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WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant.

Appeal No. 23-AP-645

Rock County
16-CF-26

REPLY BRIEF OF DEFENDANT-APPELLANT CARL LEE MCADORY

CIRCUIT COURT FOR ROCK COUNTY
HONORABLE JOHN W. WOOD, PRESIDING
HONORABLE KARL R. HANSON, PRESIDING
Circuit Court Case No. 16-CF-26

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS....................2

TABLE OF AUTHORITIES....................4

ARGUMENT....................6

I. THE CIRCUIT COURT EXCEEDED ITS LAWFUL AUTHORITY BY REOPENING THE JUDGMENT OF CONVICTION, REINSTATING THE PREVIOUSLY-DISMISSED COUNT TWO, AND ENTERING A CONVICTION THEREON, INSTEAD OF HOLDING A NEW TRIAL ON COUNT ONE....................6

A. Contrary to the Response, the Circuit Court's Inherent, Implied, and Incidental Powers Did Not Authorize Its Actions, Especially in a Post-Remittitur Posture....................6

B. The State's Attempt to Trivialize *Bohacheff* and *Bastian* Is Unpersuasive....................8

C. The State Tries to Circumvent *Henley* by Arguing That Its Rule Prohibiting Parties from Circumventing the Rules of Postconviction and Appellate Procedure Apply Only to Defendants and Not the State....................11

D. The State Fails to Meaningfully Address, Let Alone Defend, Its Mistakes in Appeal Number 20-AP-2001....................11

II. HAVING DISMISSED COUNT TWO UPON THE STATE'S MOTION AND AFTER JEOPARDY ATTACHED, THE CIRCUIT COURT'S DECISION TO "REINSTATE" COUNT TWO AND CONVICT MR. MCADORY OF THE SAME VIOLATED HIS PROTECTION AGAINST DOUBLE JEOPARDY 12

A. Whether the Double Jeopardy Clause Bars the State from Appealing to Have a Jury's Prior Guilty Verdict Reinstated is Irrelevant; That It Bars Count Two From Being Reinstated After the State Chose to Have It Dismissed In Favor of Having Mr. McAdory Convicted on Count One Is the Problem..13

B. Even If the State Believes That It Was Reasonable to Swap Count Two for Count One as the Basis for the Judgment of Conviction, the Double Jeopardy Clause Still Protected Mr. McAdory Against the Risk that This Would Happen..14

C. This Case Does Not Warrant a "Logical Extension" of the *Wilson* Rule.......................................15

CONCLUSION 16

CERTIFICATIONS

TABLE OF AUTHORITIES

Cases **Page(s)**

Auric v. Continental Cas. Co.
111 Wis. 2d 507, 331 N.W.2d 325 (1983) 12

Evans v. Michigan
568 U.S. 313 (2013) 13

Smith v. Massachusetts
543 U.S. 462 (2005) 13, 16

State ex rel. Friedrich v. Circuit Court
192 Wis. 2d 1, 531 N.W.2d 32 (1995) 7, 8

State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court
2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679 7

State v. Alles
106 Wis. 2d 368, 316 N.W.2d 378 (1982) 12

State v. Bohacheff
114 Wis. 2d 402, 338 N.W.2d 446 (1983) 30-31, 42

State v. Braunsdorf
98 Wis. 2d 569, 297 N.W.2d 808 (1980) 8-9

State v. Henley
2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350 .... 6-8, 11

Town of Menasha v. Bastian
178 Wis. 2d 191, 503 N.W.2d 382 (Ct. App. 1993) 8-11

United States v. Wilson
420 U.S. 332 (1975) 13-16

Statutes or Rules **Page(s)**

Wis. Stat. § 346.63 9-10

Wis. Stat. § 805.15 11

Wis. Stat. § 806.07 11

Wis. Stat. § 808.08 7

Wis. Stat. § 809.10 12

ARGUMENT

The response changes nothing. This case was beset by the State's questionable decision-making and the Circuit Court's exercise of questionable powers. Overcoming these obstacles proves too much. The response asks the Court to accommodate a lot but offers little legal authority on which to do it. Because the Circuit Court acted beyond its authority and contrary to the protections afforded Mr. McAdory by the double jeopardy clause, the Court should reverse.

