STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District IV, Affirming a Judgment of Conviction and Order of the Circuit Court Denying the Defendant's Motion for Postconviction Relief, Entered in Rock County Circuit Court, the Honorable Karl R. Hanson, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The circuit court lacked authority to reinstate a previously-dismissed charge following a defendant's successful appeal.

A. *Bastian* was not wrongly decided.

For the last thirty years, according to the State, every prosecutor that moved to dismiss impaired driving counts after securing a conviction on one has violated §346.63(1)(c). The State claims that the current scheme "is unworkable in practice." State's Br. at 19. The State fails to explain *how* the scheme that has been working for the last thirty years is, in fact, "unworkable."

Where the legislature leaves a statute unaltered, it "is presumed to know that in the absence of its changing the law, the construction put upon it by the courts will remain unchanged." *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis. 2d 626, 634, 157 N.W.2d 648 (1968). "This doctrine of legislative acquiescence applies with equal, if not greater, force where the legislature has acted on the statute, but declines to revise the interpreted language." *Estate of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759.

In 1993, the court of appeals determined that §346.63(1)(c) required, upon a finding of guilt for more than one impaired driving offense, the court to enter judgment of conviction on only one offense and to dismiss the other. *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). "In

Wisconsin, this is an authoritative interpretation." *Storey*, 378 Wis. 2d 358, ¶ 52.

After *Bastian* was decided the legislature amended or clarified §346.63 nine times. *See* 1995 WI Act 436, §§19-21; 1995 WI Act 448, §§371-74; 1997 WI Act 27, §4165md; 1997 WI Act 252, §141; 1999 WI Act 85, §57; 2003 WI Act 30, §§12-14; 2003 WI Act 97, §§47-53; 2013 WI Act 224, §§3g and 3r; and 2015 WI Act 371, §§3-4. None of those amendments purported to alter the procedure set forth by the court of appeals in *Bastian*.

B. This Court's imposition of a new procedure is unnecessary and would not change the outcome of this case.

The State argues this Court should overrule *Bastian* and impose a new procedure for impaired driving prosecutions because there is a risk that impaired drivers will escape accountability after a successful appeal. State's Br. at 24. This claim is flawed.

The first—and most glaring—problem is the State's assertion that, absent a favorable decision from this Court, it will be powerless to hold Mr. McAdory accountable. The State ignores that it is able to retry Mr. McAdory for the OWI offense.

The second problem with the State's proposed procedure is that it would have no impact on the result in this case. The circuit court here complied with the law by dismissing one of the two offenses, as required by *Bastian*. Thus, this Court's imposition of a new

procedure going forward would have no impact on the circuit court's compliance with *Bastian* in this case.

Third, the State's proposed procedure would conflict with other caselaw and rules.[1] The State proposes that, if a jury returns multiple guilty verdicts for impaired driving, that the circuit court enter judgment of conviction on only one offense and "accept the jury's verdicts, . . . but decline to dismiss those interrelated charges not resulting in conviction and sentence." State's Br. at 22. The State does not explain the status of the second charge, as it is neither a conviction nor a dismissed charge.

The State additionally suggests that the defendant should be allowed to seek appellate review

[1] While counsel acknowledges that the petition for review filed on Mr. McAdory's behalf by prior counsel suggested a new procedure for impaired driving prosecutions, the undersigned has determined based on her review of other caselaw, statutes, and rules of criminal and appellate procedure that the suggested procedure is untenable. Further, the undersigned believes this Court's superintending authority is unnecessary here. "This [C]ourt will not exercise its superintending power where there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *McEwen v. Pierce Cty.*, 90 Wis. 2d 256, 269, 279 N.W.2d 469 (1979). Because there are other adequate remedies available—namely, retrying Mr. McAdory on the OWI count—and the imposition of judgment on a single impaired driving offense and dismissal of the other does not seriously threaten to impose a significant hardship upon a citizen, this Court should decline the State's invitation to use its superintending authority to up-end the current impaired driving procedure and implement a new, uncertain procedure.

for both of the impaired driving offenses for which the defendant was tried. This proposal is also flawed.

An appeal is review of a "judgment or order of a circuit court." Wis. Stat. §808.01(1); Wis. Stat. (Rule) §809.01(1). The scope of an appellate court's review is therefore limited to that judgment or order. The State has posited no theory under which an appellate court could review a charge which has not been reduced to a judgment or court order.

While an appeal "brings before the court all prior nonfinal *judgments, orders, and rulings* adverse to the appellant," a jury verdict on its own, for which no judgment of conviction has been entered, is not a judgment, order or ruling adverse to the appellant. *See* Wis. Stat. (Rule) §809.10(4) (emphasis added).

Further, imposing a new procedure for impaired driving offenses would require this Court to overrule more than *Bastian*. Shortly after *Bastian*, the court of appeals held that §972.13 requires that the record contain documentation for the disposition of all charges in a case. *State v. Theriault*, 187 Wis. 2d 125, 134, 533 N.W.2d 254 (Ct. App. 1994).

