15AP0850

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT FOUR

STATE OF WISCONSIN,

Plaintiff – Respondent,

APPEAL NO.

-vs-

2015 AP 850 - CR

AMAN DEEP SINGH,

Defendant – Appellant.

APPEAL FROM THE DECISION AND ORDER DENYING WRIT OF CORAM NOBIS, FILED ON MARCH 9th, 2015,

THE HONORABLE STEPHEN E. EHLKE, PRESIDING.

(Dane County Case # 04 CT 882)

DEFENDANT – APPELLANT'S BRIEF-IN-CHIEF AND APPENDIX

Respectfully submitted:

Aman Deep Singh

Defendant – Appellant *pro se*

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CASES CITED

STATEMENT ON ORAL ARGUMENT AND PUBLISHING

Publication is warranted since prior unpublished decisions of the court of appeals have produced conflicting rulings concerning subject matter jurisdiction over first offense OWI where a prior countable offense exists. Also, the question of whether the use of administrative driver license suspensions to statutorily enhance OWI penalties violates *Apprendi v. New Jersey* has never been decided.

STATEMENT OF ISSUES

1) After Singh was successfully prosecuted for first offense OWI, does it violate Double Jeopardy to charge him again with second offense OWI based on the same incident in order to impose enhanced criminal penalties?
2) Does the use of out of state administrative Implied Consent summary suspensions to statutorily enhance OWI penalties violate Due Process under *Apprendi v. New Jersey*?

STATEMENT OF THE CASE

Singh was originally arrested and charged with first offense OWI by Dane County.[R1,R2] Singh was tried, convicted and sentenced for the offense in Dane County Circuit Court. Months later, the Dane County District Attorney was informed by the Wisconsin Division of Motor Vehicles that their records showed that Singh had a prior driver license suspension in Illinois for a violation of the Illinois Implied Consent law. The Dane County District Attorney successfully moved to have the first offense conviction vacated. Thereafter, Singh was charged with second offense OWI in the present case.[R3] Singh pled guilty and criminal penalties were imposed which have been fully satisfied.[R14-R19] Upon learning of a potential Double Jeopardy violation, Singh filed the present petition for a writ of coram nobis.[R21] The trial court found there was no double jeopardy violation and denied the petition.[R22] Singh appeals.[R23]

ARGUMENT

1. SINGH'S CONVICTION VIOLATES DOUBLE JEOPARDY.

"The writ of error coram nobis is of very limited scope. It is a discretionary writ which is addressed to the trial court. The purpose of the writ is to give the trial court an opportunity to correct its own record of an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the trial court. In order to constitute grounds for the issuance of a writ of error coram nobis there must be shown the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment." *Jessen v. State, 95 Wis. 2d 207, 213-214, 290 N.W.2d 685 (1980).*

Singh argues that the existence of a Double Jeopardy violation is such an error because it would have prevented this prosecution under all circumstances. "While this guarantee [double jeopardy], like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Robinson v. Neil, 409 U.S. 505, 509, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).*

In *Robinson*, the defendant was charged civilly in municipal court with assault in violation of a city ordinance and given a forfeiture of $50. Afterwards, he was charged and convicted again for assault, this time under state criminal statute and sentenced to years in prison. The United States Supreme Court reversed on Double Jeopardy grounds. Similarly, Singh was prosecuted under a Dane County ordinance for OWI and then subsequently criminally prosecuted for OWI under state statute for the same offense. This should also have been barred by s. 345.52 No Double Prosecution. "A judgment on the merits in a traffic ordinance action bars any proceeding under a state statute for the same violation." Wis. Stat. 345.52(1).

Straightforward application of these principles is complicated by *County of Walworth v. Rohner, 108 Wis. 2d 713, 324 N.W.2d 682 (1982)*, which ruled that a second offense OWI prosecution could follow a first offense judgment because the first offense prosecution would be void for lack of subject matter jurisdiction where a prior OWI offense exists. The court of appeals has issued conflicting rulings in the past few months whether this part of *Rohner* has been subsequently abrogated by the state supreme court. See *State v. John N. Navrestad, 2014AP2273*, unpublished slip op. (WI App July 2, 2015), Cf. *City of Stevens Point v. Lowery, No. 2014AP742*, unpublished slip op. (WI App Feb. 5, 2015).[1] If there was no subject matter jurisdiction problem with Singh's first offense prosecution, then *Robinson*, Double Jeopardy, and Wis. Stat. 345.52(1) all would prohibit Singh's second prosecution here.[2]

Ultimately, this situation is exactly what the Double Jeopardy Clause means to prevent – a second prosecution for the sole purpose of imposing additional penalties. The Double Jeopardy violation here is especially egregious because the basis for imposing enhanced penalties on Singh

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[1] Singh does not cite these unpublished opinions for any persuasive value, but rather to highlight the unresolved nature of the question.