I. THE CIRCUIT COURT EXCEEDED ITS LAWFUL AUTHORITY BY REOPENING THE JUDGMENT OF CONVICTION, REINSTATING THE PREVIOUSLY-DISMISSED COUNT TWO, AND ENTERING A CONVICTION THEREON, INSTEAD OF HOLDING A NEW TRIAL ON COUNT ONE.

The State argues that the Circuit Court had the power to reopen the judgment of conviction, reinstate the previously-dismissed count two, and convict Mr. McAdory on that count, contrary to the Court's order for a new trial on count one. It cites no authority supporting these actions. Instead, the State resorts to an unsupported view of inherent powers. Its arguments are unconvincing.

A. Contrary to the Response, the Circuit Court's Inherent, Implied, and Incidental Powers Did Not Authorize Its Actions, Especially in a Post-Remittitur Posture.

The State argues that the Circuit Court's actions were properly taken pursuant to its "inherent, implied, and incidental power . . . to ensure the efficient and effective functioning of the court . . . ." (Resp. at 11-12 (quoting *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350).) Its argument is misguided.

As the opening brief explained, a circuit court's authority, whether statutory or inherent, is uniquely limited in a post-remittitur posture. *See* Wis. Stat. § 808.08; *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court*, 2000 WI 30, ¶¶ 25, 32, 233 Wis. 2d 428, 608 N.W.2d 679. The Circuit Court's actions far exceeded those limitations—which, other than effectuating the Court's mandate, may include, e.g., imposing costs, preparing and entering necessary documents, and correcting clerical or computational errors. *Id.*

Even outside of a post-remittitur posture, a circuit court's inherent powers are modest. One case that *Henley* cites—*State ex rel. Friedrich v. Circuit Court*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995)—is notable for its survey of inherent powers that circuit courts possess: (1) to appoint counsel and set fees; (2) to appoint a guardian ad litem; (3) to appoint a special prosecutor; (4) to sanction a party; (5) to expunge juvenile records; (6) to create a judiciary budget; (7) to suspend an attorney; (8) to provide courtroom and judicial office space; (9) to hire court staff and janitors; and (10) to set interpreter fees. 192 Wis. 2d at 16 n.7.

Overhauling judgments, un-dismissing charges, and forging new convictions do not appear. The State's expansive reading of inherent powers does not exist in Wisconsin.

The State's reliance on *Henley* is also puzzling. There, the Supreme Court held that the circuit court—despite not being subject to post-remittitur constraints on its authority—*lacked* the statutory and inherent power to reopen the defendant's judgment and vacate his conviction. 328 Wis. 2d 544, ¶¶ 72-77. In fact, *Henley* clarified that a court "should only invoke inherent power when such power is necessary to the functioning of the court." *Id.* ¶ 74 (emphasis added).

Notably, one action falling *outside* a circuit court's inherent powers is the authority to dismiss a case with prejudice prior to the attachment of jeopardy. This holding is from *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), a case Mr. McAdory featured in his opening brief, (Def.'s Br. at 44-46), and mentioned in both *Henley*, 328 Wis. 2d 544, ¶ 74, and *Friedrich*, 192 Wis. 2d at 16 n.7. *Braunsdorf* reasoned, *inter alia*, that the pre-jeopardy power to dismiss a case with prejudice was not "one without which a court cannot properly function." *Id.* at 580, 584-85.

Likewise, even ignoring the heightened limitations placed on the Circuit Court's post-remittitur powers, its actions were not indispensable to its function. Had it instead exercised restraint, not only would it have functioned just fine, but it might have even complied with the Court's order for a new trial.

B. The State's Attempt to Trivialize *Bohacheff* and *Bastian* Is Unpersuasive.

The State dismisses Mr. McAdory's reliance on *Bohacheff* and *Bastian*. The Court should not follow suit. Mr. McAdory does not pretend, and has never suggested, that these cases are on all fours with the issue presented. Yet, they complement and bolster his other arguments, lending still more support to the conclusion that the Circuit Court exceeded its lawful authority.

