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 REPLY BRIEF

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ARGUMENT

I. HANSEN'S ARGUMENT IGNORES THE DISTINCTION BETWEEN COMPETENCY AND JURISDICTION SET FORTH IN *MIKRUT* AND *BOOTH*

Subject matter jurisdiction is a question of whether a court has the power to hear a certain type of case, while court competency is a question of whether a court has the power to adjudicate the particular case before it. *Mikrut* and *Booth* set forth a clear rule that whether the facts of a particular case meet statutory requirements govern whether a court has competency to act in that particular case. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79 ¶ 2, 273 Wis. 2d 76, 681 N.W.2d 190, *City of Eau Claire v. Booth*, 2016 WI 65 ¶ 21, 370 Wis. 2d 595, 882 N.W.2d 738. Therefore, the analysis of the "type of case" to determine subject matter jurisdiction is necessarily something less than an inquiry into the facts of the particular case. It follows that a court determines the "type of case" before it by reviewing what the pleadings or initiating documents indicate about the type of case.

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. A court may lose competency to exercise that jurisdiction when there is "noncompliance with statutory requirements pertaining to the

invocation of that jurisdiction in individual cases." *Booth* at ¶ 7. A judgment entered by a court lacking competency "is not void for the lack of subject matter jurisdiction but invalid for the lack of competency to proceed to judgment." *Mikrut* at ¶ 14 (quotations omitted.)

Hansen argues that in order for a municipal court to have subject matter jurisdiction over an OWI citation, the underlying offense must be "factually" a first offense. Resp't Br. at 8. Hansen's argument ignores the essential holding of *Mikrut* and *Booth*, which is that the analysis of the particular facts of an individual case, and whether those facts statutorily permit a court to proceed, is an inquiry into court competency. *Booth at* ¶ 7, *Mikrut* at ¶ 2. Just as the *Booth* court did not hold that its erroneous first offense OWI citation was something other than a civil citation, this Court should not hold that the municipal citation here is transformed into another "type of case" by virtue of the underlying facts. A court determines the type of case before it by reviewing the pleading or other initiating document, and in municipal court that initiating document is the citation. Wis. Stat. § 800.01(1). Because a municipal court has a constitutional grant of subject matter jurisdiction over citations arising under municipal ordinances, the municipal court here had jurisdiction over the first offense OWI citation before it. WIS. CONST. art. VII, § 14.

Hansen attempts to boot strap the two analyses together by arguing that "subject matter jurisdiction…is a factual determination, not limited to the allegations of the charging document." Resp't Br. at 8. However, neither *Booth* nor any other case cited by Hansen supports this view. Indeed, *Mikrut* and *Booth*'s holdings that the competency inquiry requires such a factual determination cuts directly against Hansen's conclusion.

Hansen nevertheless urges this court to maintain the "factually based, subject-matter jurisdiction analysis" of *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). Hansen's reliance on *Rohner* is misplaced given that *Booth* explicitly withdrew from *Rohner* the analysis of this issue in terms of subject matter jurisdiction. *Booth* at ¶ 14. Nor does *Booth*'s statement that *Booth* "leaves intact *Rohner*'s holding that the state has exclusive jurisdiction over a second offense for drunk driving" constitute *Booth* "explicitly disavow[ing] the City's argument." *Booth* at ¶ 15, Resp't Br. at 8. *Booth*'s statement correctly reaffirms the legislature's intention that repeat offenders be prosecuted criminally. But, as the *Booth* court held, mischarging an OWI "results in a failure to abide by mandatory OWI penalties central to the escalating penalty scheme," and, therefore, deprives the trial court of competency. *Booth* at ¶ 22.

Municipal courts have constitutionally vested jurisdiction over matters arising under local ordinances. In 2005, the City, believing

this to be a first offense case, issued Hansen municipal citations. The municipal court has jurisdiction over that type of case. The underlying facts did not support the municipal court's exercise of its jurisdiction and resulted in the municipal court lacking competency. Hansen forfeited his objection to the lack of competency by waiting more than 11 years to raise it. Therefore, this Court should reverse the circuit court.

