RECEIVED
09-04-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No: 2020AP000473

COUNTY OF GREEN LAKE,

Plaintiff-Respondent,

vs.

LORI A. MELCHERT f/k/a LORI A. ZUPKE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Notice of Appeal to Review the Denial of a Motion Contesting Circuit Court Competency Entered in the Circuit Court for Green Lake County, the Honorable Mark T. Slate Presiding

---

BY: TODD A. SNOW
State Bar No. 1062578

SNOW LAW, S.C.
Attorneys for the Defendant-Appellant
514 E. Main St. / P.O. Box 591
Waupun, Wisconsin 53963
(920) 324-4711
tsnow@snowlaw.net

Attorney for Lori A. Melchert

TABLE OF CONTENTS

CASES CITED

ISSUES PRESENTED

I. WHETHER MS. MELCHERT'S INVOCATION OF HER 5TH AMENDMENT RIGHT TO REMAIN SILENT CAN BE USED TO SUPPORT FORFEITURE OF HER RIGHT TO CONTEST THE CIRCUIT COURT'S COMPETENCY.

THE CIRCUIT COURT REFUSED TO ADDRESS THIS ISSUE.

II. WHETHER MS. MELCHERT FORFEITED HER RIGHT TO RAISE THE ISSUE OF THE COURT'S COMPETENCY WHERE THE STATE KNEW, OR SHOULD HAVE KNOWN, THAT THE OWI AT ISSUE WAS A SECOND OFFENSE AT THE TIME OF SENTENCING, OR SHORTLY THEREAFTER.

THE CIRCUIT COURT HELD THAT, DUE TO THE PASSAGE OF TIME, MS. MELCHERT HAD FORFEITED HER RIGHT TO CHALLENGE THE COURT'S COMPETENCY.

STATEMENT ON PUBLICATION

Ms. Melchert recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

Defendant, Lori Ann Melchert, was convicted of OWI 1st on March 1, 1996 in Marquette County, WI circuit court. (R.22). She was subsequently convicted of a second OWI first (1st) on March 11, 1996 in Green Lake County, WI circuit court. (R.3, 22). This is an appeal of the denial of Ms. Melchert's Motion to Reopen and Dismiss the March 11, 1996, OWI first (1st) Conviction for Lack of Court Competency (R.7).

In early 2019, Ms. Melchert received citations for OWI third (3rd), and PAC third (3rd) in Fond du Lac County, WI.

After receiving the citations for her third offense, Ms. Melchert filed a motion to reopen and dismiss the March 11, 1996 Green Lake OWI 1st conviction, based on lack of court competency. (R.7).

The Motion to Reopen was based on the fact that, at the time of her March 11 conviction, Ms. Melchert had one (1) prior OWI conviction on her driving record. (R.22). Thus the OWI she plead to on March 11, 1996 should have been charged as an OWI second (2nd) offense. Accordingly, Ms. Melchert argued that the circuit court lacked competency to enter a conviction for OWI first (1st) on March 11, 1996.

The Court, in denying the motion, held that Ms. Melchert had waived her right to raise the issue of competency, based on the passage of time. (R.20: p. 9, L11-16). The defendant filed a motion to reconsider the denial of her motion on February 5, 2020 (R.8). That motion was denied without a hearing by order dated February 18, 2020 (R.9).

ARGUMENT

I. MS. MELCHERT'S INVOCATION OF HER FIFTH AMENDMENT RIGHT TO REMAIN SILENT CANNOT BE USED TO SUPPORT FORFEITURE OF HER RIGHT TO CONTEST THE CIRCUIT COURT'S COMPETENCY.

Ms. Melchert had a 5th Amendment right to remain silent concerning her prior OWI conviction and, therefore, her silence regarding her prior OWI conviction cannot be used to support a forfeiture argument.

A. Standard of Review

An appellate court independently reviews whether a party has forfeited his or her right to challenge a court's competence. Thus, the issue is reviewed de novo. ***City of Eau Claire v. Booth***, 370 Wis.2d 595 (2016).

B. Ms. Melchert had a Fifth Amendment right to remain silent about her prior conviction.

In denying the appellant's motion, the circuit court relied upon ***City of Eau Claire v. Booth***, 370 Wis.2d 595, 604 (2016). In ***Booth***, the WI Supreme Court held that, although a Circuit Court has subject matter jurisdiction over a mis-filed OWI 1st, the Court nonetheless lacks competency to proceed

on the matter. ***Id***. at 606 (citing ***Vill. of Trempealeau v. Mikrut,*** 273 Wis.2d 76, 82 (2014). The ***Booth*** court noted that a "judgment rendered by a court lacking competency is '. . . invalid for the lack of competency to proceed to judgment.'" ***Id***. Despite this assertion, the ***Booth*** court held that the defendant in that case had "forfeited her right to challenge her [mis-filed OWI 1st] judgment by failing to timely raise it." ***Id***. In denying Ms. Melchert's motion, the Green Lake court held that, pursuant to ***Booth***, due to the passage of time, Ms. Melchert had waived[1] her right to contest the court's competency to act in the 1996 case. (R.20: p. 9, L11-16).

