COURT OF APPEALS OF WISCONSIN
DISTRICT 2

TOWN OF WATERFORD,

Plaintiff-Respondent,

vs.

Appeal No.: 2019AP000737
Circuit Court:

2018CV000828
CHRISTOPHER PYE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ON NOTICE OF APPEAL FROM CIVIL JUDGMENT
ENTERED ON FEBRUARY 28, 2019
IN RACINE COUNTY CIRCUIT COURT, BRANCH 10
THE HONORABLE TIMOTHY D. BOYLE, PRESIDING

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CHRISTOPHER PYE,
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ISSUES PRESENTED

1. Was the Citation of the Town of Waterford (hereinafter "Respondent or "the Town") alleging that the Christopher Pye (Hereinafter "Appellant" or "Pye") committed a violation of the Town's municipal ordinances adopting Sec. 346.63(1) Wis. Stats. barred by the Statute of Limitations, which is Sec. 893.93(2)(b) Wis. Stats.?

   The trial court answered this question, "No".

2. Could the Town avoid the apparent terms of the Statute of Limitations under the doctrine of "Equitable Tolling"?

The trial court answered this question, "Yes".

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant does not believe that there is any need for oral argument in this case as the issues can be adequately addressed in the briefs of the parties. Generally, an appeal of a judgment of this nature is addressed to one judge of the Court of Appeals, and is therefore not published.

STATEMENT OF THE CASE

The facts are not in dispute (R4: 1-2) (R6: 1). On June 24, 2014, Mr. Pye was allegedly involved in a traffic accident in which he was alleged to be driving a vehicle that struck and injured a pedestrian. Officer W. Jeschke of the Town of Waterford Police Department issued Mr. Pye three citations, W026710-5 (State of Wisconsin vs. Christopher Pye--OWI 1st Causing Injury), W026773-5 (State of Wisconsin vs. Christopher Pye--Prohibited Alcohol Concentration) and W026743-3 (Town of Waterford vs. Christopher Pye—Inattentive Driving).

The first two citations were ***never*** municipal citations for ordinance violations, but rather were citations giving

the defendant notice to appear in Racine County Circuit Court to answer for criminal charges that were anticipated to be issued by the district attorney. Criminal charges were, in fact, issued by the Racine County District Attorney in Racine County Circuit Court cases 14 CT 727 and 15 CF 428. Eventually, all state charges were dismissed, because they were mistakenly issued by Officer Jeschke as crimes and the Racine County District Attorney (through various assistant district attorneys, but hereinafter collectively referred to as "the District Attorney") erroneously charged the offenses as crimes.

These actions of Officer Jeschke and the District Attorney are accurately called "mistakes" or "errors" because on June 24, 2014, the crime of "Causing Injury by Intoxicated Operation of a Motor Vehicle", a violation of Sec. 346.63(6) required as an element that the injured victim sustain "Substantial Bodily Harm" as defined under Sec. 939.22(38). In 2014 this requirement was a relatively recent addition to the law, and it did not last long. Shortly afterward that legislature modified Sec. 346.63(6) again to remove "Substantial Bodily Harm" as an element of that crime. There were other legal issues litigated in Mr. Pye's criminal cases, but then the issue of the extent of the victim's injuries was raised for the first time in

2016. The Racine County Circuit Court then having jurisdiction over Racine County Circuit Court Case No. 15 CF 428 dismissed the Criminal Complaint and Information in that case. The dismissal occurred on June 13, 2016, while there was still time, although only eleven days, for the Town to issue new citations. Even though the criminal charges were dismissed at this point, Officer Jeshke did not learn of this until some time in October of 2016. But no new citations were issued until November 19, 2016. Two of the new citations alleged violations of ordinances adopting 346.63(1) Wis. Stats., and the third alleged Reckless Driving.

The citations were originally litigated in the Town of Waterford Municipal Court, in which all three were challenged in on the ground that the Statute of limitation had run prior to them being issued. The Municipal Court dismissed the Reckless Driving citation on Mr. Pye's motion, but denied the motion to dismiss on the other two citations (OWI 1st Offense and PAC 1st Offense) having agreed with the Town's argument on the doctrine of "Equitable Tolling". There was a trial to the court in the Municipal Court, and the Appellant was convicted.

