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COURT OF APPEALS OF WISCONSIN

**11-05-2019**

DISTRICT 2

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

TOWN OF WATERFORD,  
Plaintiff - Respondent

vs.

Appeal No: 2019AP000737

Circuit Court: 2018CV000828

CHRISTOPHER PYE,  
Defendant - Appellant

PLAINTIFF - RESPONDENT'S BRIEF

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

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**ISSUE PRESENTED**

Can the Citation issued by the Town of Waterford (hereinafter "Respondent" or the "Town") to Christopher Pye (hereinafter "Appellant") for violation of the Town's municipal ordinances adopting Wis. Stat. § 346.63(1) after the time period established by Wis. Stat. § 893.93(2)(b) be cured by the doctrine of "Equitable Tolling?"

The trial court answered this question, "Yes."

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Respondent agrees with Appellant that there does not appear to be any need for oral argument in this case as the issues can be addressed by the parties' briefs. Respondent further agrees that this type of appeal is generally addressed to one judge of the Court of Appeals and is not published.

**STATEMENT OF THE CASE**

Appellant's brief accurately states the history of this case and Respondent will not restate it aside from a few brief clarifications. This matter stems from a traffic accident that caused injury to a pedestrian. As a result of the incident, Officer William Jeschke of the Town of Waterford Police Department issued three citations: W026710-5 (OWI 1st Causing Injury), W022773-5 (Prohibited Alcohol Concentration), and W026743-3 (Inattentive Driving). The citation for Inattentive Driving was solely a municipal citation, but the other two citations led to criminal charges being issued by the Racine County District Attorney in Circuit Court cases 14CT727 and 15CF428.

Appellant's brief correctly notes that, at the time, the resulting criminal charge of "Causing Injury by Intoxicated Operation of a Motor Vehicle," a violation of Wis. Stat. § 346.63(6), required that the injured victim sustain "Substantial Bodily Harm" as defined under Wis. Stat. § 939.22(38). The criminal charges were ultimately dismissed as the injuries to the pedestrian did not apparently rise to the requisite level for the prosecution to prove its case in circuit court. The dismissal occurred on June 13, 2016, which was only eleven days prior to the expiration of two years following the traffic incident.

The Town was not informed by the Racine County District Attorney's Office of the dismissal. Officer Jeschke did not learn of the dismissal until sometime in October 2016, and municipal citations regarding the incident were subsequently issued November 19, 2016.

#### **ARGUMENT**

**The Town's violation of the Statute of Limitations may be cured by the doctrine of Equitable Tolling.**

There is a relative lack of caselaw on the issue of the statute of limitations with respect to the issuance of municipal citations. The Appellant's brief does cite a case in which an OWI citation was issued within the statutory time period but later dismissed without prejudice. The Court of Appeals in *City of Waukesha vs. Murphy*, 2012 WI App 1, 338 Wis. 2d 211 (Ct. App. 2011) held that the City's motion to reopen its case against Murphy was not barred by the two year statute of limitations despite being more than two years after the alleged violations and issuance of the original citations. This case is factually inapposite to the instant matter.

In the current matter, no municipal citations were issued until after the time limit set by Wis. Stat. § 893.93(2)(b) had run. As mentioned above, the reason that municipal citations were not issued was due to the fact

that there were criminal charges issued and pending that stemmed from the same incident. The Town was not informed of or aware of the dismissal of the criminal charges until after the expiration of the two year statutory period and the Town promptly issued the municipal citations upon learning of the dismissal.

While there is very little caselaw regarding the statute of limitations on municipal ordinance violations, the doctrine of equitable tolling of a statutory time period is well-developed in Wisconsin cases. In a recent Wisconsin Supreme Court case, *State v. Zimbal*, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327, Chief Justice Roggensack provided a description of the doctrine of equitable tolling. "Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed." *Zimbal*, at 65. Chief Justice Roggensack further states that "[e]quitable tolling focuses on whether there was excusable delay by the plaintiff." *Id.* At 65. The United States Supreme Court, in a unanimous decision in a case arising out of Wisconsin, provided further clarification on the doctrine of equitable tolling. The United States Supreme Court, quoting *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) held that:

[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755, 193 L. Ed 2d 652 (2016).

In the instant case, the Town issued the original citations that led to the criminal charges shortly after the incident occurred. Once referred out to the Racine County District Attorney, the Town had essentially no role in the pursuit of criminal charges at the county level. As is the common policy and practice, the Town deferred issuing its own municipal citations due to the pending criminal charges arising from the exact same traffic accident. Once the Town learned that the criminal charges were dismissed, the Town acted promptly in issuing municipal citations.