First, the State's response contends that Mr. McAdory is trying to dupe the Court into believing that *Bastian* and *Bohacheff* established a rule that dismissing an intoxicated driving offense of which the defendant was found guilty constitutes an "irreversible dismissal." (Resp. Br. at 15.) Had these cases expressly declared such a rule, these briefs would be much shorter.

Instead, Mr. McAdory asked the Court to consider the natural consequences of *Bastian* and *Bohacheff*. Their principal holdings provide the foundation on which the Court can reasonably infer that dismissing an intoxicated driving offense of which the defendant was found guilty is, like any other post-jeopardy dismissal, an irreversible dismissal for all purposes, including the purpose of finality. (Def.'s Br. at 30-31.)

Bastian's holding—which the State reluctantly recognizes—is that, when a defendant is found guilty of multiple types of intoxicated driving offenses, he "is to be sentenced on one of the charges, and the other charge[s] [are] to be dismissed." *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993).[1] *Bohacheff*'s holding is that, under Wis. Stat. § 346.63(1)(c), the conviction is a "conviction for all purposes" and is not just "for limited purposes" such as "sentencing" or "counting convictions under the motor vehicle code." *State v. Bohacheff*, 114 Wis. 2d 402, 413, 338 N.W.2d 446 (1983). From these premises, Mr. McAdory asks the Court to draw the reasonable inference that a judgment of dismissal under *Bastian* is as broad and unconditional as a judgment of conviction under *Bohacheff*.

Second, the State argues that "there can be no sincere dispute that *Bastian* and Wis. Stat. § 346.63(1)(c) say nothing barring a defendant from being convicted and sentenced for a particular offense so long as he is not also convicted and sentenced of a companion offense." (Resp. Br. at 16.)

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[1] The State accuses the Court of wrongly deciding *Bastian*. (Resp. Br. at 15-16.) Mr. McAdory disagrees. *Bastian* does not specify when the State must dismiss the other count(s). Had the State acted prudently, it would have waited until the appellate proceedings concluded before seeking any dismissal. That it didn't isn't Mr. McAdory's fault.

This misses the point. It was the State's burden, as well as the Circuit Court's obligation, to identify a source of law to support the ordered remedies. Neither did. Now, the State criticizes Mr. McAdory's reliance on *Bastian* and § 346.63(1)(c) simply because neither expressly forbade a defendant from being convicted and sentenced on one intoxicated driving offense if he had not been convicted and sentenced on one or both companion offenses. The State insists that, therefore, once this Court reversed and remanded, the Circuit Court was free to convict and sentence Mr. McAdory on the companion charges.

This conclusion begs for a legal citation, but the State offers none. It does no more than blame Mr. McAdory for citing two sources that do not forbid its unsupported legal conjecture. Regardless, it was the State, itself, who chose to convict Mr. McAdory on count one and dismiss count two. Furthermore, once the State Mr. McAdory filed his notice of appeal indicating that the conviction on count one might be in jeopardy, the State chose not to assert a cross-appeal or claim in its response brief that, if his appeal succeeded, then a conviction should, instead, be entered on count two and the judgment affirmed.

In other words, the State takes these positions only because of its own errors in prosecuting this case. But for these errors, the Court would not need to create new, far-reaching inherent powers, devise a way to work around the wrongly-decided *Bastian*, or rewrite *Bastian* and Wis. Stat. § 346.63(1)(c) to authorize the Circuit Court's actions. Sometimes, it is best to learn from one's mistakes.

C. The State Tries to Circumvent *Henley* by Arguing That Its Rule Prohibiting Parties from Circumventing the Rules of Postconviction and Appellate Procedure Apply Only to Defendants and Not the State.