This Court should decline the State's invitation to set forth a rule that contradicts §972.13 and overrules *Bastian* and *Theriault*, and instead direct circuit courts that every charge in a case need not be disposed of, and may be merely left open or pending without disposition. Such an unprecedented rule would contradict the finality of criminal prosecutions.

Finally, the State proposes that the defendant only be entitled to relief on appeal if he can overturn

the guilty verdicts for both impaired driving offenses. What happens if the court of appeals determines that reversible error occurred on the OWI count but not the RCS count? If the court of appeals reverses the conviction for the OWI count but allows imposition of a judgment of conviction on the RCS count, has there been an "adverse decision," allowing the defendant to seek review in this Court? *See* Wis. Stat. (Rule) §809.62(1g) and (1m)(a)1.

C. Circuit courts do not possess inherent authority to reinstate previously-dismissed counts following appeal because such authority is unnecessary for it to perform its functions.

The State claims that the circuit court must have the inherent authority to ensure "that a defendant found guilty of an RCS offense did not escape the consequences of his actions. . .." State's Br. at 26. Whether an individual "escapes consequences" is not relevant to determining whether the circuit court had the inherent authority to take the disputed action.

Circuit courts have limited inherent authority. *See State v. Henley*, 2010 WI 9, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350. Circuit courts may only exercise "inherent authority" when its actions are necessary for the court to function as a court. *State v. Schwind*, 2019 WI 48, ¶ 15, 386 Wis. 2d 526, 926 N.W.2d 742.

The State argues that the circuit court could swap the basis for Mr. McAdory's impaired driving conviction because this was more efficient than retrying him. The State does not explain how

swapping convictions ensures the effective and efficient administration of justice, other than saving the State the burden of a new jury trial. The efficiency of avoiding a jury trial, however, exists in every case, but that does not mean that the circuit court has the inherent authority to forego a jury trial whenever it pleases.

The State also fails to explain how, without the power to swap the basis of conviction after appeal, a circuit court ceases to function as a court. Circuit courts do not exist simply to convict the accused—rather, courts exist to "administ[er] justice." *See* Wis. Stat. §753.03. Here, the court of appeals determined that a new trial was required to fairly administer justice. It is unclear what power the circuit court requires such that it can usurp that determination by an appellate court.

D. The dismissal of the RCS offense was not erroneous.

The State complains that the dismissal of the RCS offense was erroneous and done without authority. The State, however, fails to recognize that the circuit court dismissed the RCS offense *on the State's motion*. The State has wide prosecutorial discretion to dismiss a charge, subject only to the circuit court's determination that it is in the public interest. *State v. Kenyon*, 85 Wis. 2d 36, 42, 270 N.W.2d 160 (1978). Once the State made the motion, the court had the authority to dismiss the RCS offense.

The State next points to purported noncompliance with §967.055(2)(a) as support for its argument that the circuit court dismissed the RCS

offense without authority. Section 967.055(2)(a) requires the State to apply to the court for any dismissal of impaired driving offenses. Wis. Stat. §967.055(2)(a). The State must "state the reasons for the proposed . . . dismissal," and the court determines whether dismissal is consistent with deterring impaired driving. *Id.*

While no party explicitly invoked §967.055(2)(a), its mandate was fulfilled and any failure to explicitly mention it is harmless. First, the State applied to the circuit court by orally requesting that the court dismiss the RCS offense. (152:4). Second, the State provided its reasons for the dismissal: "it is a duplicative count with" the OWI offense. (152:4). Third, while the court did not explicitly find that dismissing the RCS offense was consistent with deterrence, it implicitly did so as Mr. McAdory was also convicted of and sentenced for an OWI offense from the same incident. The court noted the serious penalties available for the OWI offense. (152:5). While they may have done so unintentionally, §967.055(2)(a) was complied with by the State and the court. Therefore, the dismissal of the RCS charge was done pursuant to lawful authority and the court did not have the authority to resurrect it after a successful appeal on a different count.

II. The State is the only party that forfeited an argument it has advanced.

A. The State's failure to appeal the dismissal of the RCS offense forfeited its argument that the RCS dismissal was in error.

The State argues that it should not be faulted for failing to raise the RCS offense as an alternative basis on which to sustain the judgment of conviction because "a guilty verdict on an RCS charge does not support an OWI conviction any more than it would support a disorderly conduct conviction." State's Br. at 29. This argument, however, misses the point of the forfeiture doctrine. "The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. Forfeiture is designed to prevent "sandbagging," whereby parties "fail[] to object to an error for strategic reasons and later claim[] the error is grounds for reversal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727.

Here, the State claims that the circuit court erred when it dismissed the RCS offense. The State never objected to the dismissal of the RCS offense—in fact, the State *requested it*. The State should not get to invite "error" and then use that error to its advantage.

If the State believed swapping the basis for conviction was a permissible mechanism for preserving the judgment of conviction, it should have raised that argument to the court of appeals in Mr. McAdory's first appeal. However, it was only upon

receiving an unfavorable decision in the court of appeals that the State raised this possibility in the circuit court. Just as defendants must abide by their litigation strategies, so too must the State be held to its strategic litigation decisions. *See State v. Myers*, 158 Wis. 2d 356, 369, 461 N.W.2d 777 (1990).

