

WISCONSIN COURT OF APPEALS
DISTRICT IV

CITY OF STEVENS POINT,


Appeal Case No. 2014 AP 742
Portage County Case No.
10 TR 664

Plaintiff-Respondent,

v.

JARED T. LOWERY,

Defendant-Appellant.

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APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN THE
CIRCUIT COURT OF PORTAGE COUNTY, BRANCH 1,
CASE NO. 10 TR 664
HONORABLE THOMAS B. EAGON, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF
OF
City of Stevens Point

ANDREW LOGAN BEVERIDGE
Attorney for City of Stevens Point
1515 Strongs Avenue
Stevens Point, WI 54481
(715) 346-1556
State Bar No. 1078864

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

STATEMENT ON ORAL ARGUMENT..... iii

STATEMENT ON PUBLICATION..... iii

ARGUMENT..... 1

**I. THE TRIAL COURT HAD SUBJECT
 MATTER JURISDICTION..... 1**

**II. THE TRIAL COURT MAY HAVE LACKED
 COMPETENCY, BUT LACK OF COMPETENCY
 DOES NOT RENDER A JUDGMENT VOID3**

**III. THE DEFENDANT WAIVED HIS OPPORTUNITY
 TO CHALLENGE THE TRIAL COURT’S LACK OF
 COMPETENCY4**

CONCLUSION..... 6

TABLE OF AUTHORITIES

Wisconsin Supreme Court Cases

<i>Matter of Guardianship of Eberhardy</i> , 102 Wis. 2d 539, 307 N.W.2d 881 (1981).....	3
<i>Mueller v. Brunn</i> , 105 Wis. 2d 171, 313 N.W.2d 790 (1982)	2
<i>State v. Banks</i> , 105 Wis. 2d 32, 313 N.W.2d 67 (1981)	1, 2
<i>State v. Erickson</i> , 227 Wis.2d 758, 596 N.W.2d 749 (1999).....	4
<i>State v. Huebner</i> , 2000 WI 59, 611 N.W.2d 727	4, 5, 6
<i>Village of Trempealeau v. Mikrut</i> , 2004 WI 79, 273 Wis.2d 76, 681 N.W. 2d 190	1, 2, 3, 4
<i>Walworth County v. Rohner</i> , 108 Wis. 2d 713, 324 N.W.2d 682 (1982).....	1, 2, 3, 4

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The above-named Plaintiff-Respondent, City of Stevens Point, does not believe that oral argument is necessary in the above-entitled matter pursuant to Rule 809.22(2)(b), Stats., since the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time. The Plaintiff-Respondent recognizes that this appeal is a one-judge appeal and does not qualify under this Court's operating procedures for publication; and therefore, does not believe that the opinion of the Court of Appeals in this case should be published.

ARGUMENT

I. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.

The Appellant relies on *Walworth County v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), and *State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981), to argue that the trial court lacked subject matter jurisdiction. *Walworth County* is superseded by *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis.2d 76, 681 N.W. 2d 190, and *State v. Banks* is clearly distinguishable from the case at hand.

In *State v. Banks*, the defendant was arrested and cited with two drunken driving offenses in a three-month span. *State v. Banks*, 105 Wis. 2d 32, 36. The defendant was inadvertently tried and convicted of the second offense as though it were a first offense. *Id.* The Court found that the trial court lacked subject matter jurisdiction, but based its decision on the case having been held before a Dane County Judicial Court Commissioner rather than a circuit court judge. *Id.* The Court held that a second OWI violation must be treated as a criminal matter. *Id.*, 40. Consequently, the Court declared the proceeding before the Judicial Court Commissioner a nullity because “[j]urisdiction to preside over a criminal trial . . . is not among the actions which a court commissioner is permitted to perform, pursuant to the provisions of sec. 757.69, and, thus, a court commissioner lacks subject matter jurisdiction over a criminal trial.” *Id.*, 41. In the case at hand, Mr. Lowery was tried before Portage County Circuit Court Judge Frederic Fleishauer, not a circuit court commissioner. (R. 11, p.1). Because the trial court’s judgment

was ordered by a circuit court judge, the Court's finding in *State v. Banks* is inapplicable to the case at hand.