Although the State too often benefits from the unilateral application of supposedly bilateral procedural rules (see, e.g., forfeiture), *Henley*'s rule is not among them. The State invites the Court to find that only defendants are beholden to *Henley*'s rule that parties in criminal cases may not circumvent the rules of postconviction and appellate procedure by resorting to things like Wis. Stat. § 805.15, Wis. Stat. § 806.07, and a circuit court's inherent powers. (Resp. Br. at 16-17.) The State, meanwhile, should be left to apply, or not apply, chapters 808, 809, and 974 as it pleases. The Court should decline the invitation. There is no principled justification for not applying *Henley* bilaterally—not even to salvage a drunk driving conviction.

D. The State Fails to Meaningfully Address, Let Alone Defend, Its Mistakes in Appeal Number 20-AP-2001.

Finally, the State asserts that "[t]he critical flaw" in Mr. McAdory's argument that the State was required to either cross-appeal or claim contingent relief in its response brief "is that the State had suffered no *adverse* decision for which it could even seek appellate review like in *Bastian* or file a cross-appeal." (Resp. Br. at 17-18 (emphasis in original).)

What the State feels is a "critical flaw" in Mr. McAdory's argument is, in fact, a "critical flaw" in its interpretation of appellate procedure. The State is authorized to assert cross-claims pursuant to Wis. Stat. § 974.05(3)—not § 974.05(1)(a), the subsection to which the State cites for the "adverse" decision language. Regardless, a cross-claim *does not* require an adverse decision; it requires only "[a]

respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding . . . ." Wis. Stat. § 809.10(2)(b).

Likewise, an "adverse" decision is not required for "a respondent [to] raise an issue in [its] briefs without filing a cross-appeal 'when all that is sought is the raising of an error which, if corrected, would sustain the judgment . . . .'" *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983) (quoting *State v. Alles*, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982)).

For these reasons, the State's arguments that the Circuit Court had the authority to reopen the judgment of conviction, reinstate the previously-dismissed count two, and convict Mr. McAdory thereon, contrary to the Court's order for a new trial on count one, are unpersuasive.

II. HAVING DISMISSED COUNT TWO UPON THE STATE'S MOTION AND AFTER JEOPARDY ATTACHED, THE CIRCUIT COURT'S DECISION TO "REINSTATE" COUNT TWO AND CONVICT MR. MCADORY OF THE SAME VIOLATED HIS PROTECTION AGAINST DOUBLE JEOPARDY.

In contrast with its unreasonably expansive take on circuit court authority, the State offers an unreasonably restrictive take on double jeopardy. In doing so, it largely ignores Mr. McAdory's arguments. Its primary counterarguments are addressed below.

A. Whether the Double Jeopardy Clause Bars the State from Appealing to Have a Jury's Prior Guilty Verdict Reinstated is Irrelevant; That It Bars Count Two From Being Reinstated After the State Chose to Have It Dismissed In Favor of Having Mr. McAdory Convicted on Count One Is the Problem.

The State argues that the double jeopardy privilege does not bar the reinstatement of a jury's prior guilty verdict, citing the *Wilson* rule. *See United States v. Wilson*, 420 U.S. 332 (1975). (Resp. Br. at 19-21.) Neither its argument nor *Wilson* addresses the problem.

Wilson held that, when a defendant successfully moves to dismiss his indictment for a count on which he had been found guilty, the Double Jeopardy Clause does not prevent the State from appealing the dismissal order because reversal would result only in the reinstatement of the guilty verdict on that count. 420 U.S. at 344-45; *see also Evans v. Michigan*, 568 U.S. 313, 330 n.9 (2013) ("If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial." (citing *Wilson*, 420 U.S. 332)). In double jeopardy jurisprudence, the so-called *Wilson* rule is often recounted as the Supreme Court's "single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury[.]" *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005).

The circumstances here are simply not ones to which the *Wilson* rule applies. The State *chose* to have count two dismissed in favor of having Mr. McAdory convicted on count one, and regardless, it *chose* not to appeal. Once the State elected to have count two dismissed, Mr. McAdory was reasonably entitled to finality on that count. The *Wilson* rule is relevant, if at all, only insofar as it supports the

proposition that the State should have appealed. But it did not. Consequently, its argument, and its reliance on *Wilson*, are misplaced.