Having been convicted in Municipal Court, Mr. Pye appealed to the Racine County Circuit Court, and again

raised the issue of the Statute of Limitations by filing a Motion to Dismiss. The Town filed a written objection to Mr. Pye's Motion to Dismiss, and Mr. Pye filed a written Rebuttal. Effectively, the issue of the Statute of Limitations was re-litigated by the circuit court, which heard oral arguments on April 4, 2018, and rendered an oral decision on that same day denying Mr. Pye's Motion to Dismiss(R16). The parties thereafter prepared for trial, but prior to trial they entered into a stipulation allowing the Circuit Court to convict Mr. Pye on the agreed upon facts, but preserving his right to appeal to this court on the issue of the Statute of Limitations (R14, R15). Mr. Pye appeals.

ARGUMENT

I. The citations issued November 19, 2016 are barred by the Statute of Limitations

Not surprisingly, there is not a lot of case law on the statute of limitations for Municipal Citations, but there is the unpublished opinion of *City of Waukesha vs. Murphy*, 338 Wis.2d 211 (Ct. App. 2011). Because the *Murphy* case was decided after July 1, 2009, it may be cited for persuasive, but not precedential, authority.

The *Murphy* case has some similarities to the cases at

bar, but also has significant differences. Most important from the Appellant's perspective is that the *Murphy* case recognized that Sec. 893.93(2)(b) Stats. is, in fact, a Statute of Limitations that bars the commencement of an action to enforce a town ordinance after two years have passed since the cause of action accrues. Which is to say that when an offense is allegedly committed on June 24, 2014, citations issued after June 24, 2016 are barred.

Where the *Murphy* case is distinguishable from this case is that in the *Murphy* case the City charged Mr. Murphy with an ordinance violation prior to the expiration of the two year period, and then dismissed the citations without prejudice when it was discovered that Mr. Murphy had a refusal finding that should have counted as a first offense. So, the Municipal Court dismissed its citations against Mr. Murphy until he succeeded in reopening his old refusal case. At that point, the City moved to reopen its cases against Mr. Murphy under Sec. 806.07 Wis. Stats., which allows for the reopening of civil judgments at the court's discretion for equitable reasons.

The court of appeals reasoned that the City "commenced" an action against Mr. Murphy when it issued its original citations returnable to the City of Waukesha Municipal Court. And that even though those citations had been

dismissed, the Municipal Court had the discretion to entertain a motion to reopen them under Sec. 806.07. The *Murphy* Court stated: "...the City commenced its action against Murphy by issuing citations well within the statute of limitations period—on the same day that the cause of action accrued. The City did not issue new citations after the statute of limitations had run; it requested that the existing citations, which had been previously dismissed, be reopened."

However, for the citations in this case, the Town ***did not*** commence its actions back at the time the cause of action accrued (choosing, rather, to use the citation form as a notice to the defendant to appear to answer criminal charges in Circuit Court), and the Town ***did*** issue its ***only*** Municipal citations alleging OWI First Offense after the statute of limitations had run. There are not, and have never been, any actions commenced in Municipal Court regarding this event alleging violations of Sec. 346.63(1). There were never any other previously filed citations to reopen. Therefore, according to the clear language of Sec. 893.93(2)(b), and the reasoning of *City of Waukesha vs. Murphy,* id., the Town cannot lawfully commence new actions against Mr. Pye after the statute of limitations has run. The Municipal Court should have dismissed the citations

before it, and on de novo review, the Circuit Court should have done so.

II. **The violation of the Statute of Limitations cannot be cured by the doctrine of Equitable Tolling.**

In the courts below, that Town has argued that the failure to charge the Appellant within the time set forth in the Statute of Limitations can be cured by the doctrine of Equitable Tolling. The Appellant responds that the Town's reliance on the doctrine of Equitable Tolling is misplaced. The cases cited by the Town, themselves, do not support the relief the Town seeks. For example, in the courts below the Town cited the concurrence of Justice Ziegler in *State vs. Zimbal*. 2017 WI 59, Slip opinion at p.65. However, that was a case wherein a criminal defendant had sought to file a Request for Substitution of Judge outside the twenty day time limit, after having been specifically directed by the court not to do so until counsel was appointed for him. Noting that there should be equitable tolling because the defendant should not be penalized for merely obeying the court's order, Justice Ziegler went on to say: "Clearly, these are unique facts. Indeed, litigants should be hesitant to cite this case as authority in the future in circumstances not identical to

