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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2020-AP-473
Circuit Court Case No. 1996-TR-120

COUNTY OF GREEN LAKE,
Plaintiff-Respondent,

v.

LORI A. MELCHERT F/K/A LORI A. ZUPKE,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM AN ORDER DENYING A MOTION TO REOPEN AND DISMISS AN OWI CONVICTION ENTERED IN THE CIRCUIT COURT OF GREEN LAKE COUNTY, THE HONORABLE MARK T. SLATE, PRESIDING

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STATEMENT OF THE ISSUE

The issue on appeal is whether Lori Melchert forfeited her right to challenge the competence of the circuit court that had entered a civil forfeiture judgment for a first-offense operating while intoxicated (OWI) that should have been criminally charged as a second-offense OWI. The circuit court found that, nearly 24 years later, Melchert had indeed forfeited that right and denied her motion to reopen and dismiss the 1996 judgment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issue on appeal can be fully developed in briefs. Publication is not requested.

STATEMENT OF THE CASE

On November 25, 1995, Lori Melchert committed the offense of operating while intoxicated in Marquette County. The circuit court in Marquette County convicted Melchert of this charge on March 1, 1996. (R22.)

Melchert committed another violation of operating while intoxicated on January 13, 1996, this time in Green Lake County. The deputy sheriff issued her a citation for operating while intoxicated as a first-offense civil forfeiture, because on this date her record remained clear of any other OWI conviction. The citation was filed with the court on January 17, 1996, commencing the civil action. (R1.) Melchert pled no contest and was found guilty as charged in the Green Lake County circuit court on March 11, 1996. (R22.) The court assessed a seven-month license suspension, within the range of appropriate penalties for a first offense. (R1.) After the conviction was reported to the Department of Transportation, on April 26, 1996, it mailed a letter to Melchert indicating that

it had revoked her license for one year, the minimum license consequence for a second offense. (R25:3.)

On January 2, 2020, with yet another OWI charge pending elsewhere, Melchert filed a motion to reopen and dismiss the 1996 Green Lake County conviction. (R7; R15:3.) Her motion challenged the competence of the circuit court to enter a second first-offense conviction against her. (R7.) The circuit court held that Melchert had forfeited her right to challenge the court's competence and denied the motion. (R15:9.)

ARGUMENT

I. After waiting nearly 24 years, Melchert forfeited her right to challenge the competence of the circuit court.

In Wisconsin, first-offense OWI is a forfeiture, and second and subsequent offenses are generally crimes. Sec. 346.65(2)(am), Wis. Stats. When Lori Melchert pled no contest to and was found guilty of a second civil-forfeiture OWI in Green Lake County on March 11, 1996, she avoided a criminal charge. There is no suggestion in the record that the district attorney or circuit court of Green Lake County knew anything about a prior offense at the hearing, and Melchert was the only one in the courtroom that knew she had a recent prior OWI conviction. (R3.)

Melchert argues that, nearly 24 years later, she has not forfeited the right to challenge the circuit court's competence to hear her 1996 Green Lake County OWI. However, the Wisconsin Supreme Court has ruled on this very issue and held otherwise in two recent cases: *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, and *City of Cedarburg v. Hansen*, 2020 WI 11, 390 Wis. 2d 109, 938 N.W.2d 463. Melchert fails to distinguish the facts of her case from *Booth* and *Hansen*.

In *City of Eau Claire v. Booth*, *supra*, Booth had been found guilty of a 1992 civil-forfeiture OWI in Eau Claire County circuit court. *Id.* at ¶2. The parties in Eau Claire County were apparently unfamiliar with Booth's 1990 OWI conviction in Minnesota. *Id.* In 2014, Booth filed a motion to reopen and vacate her 1992 OWI, alleging that the circuit court did not have subject matter jurisdiction because it was legally a second offense and required to be charged criminally. *Id.* at ¶3. The Wisconsin Supreme Court disagreed and held that the circuit court had retained subject matter jurisdiction. *Id.* at ¶10. It also held that Booth, by not challenging her mischarged 1992 OWI until 2014, had not timely objected to the circuit court's competence. *Id.* at ¶25. The considerable delay resulted in forfeiture of any right to challenge the 1992 OWI judgment. *Id.*