Walworth County v. Rohner provides a superficial basis for the Appellant's position on subject matter jurisdiction, but it is a narrow foothold at best and was later rejected in *Village of Trempeleau v. Mikrut*. The Appellant cites the Court's statement in *Walworth County* that the County "had no jurisdiction over the offense and the prosecutor had no discretion to charge under the county ordinance which can have no application to a subsequent drunk driving offense." *Walworth County*, 108 Wis.2d 713, 721. This passage refers to the jurisdiction of the County as a prosecuting agency, not the trial court's subject matter jurisdiction over the case. The Court refers specifically to subject matter jurisdiction later in the opinion, stating that "[b]ecause the complaint is to be dismissed for want of subject-matter jurisdiction, there could not have been a valid proceeding against Rohner." *Id.*, 722. However, apart from noting the defendant's motion on jurisdictional grounds occurred at trial, this is the Court's only specific reference to subject matter jurisdiction anywhere within the opinion. *Id.*, 715.

In *Village of Trempeleau v. Mikrut*, the Court unequivocally rejected the notion that a circuit court can be deprived of subject matter jurisdiction due to a failure to comply with a statutory requirement necessary to the exercising of that jurisdiction. *Village of Trempeleau*, 2004 WI 79 ¶2. "[N]o circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Id.*, ¶8 [citing *Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982)]. "Thus,

the subject matter jurisdiction of the circuit courts cannot be curtailed by state statute.” *Id.*, ¶8.

Curtailing the circuit court’s subject matter jurisdiction by state statute is precisely what the Appellant proposes to do. In *Walworth County*, the Court stated that “[t]he legislature intended a second offense for drunk driving to be within the exclusive province of the State to prosecute as a crime.” *Walworth County*, 108 Wis.2d 713, 721 [emphasis added]. Allowing legislative intent to curtail the circuit court’s subject matter jurisdiction over OWI violations would directly conflict with the Court’s holding in *Village of Trempeleau*. “The jurisdiction and the power of the circuit court is conferred not by act of the legislature, but by the Constitution itself.” *Village of Trempeleau*, 2004 WI 79 ¶8 [citing *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W.2d 881 (1981)]. While second and subsequent offense OWI violations must be prosecuted by the State, a violation of this rule cannot deprive the circuit court of its subject matter jurisdiction.

II. THE TRIAL COURT MAY HAVE LACKED COMPETENCY, BUT LACK OF COMPETENCY DOES NOT RENDER A JUDGMENT VOID.

“The failure to comply with . . . statutory conditions does not negate subject matter jurisdiction but may under certain circumstances affect the circuit court’s competency to proceed to judgment in the particular case before the court.” *Village of Trempeleau*, 2004 WI 79 ¶2. This principle applies to the case at hand

because the requirement to prosecute second and subsequent OWI violations as criminal matters is a statutory condition. *Walworth County*, 108 Wis.2d 713, 721. When the trial court lacks competency due to the violation of a statutory requirement, a judgment rendered “may be erroneous or invalid because of the circuit court’s loss of competency but is not void for lack of subject matter jurisdiction.” *Village of Trempeleau*, 2004 WI 79 ¶2. Regardless of whether or not the trial court lacked competency to hear the City of Stevens Point’s case against Mr. Lowery, the judgment against him is not void for lack of subject matter jurisdiction.