what occurred here." Since the circumstances are not identical to this case, such hesitance is warranted. The Town also relies on *Menomonee Indian Tribe of Wisconsin vs. United States.* 136 S. Ct. 750, 755, (2016). In that case Justice Alito writes, "We reaffirm that the second prong of the equitable tolling test is met only where the circumstances that caused the litigant's delay are both extraordinary and beyond its control" (emphasis in the original). And therein lies the Town's insurmountable problem. The decision to charge the defendant was entirely within the Town's control. The Town simply made a mistake of law as to whether the defendant could be charged with Causing Injury by Intoxicated use of a Motor Vehicle. And although it would be outside the common practice in cases like this one, the defendant knows of no legal bar that would have prevented the Town from charging these charges in municipal court simultaneously with the State charge. But, the Appellant believes that the first point is compelling. If, as Town now believes, the wrong charge was filed in the first instance, then it would have been within the Town's control to file the correct charge. The Town simply cannot claim that its own mistake in charging was outside its control.

The Appellant's argument on this point is grounded in the legal procedure for enforcement of non-criminal traffic offenses as established by the Wisconsin Legislature. The Town has argued that its attorneys had no knowledge of the issuance of the erroneous charging decision, and that its officer was not qualified to make the determination as to what statute had been violated, and therefore the delay was not the Town's fault. However, the commencement of a traffic forfeiture action does not originate in the office of an attorney for a municipality.

All non-criminal traffic offences are commenced by the issuance of a Uniform Traffic Citation under Sec. 345.11 Wis. Stats. Specific subsections of this statue are set forth below:

345.11

"**1)** On and after July 1, 1969, the uniform traffic citation created by this section shall in the case of moving traffic violations and may in the case of parking violations and all violations of ch. 194 be used by all law enforcement agencies in this state which are authorized to enforce the state traffic laws and any local traffic laws enacted by any local authority in accordance with s. 349.06."

"**(5)** Notwithstanding any other provision of the statutes, the use of the uniform traffic citation promulgated under sub. (4) by any peace officer in connection with the enforcement of any state traffic laws, any local traffic ordinances in strict conformity with the state traffic laws or s. 218.0114 (1) or 218.205 (1) shall be deemed adequate process to give the appropriate court jurisdiction over the

person upon the filing with or transmitting to the court of the uniform traffic citation."

Under the Wisconsin Administrative Code TRANS 114.08, the Secretary of the Department of Transportation has created the Uniform Traffic Citation handwritten and electronic versions, and they are exactly what the statute requires them to be: the charging documents that initiate an action to prosecute individuals for alleged non-criminal violations of state traffic laws, or county or municipal ordinances in conformity therewith.

When an individual is alleged by a traffic officer to have violated a non-criminal traffic law or ordinance, the official who drafts the charging document is the traffic officer him/herself. And it is unquestionable that the charging document, the document that initiates the action, is the Uniform Traffic Citation. The citation identifies the parties, it advises the defendant with a brief description of the charge, as well as citing the statute number (or conforming ordinance) alleged to be violated. It advises the defendant of the time and place of the alleged violation. It advises the defendant of the court before which his/her case will be heard, and the time and place of the initial appearance, by which the defendant must respond in writing or appear in person. The Uniform Traffic does

everything necessary to be what Sec. 345.11(5) requires it to be, that is: "adequate process to give the appropriate court jurisdiction over the person upon the filing with or transmitting to the court of the uniform traffic citation."

This is where the Town's argument that it, and its traffic officer, are not qualified to determine what offense should be charged fails. Under Sec. 345.11, the traffic officer is the charging official who drafts the charging document. Therefore, the traffic officer is expected by the legislature to know what the traffic code is and to be able to draft and file the charging document when the traffic laws are violated. The Town cannot be allowed to claim that its officer, whom Sec.345.11 specifically empowers to charge traffic offenses, is not qualified to do exactly that which the legislature empowers and requires him to do.