In *City of Cedarburg v. Hansen*, *supra*, Hansen was convicted in municipal court of an OWI in 2005. *Id.* at ¶2. When he was again charged with OWI in 2016, he sought to collaterally attack his 2005 OWI by showing that he also had been convicted of OWI in 2003 in Florida. *Id.* While this case also dealt with the subject matter jurisdiction of municipal courts, the Wisconsin Supreme Court held that Hansen's objection to a court's competence was forfeited by his 11 years of silence and that his 2005 and 2003 convictions were countable offenses in 2016 for purposes of Wisconsin's statutory progressive penalty requirements. *Id.* at ¶55.

Despite similar circumstances to her own case, Melchert makes little attempt to distinguish the facts in her case from those in *Booth* and no attempt at all to distinguish her case from *Hansen*.

The only difference from *Booth* that Melchert mentions is that Melchert's first offense was from a neighboring county, whereas Booth's prior offense was from a different state. This distinction makes no difference because in both cases the prosecution was unaware of a prior OWI conviction. City

attorneys and prosecutors who have knowledge of a prior OWI conviction have a duty to correctly charge subsequent OWIs. *Hansen*, 2020 WI 11, at ¶44 (*citing County of Walworth v. Rohner*, 108 Wis. 2d 713, 721, 324 N.W.2d 682 [1982]). Nothing in the record shows that the County of Green Lake had knowledge of Melchert's prior OWI offense or any reason to look into her history until the defendant filed her motion to reopen and dismiss. Melchert knew she had a prior OWI but chose to admit to the forfeiture-level OWI and take advantage of the reduced penalties for the civil infraction.

Melchert presents an argument about a hypothetical invocation of her Fifth Amendment right against self-incrimination. (App. Br. 4-8.) She claims that, had she been asked in court whether she had any previous OWI convictions, she could have invoked her right and remained silent. Surprisingly, she then suggests that her silence could properly have been used against her if court officials inferred from her silence that she had a prior conviction and should be charged criminally. (App. Br. 12 n. 2.) However, she was not asked, and this hypothetical scenario did not occur. (App. Br. 11.)

Whether she was asked or not, she clearly remained silent on the issue in court in March 1996 and up until 2020, and benefited by doing so. She escaped a criminal conviction, avoided mandatory jail time, and obtained a reduced monetary penalty. Now she also wants the conviction not to be counted—as if the offense, court hearing, and conviction never even happened. Melchert wants it both ways: acceding to the court's competence in 1996, only to challenge the court's competence in 2020.

After waiting almost 24 years, which incidentally is past the statute of limitations for filing a criminal charge, Melchert decided to point out that she has a prior OWI in an attempt to keep her second offense from being counted toward her third offense. Sec. 939.74, Wis. Stats. The Wisconsin Supreme Court has stated that such a long delay and subsequent objection are "an attempt to play fast and loose with the court

system, which is something this court frowns upon." *Hansen*, 2020 WI 11, at ¶53, citing *Booth*, 370 Wis. 2d 595, at ¶25 (other citation omitted).

It should also be noted that a recently enacted statute evinces a legislative intent to prohibit people from retroactively voiding convictions, such as this ploy by Melchert. Sec. 800.09(4), Wis. Stats., enacted as part of 2019 Wisconsin Act 70, came into effect on January 23, 2020, and bars municipal judgments from being voided due to the existence of a conviction arising from another matter unless the defendant had disclosed the conviction with specificity and in writing to the municipal court and to the prosecuting attorney.

Back in 1996, Lori Melchert separately admitted to two OWI offenses and waited nearly 24 years before claiming that one of the judgments should be vacated. The circuit court in 1996 was competent to address the OWI charge before it, and Melchert waited far too long to raise her objection.

CONCLUSION

The circuit court denied Melchert's motion to reopen and dismiss her OWI conviction, and this court should affirm that ruling.

Dated this 12th day of October, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1446 words, excluding the table of contents, table of authorities, and certifications.

Dated this 12th day of October, 2020.

Andrew J. Christenson

ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 12th day of October, 2020.

Andrew J. Christenson