

RECEIVED

COURT OF APPEALS OF WISCONSIN
DISTRICT 2

11-20-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

TOWN OF WATERFORD,

Plaintiff-Respondent,

vs.

Appeal No.: 2019AP000737
Circuit Court:
2018CV000828

CHRISTOPHER PYE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY 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

William R. Kerner
Attorney for the
Defendant-Appellant
6525 W. Blue Mound Road
Milwaukee, WI 53213
(414) 258-5989
State Bar No.: 1005739

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATUS OF THE CASE	1
ARGUMENTS	1
I. The Rule in <i>State v. Zimbal</i>	1
II. The Town Could Have Filed Its Own Citation at Any Time	4
CONCLUSION	5
CERTIFICATIONS	7

TABLE OF AUTHORITIES**CASES CITED**

<i>Milwaukee v. Johnson</i> , 192 Wis. 585, 590, 213 N.W. 335 (1927)	5
<i>State v. Kramsvogel</i> , 124 Wis. 2d 101, 369 N.W.2d 145 (1985)	5
<i>State v. Thierfelder</i> , 495 N.W.2d 669 Wis. 2d 213 (Wis. 1993).	5
<i>State vs. Zimbal</i> . 2017 WI 59.	1-4

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 REPLY BRIEF

STATUS OF THE CASE

The parties have filed briefs in this case, each citing the same cases, except one, and both agree that there is little caselaw on the issue of "equitable tolling". Therefore, the Defendant-Appellant will try to keep this Reply Brief succinct.

ARGUMENTS

I. The rule in *State vs. Zimbal*, 2017 WI 59

The Town of Waterford (the Town) cites *State vs. Zimbal*, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327 and quotes Chief Justice Roggensack, to support its position that the Town should be entitled to relief under the doctrine of equitable tolling, and notes that Chief Justice Roggensack stated "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."

(Plaintiff-Respondent's Brief at p.4). However, the Town cites this language without noting that Chief Justice Roggensack was writing a concurring opinion that the majority in *Zimbal* considered and rejected. The majority opinion in *Zimbal* states:

"There is nothing wrong with this strict compliance substitution statute, Wis. Stat. § 971.20(7), and we should not rewrite it by adding such indefinite concepts as excusable delay, good faith and prejudice. Establishing such a rule would tend to unravel what is meant to be a narrowly circumscribed statute. See, e.g., *State v. Austin*, 171 Wis. 2d 251, 257, 490 N.W.2d 780 (Ct. App. 1992). Nevertheless, the concurrence of C.J. Roggensack would do just that.

The concurrence would create a new—albeit amorphous—category for the application of equitable tolling in this context. Explaining that "[e]quitable tolling focuses on whether there was an excusable delay by the plaintiff," it reasons that "[t]he doctrine may be applied when a claimant has made a good faith error and there is an absence of prejudice to others if it is applied." Chief Justice Roggensack's concurrence, ¶12 (citation and quotation omitted). Under the approach of the concurrence, courts would have to determine when the delay is excusable. What constitutes a good faith showing and will any level of prejudice suffice? Is the new rule to be applied prospectively or retroactively? Given that the rule of the concurrence pertains only to unrepresented defendants, are there equal protection considerations? See concurrence, ¶19. What happens when a represented defendant also can show excusable delay, good faith and no prejudice? In the past this court and the court of appeals have established categorical exceptions to the rule of strict adherence to Wis. Stat. § 971.20. See, e.g., *Baldwin v. State*, 62 Wis. 2d 521, 530, 215 N.W.2d 541 (1974) (an exception when a county's calendaring procedure prevents a defendant from timely knowing the assigned judge); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty.*, 123 Wis. 2d

439, 443, 367 N.W.2d 235 (Ct. App. 1985) (an exception when the traffic and misdemeanor court's procedures prevented a defendant from timely knowing the assigned judge); State ex rel. Tinti v. Cir. Ct. for Waukesha Cty., Branch 2, 159 Wis. 2d 783, 788, 464 N.W.2d 853 (Ct. App. 1990) (an exception when an intake system does not provide adequate notice of the assigned judge). None of these cases has expanded the exception to invoke the application of the doctrine of equitable tolling and we likewise decline to do so here. Instead, we limit our decision to the unique facts of this case." *Zimbal*, Id. at footnote 2.