This takes the officer's error completely outside the second prong of the definition of Equitable Tolling, that is, that the circumstances that caused the litigant's delay must be both extraordinary and beyond its control. Not only was correct drafting of the charging document completely within Officer Jeschke's control, that control was specifically given to him by the Wisconsin Legislature when it drafted Sec. 345.11. As the acts and decisions

necessary to correctly draft the charging document (Uniform Traffic Citation) in the first instance were completely within the control of the Town official statutorily authorized to do so (Officer Jeschke), the Town cannot now invoke "Equitable Tolling" which requires that the lateness was beyond the Town's control.

That Officer Jeschke's mistake may have been made in good faith is of no help to the Town. Most mistakes that violate a Statute of limitations may have made in good faith. For Equitable Tolling, the Officer must not have been the one to have made the mistake at all. But issuing the Uniform Traffic Citation correctly was within Officer Jeschke's control. He simply made a mistake and failed to do so.

And the Town's argument that the Town, in the person of Officer Jeschke or otherwise, had no ability to monitor the progress of the Circuit Court action does not ring true. This is the age of CCAP, and monitoring the progress of Circuit Court cases has never been easier. Had the Town wanted to monitor how the Circuit Court cases involving its officers were proceeding, a matter of minutes at a computer terminal on a periodic basis could have kept the Town informed of the progress of the Appellant's cases in Circuit Court, and forewarned the Town that these had been

dismissed before the Statute of Limitations had run out. But, as will be seen below, the pendency of the Circuit Court cases had no legal effect on the Town's ability to file a traffic citation in Municipal Court for OWI First Offense.

In the court below, the Town raised that issue (R6: 3), although neither party developed it very well; but it was addressed and therefore should be considered by this court. The Town argued (R6: 3) (R16: 6-7)that the pendency of the criminal charges in the Circuit Court prevented the Town, in the person of Officer Jeschke, from filing a citation in the Municipal Court alleging OWI, First Offense, and that the Statute of Limitations should have been tolled during that time. The Appellant did object to this assertion and argued that the Town could have charged the Appellant in Municipal Court, notwithstanding the pending criminal charges (R8: 2)(R16: 7-8). The Circuit Court, in its oral decision, seemed to agree with the Town R16: 8-10).

The problem is, that the Town's line of argument contradicts the reasoning of the Wisconsin Supreme Court in *State v. Thierfelder*, 495 N.W.2d 669, 174 Wis.2d 213 (Wis., 1993). The Appellant understands that sending a defendant to either the Circuit Court ***or*** Municipal Court is the policy and practice in most Wisconsin jurisdictions. Never

the less, *Thierfelder* is right on point. Simultaneous prosecutions for OWI, First Offense in Municipal Court and Causing Injury by Intoxicated Use of a Motor Vehicle are perfectly permissible, and are not barred by the Fifth Amendment prohibition against double jeopardy, nor by Sec. 345.52(1) Wis. Stats., which prohibits double prosecutions for identical ordinances. This is because, first, a traffic forfeiture action in Municipal Court does not impose criminal penalties, and second, OWI First Offense and Causing Injury by Intoxicated Use of a Motor Vehicle are not identical, *Id.*

Officer Jeschke could have lawfully filed a Uniform Traffic Citation alleging OWI First Offense in Municipal Court at any time between June 24, 2014 and June 24, 2016, but he did not.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the decision of the court below and remand this matter with directions to dismiss the citations against the Respondent, as they were and are barred by the Statute of Limitations, Sec. 893.93(2)(b) Wis. Stats.

Date October 1, 2019

Respectfully Submitted,

By _____

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief using the following font:

X Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of the brief 16 pages.

____ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is N/A words.

Dated: October 1, 2019

Signed,

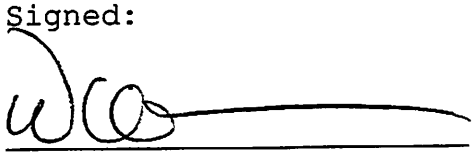
William R. Kerner
Attorney for Appellant

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic brief is Identical in content and format to the printed form of the brief as of this date.

A copy of this certificate has been served with the paper copy of this brief filed with the court and served on all opposing parties.

Signed:



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CHRISTOPHER PYE,
Defendant-Appellant

CERTIFICATION OF APPENDIX Rule 809.19(2)(b)

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 s. 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 s. 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.

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Date October 4, 2019

By 

William R. Kerner