III. THE DEFENDANT WAIVED HIS OPPORTUNITY TO CHALLENGE THE TRIAL COURT’S LACK OF COMPETENCY.

Unlike a challenge to the trial court’s subject matter jurisdiction, “a challenge to the circuit’s court’s competency is waived if not raised in the circuit court.” *Village of Trempeleau*, 2004 WI 79 ¶3. While Mr. Lowery raised his challenge in the circuit court, he did so via a motion to vacate judgment filed nearly three years after the date of the judgment. (R. 11, pp. 1-2). The purpose of the waiver rule is to promote timely objections. *State v. Erickson*, 227 Wis.2d 758, 766, 596 N.W.2d 749 (1999). The waiver rule “prevents attorneys from “sandbagging” errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.” *State v. Huebner*, 2000 WI 59, ¶12, 611 N.W.2d 727. “If the waiver rule did not exist, a party could decline to

object for strategic reasons and raise the error only when that party needed an advantage at some point in the trial.” *Id.*

Mr. Lowery’s motion seeks to accomplish precisely the type of strategic sandbagging the Court admonished in *State v. Huebner*. Mr. Lowery became aware of the grounds for his motion almost immediately after trial. At the Motion Hearing on March 4, 2014, Mr. Lowery’s attorney stated the following:

“We became aware of this after the court trial concluded, and the judge at that time ordered an eight-month revocation of my client’s license . . . and when my client, *maybe a week or so after the conviction*, received notification from the Department of Transportation that his operating privilege would be revoked for . . . over two years, and I thought there was a mistake. I went around and around with our DOT, and that is when I discovered that the DOT treated this as a third and I figured out why, and that’s when I became aware of this.” (R. 18, pp. 5-6) [emphasis added].


Mr. Lowery offered no explanation for why his motion was not filed until nearly three years after the date of his conviction, but the statute of limitations for second and third offense OWI violations may provide a clue. Such offenses are punishable by no more than one year in the county jail, Wis. Stats. § 346.65(2) & (3) (2011-12), and are therefore classified as misdemeanors under Wis. Stats. § 939.50 (2011-12). As a result, the three year statute of limitations indicated for misdemeanors under Wis. Stats. § 939.74(1) (2011-12) likely bars the State from prosecuting Mr. Lowery criminally in the event the trial court’s judgment is vacated without prejudice. If the statute of limitations is overcome, the State’s ability to locate witnesses and evidence could be compromised by the time elapsed since the offense took place. Simply put, if Mr. Lowery’s conviction is vacated, he is unlikely to be prosecuted for his actions in any manner whatsoever. Mr.

Lowery's long-delayed motion can only be explained as an attempt to "sandbag" and should be rejected under *State v. Huebner*, 2000 WI 59, ¶12.

CONCLUSION

WHEREFORE, the City respectfully requests this Court to uphold the decision of the circuit court denying Mr. Lowery's Motion to Vacate Judgment.

Respectfully submitted this 6th day of November, 2014.


ANDREW LOGAN BEVERIDGE
Attorney for City of Stevens Point
1515 Strongs Avenue
Stevens Point, WI 54481
(715) 346-1556
State Bar No. 1078864

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a new roman font, 13 point font with 11 point font for quotes; double spaced; 1.5 inch margin on the left and 1 inch margin on all other sides. This brief is 1,422 words in length.

Dated this 6th day of November, 2014.



ANDREW LOGAN BEVERIDGE

Attorney for City of Stevens Point

1515 Strongs Avenue

Stevens Point, WI 54481

(715) 346-1556

State Bar No. 1078864

CERTIFICATION

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

I hereby further certify that the content and format of the electronic copy of the brief is identical to the content and format of the paper copy of the brief.

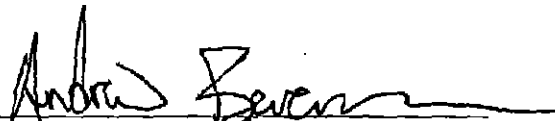
A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 6th day of November, 2014.

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ANDREW LOGAN BEVERIDGE
Attorney for City of Stevens Point
Plaintiff - Respondent
1515 Strongs Avenue
Stevens Point, WI 54481
(715) 346-1556
State Bar No. 1078864