II. A RULING IN HANSEN'S FAVOR WOULD CAUSE SIGNIFICANT DAMAGE TO THE PUBLIC POLICY OF STRICT ENFORCEMENT OF DRUNK DRIVING LAWS

Hansen argues that a ruling in favor of the City would "violate the policy of enforcement of drunken driving laws" because municipalities would have "a financial incentive" to intentionally mischarge OWI cases as first offense in order to collect civil forfeitures. Resp't Br. at 5-6. This strawman ignores that a municipal prosecutor who intentionally prosecutes a case as a first offense with actual knowledge that it is a repeat offense may violate the ethical prohibition against "mak[ing] a false statement of fact or law to a tribunal." SCR 20:3.3(1). It ignores that many municipalities pay a private attorney to serve as municipal prosecutor on an hourly rate, so any income generated by forfeitures is offset by the expense of attorney's fees. It ignores that local district attorneys who learn of such tactics could nevertheless charge the proper criminal offense,

because a civil traffic citation is not a jeopardy bar to a subsequent criminal prosecution. *See, e.g.*, *State v. Thierfelder*, 174 Wis. 2d 213, 495 N.W.2d 669 (1993). It ignores that, in cases where there is a known prior offense on the Wisconsin Department of Transportation files, the department has the authority to impose revocation based on its own counting, and will notify the convicting court when a discrepancy exists between the department's count of prior offenses and the conviction as reported by the court. Wis. Stat. § 343.30(1q)(f).

The scenario which is far more likely is that a defendant will "sandbag" both the municipality and the State by waiting to challenge an erroneous conviction until the statute of limitations has expired. The *Booth* court shared that policy concern:

> [A]ffirming the circuit court's decision to vacate the 1992 conviction with prejudice would do nothing to further our state's policy of strictly enforcing OWI laws. Instead, affirming the circuit court's dismissal with prejudice would erase the 1992 conviction, prevent it from being counted in subsequent OWI prosecutions, and forever prohibit the State from correctly charging Booth Britton for the 1992 OWI offense.

Booth at ¶ 15, n.9. The policy implication is no different when the erroneous conviction is in municipal court. If Hansen prevails here, Hansen's 2005 conviction would be erased, and the State would have no ability to prosecute him for the 2005 offense. Hansen's pending 2016 case alleging a third offense would be treated as a first offense,

because Hansen's Florida conviction is more than 10 years old. Wis. Stat. § 346.65(2)(am)(2). The legislature's policy goals are not furthered by prosecuting what is actually a third offense as a first offense.

The public policy of strict enforcement of drunk driving laws is significantly hampered when defendants attempt to evade punishment by waiting to challenging erroneous convictions until the statute of limitations has passed. Therefore, this Court should reverse the circuit court.

III. THE CIRCUIT COURT MADE A FACTUAL FINDING THAT HANSEN'S FLORIDA CONVICTION WAS UNKNOWN TO THE CITY, AND THERE IS NOTHING IN THE RECORD SUPPORTING HANSEN'S "BELIEF" TO THE CONTRARY

Hansen states in a footnote, without citing to the record, that "Hansen believes that [this] matter was later reviewed by the Ozaukee County District Attorney, who declined to prosecute [this] matter as a criminal offense due to a lack of clarity in the records. We have been unable to confirm whether that occurred." Resp't Br. at 1, n. 2. This Court should disregard Hansen's unsupported statement. Hansen did not submit any documents or sworn statements in support of this claim to the municipal court or the circuit court. The Circuit Court made a factual finding in its decision that "in 2005 the Wisconsin Department of Transportation teletype

of Hansen's driving record did not show the prior Florida operating while intoxicated conviction." R. 22:2, A-App. 102. Although Hansen now claims that the driving record is "incomplete and inconclusive," Hansen does not provide any support for that argument, and Hansen did not raise any argument with respect to the driving record in either the municipal court or in the circuit court. Resp't Br. at 1, n.2.

Additionally, the municipal citations issued to Hansen reflect they were personally served to Hansen on the date of arrest. R. 10:3-4, A-App. 135-36. Therefore, this was not a situation where the City issued criminal citations, only to have the matter sent back by the district attorney's office at a later time. Regardless, the question is what was known to the City in 2005, and Hansen points to nothing in the record indicating that the City knew of the prior conviction, or that the circuit court's factual finding was erroneous.

CONCLUSION

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 October 23, 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 produced with a proportional serif font. The length of this brief is 1,588 words.

ELECTRONIC BRIEF CERTIFICATION
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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 October 23, 2018.

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