B. The circuit court's competency to perform the disputed actions was raised in the petition for review.

The State argues that the petition for review did not address the circuit court's competency post-remand. State's Br. at 32. However, the petition for review raised the circuit court's power or authority to take certain actions after it received the remittitur from the court of appeals. *See* Pet. for Rev. at 28-29, 31. While the petition for review did not utilize the word "competency," it did invoke the notion of competency by noting that rules exist to curtail circuit court power after an appeal. *Id.* at 31 (the State "could not circumvent the effect of Wis. Stat. Rule 809.10(2)(b) by simply asking the [c]ircuit [c]ourt to modify the judgment of conviction and vacate the dismissal order instead.").

The petition for review also explicitly argued that the circuit court "lacked the authority to grant the State its desired remedy." Pet. for Rev. at 31. While this Court could read this as a reiteration of the argument regarding the circuit court's statutory authority under §346.63(1)(c), such a reading would be illogical, as the arguments are not located in the same section of the petition for review. It is much more reasonable to read this argument as a separate attack

on the trial court's competency to take actions that conflict with the mandate of the court of appeals and with §808.08. This reading is further supported by the arguments made in the court below. To the court of appeals, Mr. McAdory argued that the circuit court exceeded its "limited statutory and non-statutory authority" post-remand and cited to cases dealing with circuit court competency. Brief of Defendant-Appellant at 28, *State v. McAdory* (*McAdory II*), 2024 WI App 19, 412 Wis. 2d 29, 8 N.W.3d 101.

The State does not substantively respond to Mr. McAdory's arguments regarding the circuit court's competency to take the disputed action. Therefore, if this Court finds that the circuit court competency was sufficiently raised in the petition for review, the State has conceded that the circuit court did not have competency to take the disputed action. *See Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590.

III. Reinstating a previously-dismissed offense after a successful appeal of a different charge violates fundamental double jeopardy principles.

A. Principles of finality prohibit the resurrection of a previously dismissed charge after appeal.

The State claims Mr. McAdory does not have any interest in the finality of the RCS offense's dismissal by analogizing to reinstatement of charges after plea withdrawal. State's Br. at 38. This analogy is inapt. When a defendant moves to withdraw a guilty plea, he is on notice that, if successful, all of the

charges that were dismissed in order to induce his plea would be reinstated. *State v. Howard*, 2001 WI App 137, ¶ 38 n. 11, 246 Wis. 2d 475, 630 N.W.2d 244. In that way, plea withdrawal is commonly analogized to contract law: if the defendant breaches the contract (i.e., withdrawing his guilty plea), he no longer receives the benefit of the contract (i.e., dismissal of some counts).

In the present case, however, there was no agreement between the State and Mr. McAdory that was breached by his appeal of his OWI conviction.

Additionally, the State argues that Mr. McAdory does not have an interest in the finality of the RCS dismissal because Mr. McAdory should have realized that, if he pursued an appeal on the OWI count, the State may move to reinstate a separate offense. It is unclear how Mr. McAdory should have foreseen this considering that this is the first such case. In fact, even the circuit court remarked that "[r]einstatement of a previously dismissed charge . . . certainly raises . . . a question regarding the finality of action taken on a dismissed charge. . .." (279:3).

B. Sanctioning the substitution of a dismissed RCS offense for an OWI following a successful appeal results in multiple punishments.

"[T]he dispositive issue in determining whether a court may impose multiple punishments on a defendant in a single trial for violating two statutory provisions (regardless of whether they constitute the same offense) is whether the legislature authorized

multiple punishments." *State v. Bohacheff*, 114 Wis. 2d 402, 409, 338 N.W.2d 466 (1983).

While this Court made clear in *Bohacheff* that the legislature did not intend for multiple punishments in impaired driving prosecutions, swapping of offenses could result in multiple punishments because OWI and RCS offenses are not the "same crime" for purposes of sentence credit under §973.04.

"When a sentence is vacated and a new sentence is imposed upon a defendant *for the same crime*, the department shall credit the defendant with confinement previously served." Wis. Stat. §973.04 (emphasis added). Even where the court imposes the same sentence after appeal for a different offense, it does not result in the defendant serving exactly the same sentence.

Because §973.04 prevents the DOC from crediting a defendant with time previously served on a sentence unless it is for the *same crime*, a defendant would likely be required to again serve the sentence or portion thereof that he had already served where the court swaps offenses, resulting in the service of multiple punishments, violating double jeopardy.

CONCLUSION

For the reasons stated above and in his opening brief, Mr. McAdory respectfully requests that the Court reverse the court of appeals, vacate the amended judgment of conviction, and remand the matter for a new trial on the OWI offense.

Dated this 9th day of January, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,995 words.

Dated this 9th day of January, 2025.

Signed:

Electronically signed by
Olivia Garman
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