The facts in this matter certainly support Chief Justice Roggensack's description of when equitable tolling of a statute of limitations is appropriate. The only reasons for the delay by the Town were due to the dismissal of the criminal charges by the Racine County District Attorney in such close proximity to the expiration of the statutory deadline, and the fact the Town was not aware of the dismissal until after said expiration. The Racine



County District Attorney did not inform the Town of the dismissal and the Town had no reason otherwise to know of the dismissal. The facts also support allowing the present action to continue in the interest of justice. If the Town's citations are dismissed as time-barred, the Town is essentially penalized for the Racine County District Attorney's decision to wait so long to dismiss the criminal charges. The Town is then left without any recourse due to the delay by an unrelated entity.

The facts in the case at bar also satisfy both elements of the test for equitable tolling of the statute of limitations as set forth by the United States Supreme Court in *Menominee Indian Tribe v. United States*. The elements of the test require that the Town pursued its rights diligently and also that there were extraordinary circumstances that prevented the Town from timely issuing its citations. The Town did, in fact, pursue its rights diligently. The Town issued the original citations that led to the criminal charges shortly after the incident occurred. Further, as soon as the Town learned that the criminal charges were dismissed by the Racine County District Attorney, the Town promptly issued its municipal citations. As mentioned above, the Town deferred issuing its own municipal citations due to the pending criminal

charges stemming from the same incident. The Racine County District Attorney did not dismiss the criminal charges until only eleven days prior to the expiration of the statutory deadline. The Racine County District Attorney failed to inform the Town of the dismissal, and the Town did not learn of the dismissal until months later and after the expiration of the statute of limitations. Certainly this set of facts is extraordinary as the Town could not be expected to act on something on which it had no knowledge.

The Appellant argues that the Town fails to meet the requirements set forth in the above test as the circumstances were entirely within the Town's control. The Appellant argues first that the Town, by Officer Jeschke, was in control as it made a mistake of law as to whether the defendant could be charged with Causing Injury by Intoxicated Use of a Motor Vehicle. In this case, there was a traffic accident that caused an injury to a pedestrian. Officer Jeschke issued citations that led to criminal charges by the Racine County District Attorney. The Racine County District Attorney was responsible for prosecution of the criminal charges and, at this point, the Town was no longer entirely in control of the circumstances. The Racine County District Attorney's discovery that the injuries to the pedestrian did not seem

to rise to the requisite level to prove the case, as well as the subsequent dismissal of the criminal charges, were both factors outside the Town's control. Once the Town learned of the dismissal, and the matter was back within the Town's control, the Town issued its municipal citations.

The Appellant also argues that the Town could have maintained control throughout the two-year statutory time period in two ways. First, the Town could have issued its own municipal citations concurrently with the criminal charges for the same incident. Second, the Town could have monitored the status of the criminal charges electronically through the Wisconsin Circuit Court Access website (hereinafter "CCAP").

As mentioned above, it is common practice for a municipality to defer issuing its own municipal citations when there are pending criminal charges arising from the exact same incident. To require a municipality to issue its own municipal citations in order to potentially preserve its rights down the road in an extraordinarily rare situation such as this, is extremely duplicative and inefficient. Municipalities, with limited budgets and resources, would be required to greatly increase their caseload to preserve rights in the event criminal charges

are dismissed elsewhere in the eleventh hour prior to the expiration of the statute of limitations. If municipalities took to this practice, defendants would then be forced to defend multiple, and essentially the same or similar, charges, all arising from the same incident, in multiple locations. This becomes burdensome to defendants, municipalities, as well as to the various court systems.

Along the same lines, requiring that a municipality monitor the status of criminal charges on CCAP for incidents they may be able to issue municipal citations is unnecessarily burdensome. While it is true that CCAP can provide an easy and convenient way to monitor cases, that ease and convenience depends on the volume of cases to be monitored. It is inevitable, especially over any sizable length of time, that a municipality will have a very large number of incidents that result in criminal charges for which the municipality could also issue municipal citations. Again, given the limited budget and resources of municipalities, it is not practical or feasible to require such monitoring. If the Town's citations are dismissed as time-barred, the end result is that, moving forward, the Town, and municipalities in general, would be forced to choose from one of the overly burdensome options above.

**CONCLUSION**

For the reasons outlined above, the Respondent respectfully asks that the Court of Appeals affirm the decision of the lower court that the statute of limitations was equitably tolled for the issuance of the Town of Waterford's municipal citations.

Dated this 4th day of November, 2019.

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CERTIFICATION REGARDING WIS. STAT. § 809.19(8)(b) and (c)

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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 margin on the other 3 sides. The length of the brief is 10 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 \_\_\_\_\_ words.

Dated this 4th day of November, 2019.

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CERTIFICATION REGARDING WIS. STAT. § 809.19(12)

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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.

Dated this 4th day of November, 2019.

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CERTIFICATION OF APPENDIX  
WIS. STAT. § 809.19(12)

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I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 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 Wis. Stat. § 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 or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve the confidentiality and with the appropriate references to the record.

Dated this 4th day of November, 2019.



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