B. Even If the State Believes That It Was Reasonable to Swap Count Two for Count One as the Basis for the Judgment of Conviction, the Double Jeopardy Clause Still Protected Mr. McAdory Against the Risk that This Would Happen.

As an initial matter, Mr. McAdory offers two concessions based on the State's arguments. First, the State argues that this case does not involve multiplicitous charges. (Resp. Br. at 22-24.) True—multiplicity does not strictly fit. However, this does not assuage his double jeopardy concerns, addressed further below. Second, the State is correct that, because he was never retried on count one, the Circuit Court's decision to calendar the retrial after convicting him on count two—while bewildering—was, ultimately, inconsequential.

Nevertheless, in his opening brief, Mr. McAdory raised serious double jeopardy concerns that arise if the State is allowed to freely swap in and out the counts on which a judgment of conviction is based—e.g., the risk the State could game the sentencing or appellate processes, and the indefinite period of fear the defendant would have to endure. (Def.'s Br. at 43-44.) If allowed, the State would have the power to dictate and withhold the finality of a judgment of conviction. And, to be clear, the State *does not* argue that its interpretation would not give it this power. Rather, its sole counterargument is that, in its opinion, it wielded that power promptly and scrupulously in this case. (Resp. Br. at 23-25.)[2]

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[2] The State argues that it moved to un-dismiss count two partly because "that verdict rested on no trial errors . . . ." (Resp. Br. at 23.) This is a baseless assertion. The verdict on count two had not—*and still has not*—been reviewed for trial errors. By the time undersigned counsel was appointed, Mr. McAdory had completed his direct appeal, and the Circuit Court had un-dismissed count two and convicted

Carefully and honestly violating the double jeopardy clause is still violating the double jeopardy clause. Swapping in and out the basis for a judgment of conviction using previously-dismissed counts, even when it is done with honorable intentions, still exposes the defendant to the risk of again being convicted and punished. The double jeopardy clause protects him against this risk, the State's counterargument notwithstanding.

Finally, the State complains that Mr. McAdory had no expectation of finality and "cannot feign surprise that the State would refuse to abandon a charge if his appellate strategy ultimately proved successful." (Resp. Br. at 24-25.) Feign surprise? The fact that the State is unable to point the Court to a single case of a similar "un-dismissal" in the 175-year history of the Wisconsin judiciary entitles Mr. McAdory to genuine surprise. He had no reason to expect finality on count one and had every reason to expect it on count two. The State's argument is meritless.

C. This Case Does Not Warrant a "Logical Extension" of the *Wilson* Rule.

The State asks the Court to extend the *Wilson* rule so that it can circumvent its with-prejudice dismissal of count two. This position is unexpected. Mr. McAdory argued that the dismissal was with prejudice *because of* the double jeopardy clause. But if the dismissal was with prejudice irrespective of double jeopardy, the result is still the same: the Circuit Court was barred from reinstating it.

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and sentenced him for it—a process that, at the time, the State and the Circuit Court incorrectly called "reinstating his conviction." Between the unprecedented posture of the case and relief ordered by the Circuit Court, undersigned counsel concluded that any appealable issues should have been raised in 20-AP-2001. Consequently, his postconviction motion and appeal have focused only on the reinstatement of count two.

Regardless, this case does not warrant tinkering with *Wilson*. As already mentioned, the *Wilson* rule is unique because it is the "single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury[.]" *Smith*, 543 U.S. at 467. The Supreme Court has never suggested that the *Wilson* rule should be expanded, whether it is to include other counts, or counts that have been dismissed at the State's request, or counts on which the State failed to appeal. Indeed, because this case falls outside of the scope of *Wilson*'s "single exception," it is barred by the double jeopardy clause.

CONCLUSION

For the foregoing reasons, respectfully, the Court should reverse and vacate the amended judgment of conviction.

Dated this 13th day of December, 2023.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief meets the form and length requirements of Wis. Stat. § 809.19(8)(b), (bm), and (c) as modified by the Court's order. It is in proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes, leading of minimum 2-point and maximum 60-character lines. The length of this brief is **2,978** words.

Dated this 13th day of December, 2023.

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