[2] Singh was originally convicted of first offense OWI and the conviction was later vacated upon prosecutor motion. This makes no difference here since the Double Jeopardy clause prevents a second prosecution after both convictions and acquittals. Wis. Stat. 345.52(1) also does not distinguish the two.

was not discovered until well after he had been convicted and sentenced the first time. This second offense prosecution should never have occurred, and should be vacated.

Prior violations are not elements of the offense of OWI. "The conduct prohibited by sec. 346.63(1), Stats., consists of (1) driving or operating a motor vehicle, and (2) doing so while under the influence of an intoxicant. It is the conduct of operating a motor vehicle while under the influence of an intoxicant which is prohibited by sec. 346.63(1). Nothing more need be proven to sustain a judgment of conviction against a motorist." *State v. McAllister, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982).* The Dane County Circuit Court clearly had subject matter jurisdiction over this charge in the first prosecution, so the first offense prosecution was not void.

In *Rohner*, the defendant was convicted of first offense OWI although the circuit court and the parties were aware than he had a prior offense. The Wisconsin Supreme Court ruled that the OWI penalty enhancers were intended by the legislature to be mandatory. Therefore, the district attorney lacked discretion to charge a first offense OWI when the prosecutor was aware of prior countable offenses. See *Rohner* at *721-722.* Singh has no issue with this conclusion.

However, in order to give effect to this ruling and permit Rohner to be re-prosecuted as a repeat offender, the court cited subject matter jurisdiction. "Because the complaint is to be dismissed for want of subject-matter jurisdiction, there could not have been a valid proceeding against Rohner. There has been no valid adjudication and no jeopardy attached. The state is at liberty to commence the criminal action." *Rohner* at *722.*

Years later, the Wisconsin Supreme Court acknowledged that 'subject matter jurisdiction' and 'competency' have been incorrectly conflated in prior opinions. "In some older cases, the concept of circuit court competency was often discussed as coextensive with the court's subject matter jurisdiction, but recent cases make clear that the two concepts are distinct and that it is competency, not subject matter jurisdiction, that may be lacking where statutory prerequisites are not followed. See *Vill. of Trempealeau v. Mikrut, 2004 WI 79, ¶¶ 8-9, 273 Wis.2d 76, 681 N.W.2d 190.*" *Xcel Energy Servs., Inc. v. LIRC, 2013 WI 64, ¶¶ 27 n.8, 349 Wis.2d 234, 833 N.W.2d 665.*

"The jurisdiction and the power of the circuit court is conferred not by act of the legislature, but by the Constitution itself. Thus, the subject matter jurisdiction of the circuit courts cannot be curtailed by state statute." *Mikrut* at *¶8.* "If a court has the power, i.e., subject matter jurisdiction, to entertain a particular type of action, its judgment is not void even though entertaining it was erroneous and contrary to the statute." *Mikrut* at *¶14.* Since prior offenses are to be counted after conviction at sentencing, it is hard to grasp how this post-conviction fact finding could retroactively deprive the court of its jurisdiction to have entered the conviction in the first place. It is more difficult to understand how a penalty enhancer whose applicability was only recognized after both conviction and sentencing could possibly invalidate a completed prosecution.

The core holding of *Rohner* concerning prosecutorial discretion was not violated because the Dane County District Attorney was unaware of Singh's prior out of state suspension at the time of the original first offense prosecution. The subject matter jurisdiction discussion of *Rohner* has been subsequently abrogated by *Mikrut*, so Singh's first offense OWI prosecution was completed to a valid adjudication. Therefore, this second prosecution solely for imposing additional penalties was prohibited absolutely under *Robinson v. Neil*, Double Jeopardy, and Wis. Stat. 345.52.