As this court can plainly see, the majority in *Zimbal*, *id.*, was highly critical of the very language cited by the Town, and specifically rejected that language. The majority opted, rather, for a ruling that was limited to the unique facts of that case, which are very different from the facts in this one.

In *Zimbal*, the defendant was an unrepresented individual who had been specifically directed by a Circuit Court Judge to ignore a statutory time limit. The Defendant-Appellant fails to see how those facts in *Zimbal* are even remotely similar to the facts in this case, where the Town is a political subdivision of the State and was under no legal compulsion to fail to file its citation in a timely manner.

But, the language in *Zimbal* is clear that the Wisconsin Supreme Court does not want courts below rewriting straightforward time limit statutes by adding indefinite concepts such as excusable delay, good faith and

prejudice. Thus, the Town's reliance on *Zimbal* for support is very seriously misplaced.

II. The Town could have filed its OWI citation at any time

The Town argues (at Plaintiff-Respondent's Brief, p.8) that it would be unduly burdensome for it to be required to issue municipal citation concurrently with criminal charges arising from the same incident. But, the Town actually did issue a concurrent citation to him for inattentive driving, and that it is common practice for municipal police officers to issue municipal citations **and** criminal charges to a single individual for conduct arising out of a single incident.

However, what the Town seems to be arguing is that it is not the Town's usual practice to cite an individual for Municipal OWI First Offense and the crime of Causing Injury by Intoxicated Use of a Motor Vehicle under Sec. 346.63(6) Stats., and that to do so is not common practice in Wisconsin. This may be true, but the Town fails to cite any authority why its local policy should exempt it from complying with the relevant statute of limitations. As the Wisconsin Supreme Court has observed numerous times: No rule is better settled in Wisconsin than that a prosecution under a city ordinance does not bar a prosecution for the

same act under a state statute or under the common law. *State vs. Thierfelder*, 174 Wis. 2d 213, 495 N.W.2d 669 (Wis. 1993), *State v. Kramsvogel*, 124 Wis. 2d 101, 369 N.W.2d 145 (1985), *Milwaukee v. Johnson*, 192 Wis. 585, 590, 213 N.W. 335 (1927), and there is no reason not to conclude that the converse is equally true.

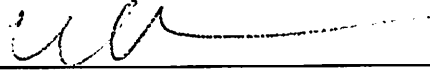
The issuance of a concurrent citation to the Defendant-Appellant for Municipal OWI-First Offense would have had no detrimental effect on the prosecution, or lack of prosecution, of the criminal referral. Some municipalities issue citations at the same time their officers make a criminal arrest or referral, and then dismiss their citations if the criminal case resolves with a plea agreement.

But speculating about how the various ways that Wisconsin municipalities preserve their rights to write municipal citations is ultimately immaterial. What is material is that the Town failed to charge the Defendant-Appellant within the time period mandated by statute. And that is fatal to the Town's case.

CONCLUSION

For the foregoing reasons this court should reverse the decision of the circuit court below.

Respectfully submitted

By 

William R. Kerner

Attorney for the Defendant-
Appellant

6525 W. Blue Mound Road

Milwaukee, WI 53213

(414) 258-5989

State Bar No.: 1005739

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 6 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:

November 19, 2019

Signed,



William R. Kerner

Attorney for Defendant-Appellant

State Bar No.: 1005739

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:

A handwritten signature in black ink, appearing to read 'W. R. Kerner', is written over a horizontal line.

William R. Kerner
Attorney for Defendant-Appellant
State Bar No.: 1005739