The court did not address Ms. Melchert's argument that she had an absolute right, pursuant to the 5th Amendment, to remain silent about her prior OWI conviction at the January 21, 2020, motion hearing. Therefore, Ms. Melchert filed a Motion to Reconsider (R.8), wherein she asked the court to address the 5th Amendment argument. The court issued a written Order on Reconsideration (R.9), wherein the court

[1] The Circuit Court used the term "waived," but it was understood by all parties that the court meant "forfeited."

cited ***City of Cedarburg v. Hansen***, 390 Wis.2d 109 (2020) in denying the motion, again noting that by remaining silent Ms. Melchert had "forfeited the right to raise the issue." (R.9). The court, again, did not directly address the 5th Amendment argument, stating that the "[t]he Court understands the defendant's argument and the defendant's right to remain silent, but that is an argument that is better made to a higher court." (R.9).

C. The reasoning of ***Booth*** does not apply in this case, where Ms. Melchert was facing criminal penalties if she informed the court of her prior OWI.

The case relied on by the ***Booth*** court to support the finding that the defendant in that case had forfeited her right to challenge the court's competency is ***Vill. of Trempealeau v. Mikrut***, 273 Wis.2d 76 (2004). ***Mikrut*** involved a challenge to a court's subject matter jurisdiction over numerous ordinance violations. ***Id***. at 84. Unlike the present case, ***Mikrut*** did not involve a situation where raising the issue of the court's competency to proceed would have subjected Mikrut to criminal penalties.

In the case at bar, had Ms. Melchert alerted the Green Lake court that she had a prior OWI conviction, she would have been subjecting herself to criminal penalties applicable to an OWI 2nd offense, including incarceration. "[U]nder our OWI statutes, a prosecutor has no discretion to charge what is factually a second-offense OWI as a first-offense municipal ordinance OWI." ***City of Eau Claire v. Booth***, 370 Wis. 2d 595, 604 (2016).

It is well-settled that, when faced with such a choice, a defendant has an absolute right to remain silent and not volunteer incriminating information. "The Fifth Amendment. . . not only permits a person to refuse to testify against [her]self at a criminal trial in which [s]he is a defendant, but also 'privileges h[er] not to answer official questions put to h[er] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate h[er] in future criminal proceedings.'" ***Minnesota v. Murphy***, 465 U.S. 420, 426 (1984).

It is also well-settled that a "defendant cannot receive a harsher sentence solely because [s]he availed [her]self of one of h[er] constitutional rights." ***Buckner v. State***, 56 Wis. 2d 539, 550

(1972). To apply the ***Mikrut*** rationale to the case at bar would result in punishing the defendant for exercising her 5th Amendment right against self-incrimination. To now find that the defendant has "forfeited her right" to challenge the competency of the court in the Green Lake proceedings, based upon the fact that she availed herself of her Constitutional right against self-incrimination, runs afoul of established jurisprudence, and should not be allowed.

In short, Ms. Melchert had the right to remain silent, pursuant to the 5th Amendment, concerning her prior OWI conviction. Thus, the invocation of her Constitutional right to remain silent regarding the court's lack of competency may not be used to support a forfeiture argument.

II. MS. MELCHERT DID NOT FORFEIT HER RIGHT TO RAISE THE ISSUE OF THE COURT'S COMPETENCY WHERE THE STATE KNEW, OR SHOULD HAVE KNOWN, THAT THE OWI AT ISSUE WAS A SECOND OFFENSE AT THE TIME OF SENTENCING, OR SHORTLY THEREAFTER.

Ms. Melchert's failure to inform the court in 1996 of her prior OWI should not result in the forfeiture of her right to

raise the issue now, because the prosecutor knew, or should have known, of her prior conviction at the time she entered her plea in the 1996 Green Lake case.

In ***Booth***, "[t]he parties agree[d] that Booth['s] . . . 1990 Minnesota conviction was a prior countable OWI offense under Wisconsin's OWI penalty scheme; therefore, her 1992 first-offense OWI in Eau Claire County was in fact a second-offense OWI, and therefore should have been charged as a criminal offense." ***City of Eau Claire v. Booth***, 370 Wis. 2d 595, 613 (2016).

The ***Booth*** court ultimately held "that Booth . . . forfeited her ability to challenge the 1992 OWI first-offense civil forfeiture judgment[,]" ***City of Eau Claire v. Booth***, 370 Wis. 2d 595, 615 (2016), by "not timely object[ing] to the circuit court's competency in the 1992 circuit court action." ***Id***. at 614.

In the present case, there is no dispute that Ms. Melchert's 1996 Green Lake County OWI was, in fact, a second-offense OWI, and therefore should have been charged as a criminal offense. "[U]nder our OWI statutes, a prosecutor has no discretion to charge what is factually a second-offense OWI as a first-

offense municipal ordinance OWI." ***Id***. at 604 (citing ***County of Walworth v. Rohner***, 108 Wis.2d 713, 721 (1982)).