2. OUT OF STATE IMPLIED CONSENT SUSPENSIONS MAY NOT BE USED TO STATUTORILY ENHANCE OWI PENALTIES.

Singh also argues that a prior out of state administrative suspension may not be used to enhance an OWI conviction. This argument was not raised in the trial court. However, this is a facial attack on the constitutionality of Wis. Stat. 346.65(2)(am), and "a facial challenge is a matter of subject matter jurisdiction and cannot be waived." *State v. Bush, 2005 WI 103, ¶17, 283 Wis.2d 90, 699 N.W.2d 80.* Singh argues that the use of out of state driver license suspensions to increase mandatory penalties runs afoul of the Due Process Clause as explained in *Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).* Therefore, no crime was committed and Singh should never have been charged criminally with a second offense OWI.[3]

Prior violations are not elements of the underlying offense of operating while intoxicated. "The penalties for violation of OMVWI are contained in sec. 346.65(2), Stats. Repeated violations are subject to increasingly harsher penalties. This graduated penalty structure is nothing more than a penalty enhancer similar to a repeater statute which does not in any way alter the nature of the substantive offense, i.e., the prohibited conduct, but rather goes only to the question of punishment." *State v. McAllister, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982).*

Statutorily enhanced penalties for OWI may only be imposed based on elements or prior convictions. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at *490.* Out of state administrative suspensions are neither elements of the crime nor prior convictions. They certainly could be an appropriate sentencing factor for the circuit court to consider, but *Apprendi* prohibits their use for the purpose of *statutorily* increasing the *mandatory* penalties at sentencing since they are not elements of the offense.

In *State v. Carter, 2010 WI 132, 330 Wis. 2d 1, 794 N.W.2d 213*, the Wisconsin Supreme Court determined that out of state administrative suspensions "are convictions within the meaning of Wis. Stat. §§ 343.307(1)(d) and 340.01(9r)." *Carter* at ¶6. However, *Carter* only concerns **statutory construction** of state statutes. It provides no guidance on the **constitutional question** of whether an out of state suspension is a "prior conviction" under *Apprendi*.[4]

The meaning of "prior conviction" for *Apprendi* is under some debate relating to the procedural safeguards and level of reliability necessary in the prior court proceeding. However, no court has ever concluded that a purely executive branch administrative process, with no proceeding in a court of law or fact based adjudication by an actual judge under substantial burden of proof, could possibly constitute a "prior conviction" under *Apprendi*.[5]

Carter interpreted the definition of conviction under Wis. Stat. 340.01(9r) that is applicable only to the traffic code. This is a vastly broader statutory definition than the rule for criminal prosecutions generally in Wisconsin which requires a judgment in a court of competent jurisdiction for a 'conviction'. See Wis. Stat. 939.73 and 972.13. An administrative penalty is not a

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3 First offense OWI is a civil proceeding.

4 Neither *Carter* nor any cases interpreting it discuss *Apprendi*.

5 For example, in *People v. Towne, 44 Cal.4th 63(2008)*, the California Supreme Court determined that while *Apprendi* did permit use of prior incarcerations and parole status when reoffending as enhancement factors, the fact of a prior administrative parole revocation would not be acceptable.

'conviction' under the statutory definition of the general Wisconsin criminal statutes, so their use for statutorily enhancing mandatory penalties would certainly violate *Apprendi* for all criminal contexts other than OWI. Cases interpreting *Apprendi* have always referred to prior **court** conviction and have emphasized the need for some judicial record. "The Court stated that a judge's inquiry into the nature of a previous offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *State v. Long, 2009 WI 36, ¶58, 317 Wis. 2d 92, 765 N.W.2d 557.* Similarly, *McAllister* at *539* permitted enhancement based on prior convictions only because "such convictions have already been determined in the justice system...."

There is just no room in any "prior conviction" definition under *Apprendi* for a summary and entirely administrative action with no court or judicial branch judgment whatsoever. The Illinois Implied Consent suspension is a summary procedure, and therefore requires no burden of proof determination at all. No criminal constitutional rights, such as right to counsel or right to jury trial, are present. Simply, it is too lacking in a judicial record, substantial procedural safeguards, and significant indicia of reliability. Therefore, an out of state summary administrative driver license suspension is a 'fact other than a previous conviction'. The Wisconsin Supreme Court has already held that such suspensions are not elements of an OWI offense, so they simply cannot be used for statutory penalty enhancement. Since Singh's prior out of state summary suspension was neither an element of the crime charged nor a prior conviction, Singh could never have been charged with criminal second offense OWI. The portion of Wis. Stat. 343.65(2)(am) that permits statutory penalty enhancement on the basis of non-court adjudicated driver license suspensions is facially unconstitutional under *Apprendi* since prior suspensions have already been determined to not be elements of the crime.

CONCLUSION

For the foregoing reasons, Singh could never have been prosecuted for second offense OWI. This is the true regardless of any details of the charged incident or anything that transpired during this prosecution. Therefore, a writ of coram nobis vacating and dismissing this conviction is appropriate. Alternatively, a writ of mandamus is appropriate as well since the circuit court violated a clear duty by permitting this second prosecution.

Dated this 23rd day of July 2015,

Aman Deep Singh