis. 2d at 49, we noted that the same objectives are the underlying premise of the criminal penalties contained in sec. 346.65(2) (a).
>
> *Rohner*, 108 Wis.2d at 718.

Ironically, although the City argues in favor of the validity of the judgment of conviction in this case, the City's position undermines effective enforcement of the law. As the court noted in *Rohner*, the City's argument entails that a municipality may prosecute cases that are factually criminal, as long as neither party objects. Under the City's view, an improper municipal court judgment is enforceable if neither party objects. Both parties have an incentive to enforce such a judgment. A municipality has a financial incentive to do so, under Wis. Stat. §778.105 (allowing a municipality to collect civil forfeitures). A defendant has incentive to proceed in municipal court in order to avoid criminal penalties.

Rohner alleviated that problem by holding that such judgments were not just voidable, but they were inherently void. *Rohner* used the factually based, subject-matter jurisdiction analysis, and it worked. In *City of Kenosha v. Jensen,* 184 Wis.2d 91, (Ct.App 1994), for example, the city

moved to vacate an improperly entered municipal court judgment. The defendant objected, arguing correctly that the statutes provided a municipality no right to relief from a forfeiture judgment. The court of appeals, however, held that the municipal court had inherent power to vacate void judgments. Since the matter was jurisdictional, the judgment was void, and the city needed no statutory authority to seek relief from judgment. *Rohner,* was, thus, applied to enforce the state policy to deter impaired driving. This court should, similarly, recognize and apply the policy of holding that a municipal court judgment is void in a case that is factually criminal.

Booth Explicitly Excludes Municipal Court Judgments from Its Holding

The City argues that *Booth* has overruled *Rohner* and *Jensen,* based on the evolving law of court competency expressed in *Village of Trempeleau v. Mikrut*, 2004 WI 79, 273 Wis.2d 76, 681 N.W.2d 901. This argument is mistaken. *Booth* does not suggest that the constitutional grant of subject matter jurisdiction in OWI cases that are factually criminal in nature can, or should, extend to municipal courts. *Booth* does not suggest that this determination is based on the four corners of the citation, or that a municipality has jurisdiction to prosecute a case that is factually criminal.

Rather, *Booth* states that its holding is based both on *Mikrut*, **and the constitutional grant of general subject matter jurisdiction to circuit courts**:

> Based on the Wisconsin Constitution's broad grant of subject matter jurisdiction to circuit courts as well as this court's clarification of the principles of subject matter jurisdiction and competency in *Mikrut,* we conclude that the circuit court had subject matter jurisdiction over the 1992 OWI first-offense action. Therefore, the 1992 civil forfeiture judgment is not void for lack of subject matter jurisdiction under Wis. Stat. § 806.07(1)(d).
>
> *Booth*, at paragraph 19.

Further, *Booth* explicitly disavows the City's argument, a point that the City fails to acknowledge or address:

> Our decision to withdraw such language leaves intact *Rohner's* holding "that the state has exclusive jurisdiction over a second offense for drunk driving."
>
> *Booth,* at paragraph 15.[3]

The City's argument ignores both the plain language of *Booth*, as well as the rule that subject matter jurisdiction in these circumstances is a factual determination, not limited to the allegations of the charging document. *Booth* framed that issue in a manner acknowledging that it is a factual inquiry:

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[3] The significance of this quote and inapplicability of *Booth* to municipal courts judgments was recognized in a memorandum email from offices of the Attorney General to all state district attorneys, attached hereto.

> We are asked to determine whether a circuit court lacks subject matter jurisdiction to enter a civil forfeiture a municipal ordinance for a first offense operating while intoxicated (OWI) that ***factually*** should have been criminally charges as a second offense OWI due to an undiscovered prior countable conviction.
>
> *Booth* at 1. (emphasis added).

The City argues that the issue is one of competence of the municipal court, rather than jurisdiction, and it stresses why such a view would be good law. While the City explains its view of the what the law should be, it fails to show how *Booth* actually applies to a municipal court judgment. The City fails to even acknowledge the language in *Booth* that contradicts its position. Competence is the power of a court to exercise its constitutionally vested jurisdiction. *Mikrut*, *supra*. In this case, as the municipal court has no subject matter jurisdiction to exercise, it can be neither competent nor incompetent to hear a case that is factually a criminal matter. The City's argument fails to address this jurisprudential problem. The City's argument is, essentially, nonsensical.

Conclusion

The decision of the circuit court for Ozaukee County was correct. A municipal court has no jurisdiction over the subject matter of an OWI

action that is factually a criminal matter. The judgment in this case is void. Hansen respectfully prays that the decision of the circuit court be affirmed.

Signed and dated at Glendale, Wisconsin this _8th_ day of October, 2018.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 1,953 words.

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 Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Finally, I affirm and certify that on October 8, 2018, ten copies of the Response Brief of Defendant-Respondent were mailed to the Court of Appeals and three copies were mailed to counsel for the Plaintiff-Appellant.

Signed and dated at Glendale, Wisconsin this _8th_ day of October, 2018.

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