In ***Booth***, "[t]he 1990 Minnesota conviction was unknown to the City Attorney's office when it prosecuted the 1992 OWI as a first offense." ***Booth***, 370 Wis.2d at 600. In contrast, Ms. Melchert's prior was from WI and, in fact, from a nearby county. In addition, her conviction would have been reported to the State DOT by the applicable clerk of courts, making the conviction of record and easily obtained by the prosecutor in any subsequent case. ("There is a presumption that public officers in performing their official duties have complied with all statutory requirements. . . ." ***Bohn v. Sauk County***, 268 Wis. 213, 219, 67 N.W.2d 288, 292 (1954)). Thus, the prosecutor presumptively had the ability to learn of Ms. Melchert's prior OWI conviction simply by requesting her driving abstract from the DOT prior to her plea hearing on March 11, 1996.

Even if the DOT did not have the information regarding Ms. Melchert's prior conviction *before* she entered her plea on March 11, 1996, it clearly had that information long before Ms. Melchert filed her current motion. As such,

the plaintiff, Green Lake County, could have moved to re-open the improperly charged OWI first (1st) and proceed with issuing charges for an OWI second (2nd) long before she was charged with her pending offense. This knowledge of the prior offense was available to the County for over two decades, and they did nothing to act on that information.

Based on these facts, the County should be estopped from alleging that the defendant should have brought this issue to the attention of the court before being charged in the present case.

In addition to having access to Ms. Melchert's driving abstract, the prosecutor, or judge, could have simply asked the defendant if she had any prior OWI convictions. It appears that she was never asked.[2]

The bottom line is, Ms. Melchert did absolutely nothing wrong when she plead to the citation on March 11, 1996 as a first (1st) offense. She showed up when she was supposed to, and entered a plea to the citation – a citation that

does not denote whether it is for a first (1st) or second (2nd) offense. (R:1). She did exactly what she was supposed to do. She took responsibility for her actions. Moreover, she was the only person engaged in the process that did not know that the court could not properly accept her plea if she had a prior conviction.

As noted, the ***Booth*** court held that the defendant in that case had forfeited her right to challenge the propriety of the mischarged offense, because she failed to timely raise it. In the present case, it should be clear that the defendant is raising the issue as soon as she became aware of it being an issue. The same cannot be said for the County, who has had access to this information for over twenty (20) years. Again, it bears repeating that the defendant was the only one involved that was unaware, in 1996, that the court could not enter a valid judgment on the citation she plead to in Green Lake County.

---

[2] And, had she been asked, she had a 5th Amendment right not to answer. Her non-response would likely have tipped off the prosecutor to investigate her driving history, thus avoiding the issue at hand.

Moreover, the County has had just as much time as the defendant to "raise the issue." In fact, the DOT recognized that is should be a second (2nd) offense, and has the revocation period on the driving abstract as 1 year, as opposed to the 7 months that was ordered. (R.22).

To place the onus on Ms. Melchert to "raise the issue," when the County had access to this information for over two (2) decades is, simply put, unfair. As such, the County should be the party deemed to have forfeited its right to contest the lack of competency and subsequent invalidity of the Green Lake County judgment of conviction for OWI 1st.

Based on the foregoing, the Defendant respectfully requests that the Court find that the State has forfeited its right to contest that the March 11, 1996 Green Lake County OWI conviction is void for lack of competency, and grant the Defendant's motion to find such conviction void.

CONCLUSION

Ms. Melchert's respectfully requests this Court reverse the decision of the trial court and remand for further proceedings.

Dated this _____ day of September, 2020.

Respectfully submitted,

_____

BY: TODD A. SNOW
State Bar No. 1062578

SNOW LAW, S.C.
Attorneys for the Defendant
514 E. Main St. / P.O. Box 591
Waupun, Wisconsin 53963
(920) 324-4711
tsnow@snowlaw.net
Attorney for Lori A. Melchert

CERTIFICATION AS TO FORM/LENGTH

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

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 2,130 words.

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

Dated this _____ day of September, 2020.

Signed,

_____

TODD A. SNOW
State Bar No. 1062578

SNOW LAW, S.C.
Attorneys for the Defendant
514 E. Main St. / P.O. Box 591
Waupun, Wisconsin 53963
(920) 324-4711
tsnow@snowlaw.net

Attorney for Lori A. Melchert

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this _____ day of September, 2020.

Signed,

_____

TODD A. SNOW
State Bar No. 1062578

SNOW LAW, S.C.
Attorneys for the Defendant
514 E. Main St. / P.O. Box 591
Waupun, Wisconsin 53963
(920) 324-4711
tsnow@snowlaw.net

Attorney for Lori A. Melchert

A P P E N D I X

TABLE OF CONTENTS

CERTIFICATION AS TO APPENDIX

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 § 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.

Dated this _____ day of September, 2020.

Signed,

_____

TODD A. SNOW
State Bar No. 1062578

SNOW LAW, S.C.
Attorneys for the Defendant
514 E. Main St. / P.O. Box 591
Waupun, Wisconsin 53963
(920) 324-4711
tsnow@snowlaw.net