17AP1609

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT FOUR

State of Wisconsin, Plaintiff-Respondent,

v.

Aman Deep Singh, Defendant-Appellant.

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OF WISCONSIN

Appeal No. 2017 AP 1609

ON APPEAL FROM DECISION AND ORDER DENYING MOTION TO VACATE JUDGMENT, FILED ON MAY 16, 2017,

THE HONORABLE STEVEN E. EHLKE, PRESIDING

(Dane County Case # 2004 CT 882)

Respectfully submitted:

AMAN DEEP SINGH

Defendant-Appellant

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CASES CITED

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs should adequately set forth the issues. Publication is not warranted because the case only involves applying settled law.

STATEMENT OF THE ISSUES

1) Is a violation of § 345.52(1) a cognizable § 973.13 claim? (The circuit court said "no".)
2) Was Singh's state conviction for OMVWI in excess of that authorized by law after Singh had already been convicted of OMVWI under a county ordinance for the same incident? (The circuit court said "no".)

STATEMENT OF THE FACTS AND CASE

In 2003, Singh was arrested, charged, convicted at trial and sentenced for OMVWI by Dane County. In 2004, the Dane County DA petitioned the court to vacate this conviction, citing a previously unknown Illinois implied consent license suspension. Singh was then recharged by the State of Wisconsin with second offense OMVWI. [R1] Singh was reconvicted. [R2] The sentence and civil penalties have long since been satisfied.

In 2015, Singh petitioned for a writ of *coram nobis* alleging that this second conviction violated his Double Jeopardy rights. The petition was denied, and affirmed on appeal. [R16] This court held that such a claim was not cognizable via *coram nobis*. (2015AP850-CR)

Later, the Wisconsin Supreme Court issued its decision in *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. Citing this opinion and proceeding now under § 973.13 instead of *coram nobis*, Singh filed a new motion alleging that the second conviction was in excess of law. [R18] The court denied this motion. [R22] Singh appeals. [R23]

ARGUMENT

I. SINGH HAS RAISED A COGNIZABLE § 973.13 CLAIM.

> **973.13 Excessive sentence, errors cured.** In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

Singh's motion to vacate argues that his double jeopardy/§345.52 grievance is cognizable under § 973.13. [R18:1] There is no procedural bar to § 973.13 motions. "As in *Flowers*, to allow the imposition of a criminal penalty where none is authorized by the legislature, simply on the basis of waiver, would ignore the dictate of § 973.13." *State v. Hanson*, 2001 WI 70, ¶ 22, 244 Wis. 2d 405, 416, 628 N.W.2d 759. The first question here is whether Singh's claim is of a nature that is recognized under this statute. If so, he may litigate it at any time. Singh argues that it is, based on the principles explained in *Hanson*.

The defendant in *Hanson* was convicted of operating while revoked as a habitual traffic offender(HTO). After committing the violation, he successfully petitioned the Department of Transportation to rescind his HTO status. On appeal, the Wisconsin Supreme Court concluded that a criminal conviction under these circumstances was contrary to the OAR statutory scheme. This situation brought the conviction under the ambit of § 973.13, despite the sentence imposed being well within the maximum penalties. "As a consequence of the rescission of Hanson's HTO status, we conclude that the circuit court could not properly impose a criminal penalty based solely upon that status. The imposition of a criminal penalty based solely upon that status would be in excess of that authorized by the legislature and must be declared void pursuant to Wis. Stat. § 973.13." *Hanson* at ¶ 38.

Analogous to the *Hanson* holding that the statutory OAR scheme does not permit a state criminal conviction following rescission of HTO status, the statutory OMVWI scheme does not permit a second offense conviction following a first offense conviction for the same incident.

345.52 No double prosecution.

(1) A judgment on the merits in a traffic ordinance action bars any proceeding under a state statute for the same violation. A judgment on the merits in an action under a state statute bars any proceeding under a traffic ordinance enacted in conformity with the state statute for the same violation.

Once a first offense OMVWI reaches a judgment on the merits, the state no longer has the authority to criminally prosecute a second OMVWI based on the same incident. It is in excess of that authorized by law, and relief under § 973.13 is available at any time.

The trial court found [R22:5] that 973.13 did not apply here because the sentence imposed did not exceed the statutory maximum for a second offense OMVWI. *Hanson* shows why this is off the mark. The sentence that Hanson received was also within the statutory limits for the offense of conviction. Instead, *Hanson* held that an enhanced traffic conviction that is contrary to the statutory scheme and for which the state lacks authority to charge is also a situation in which 973.13 relief is available regardless of the severity of actual sentence imposed; and the state recharging an OMVWI after a judgment on the merits was reached in a county first offense prosecution is contrary to the statutory scheme per § 345.52.

The trial court also held that Singh had already litigated this issue in his petition for *coram nobis*.[R22:5] However, this court declined to reach the merits there because it determined that was not the appropriate procedural mechanism. This court specifically declined to address Singh's claim under § 973.13. [R16:4, fn4] Indeed, fn4 indicated that the appropriate step forward was to start over in the circuit court as a §973.13 motion. In any case, the subsequent opinion in *Booth* is sufficient reason for re-raising the claim because it changes the merits as explained in section II.

The trial court also determined that Singh's objection based on § 345.52 goes to the competency of the second offense conviction and is therefore untimely because 13 years have passed. While this might otherwise be true, the reasoning does not apply here for two reasons: 1) Singh's claim falls under § 973.13 and therefore is not subject to untimeliness; and 2) Singh could not have objected earlier ... prior to *Booth*, relief was barred under *Rohner* and *Jensen* as explained in the next section so any earlier motion would have been frivolous. Singh filed this motion immediately after *Booth* was decided.

II. SINGH'S SECOND OFFENSE CONVICTION IS IN EXCESS OF LAW.

A first offense OMVWI where there is an unknown prior offense was previously considered void for lack of subject matter jurisdiction. Since it was void, no valid judgment on the merits could result and the state was permitted to later charge a second offense. "As the State points out in its *amicus curiae* brief, a municipal court does not have subject matter jurisdiction to try and convict a criminal operating while intoxicated. Any such municipal action is null and void. See *County of Walworth v. Rohner*, 108 Wis. 2d 713, 722, 324 N.W.2d 682, 686 (1982); *State v. Banks*, 105 Wis. 2d 32, 40-41, 313 N.W.2d 67, 71 (1981). As no jeopardy has attached as a result of municipal court action, the State may proceed regardless of what the municipal attorney or the municipal court does. The municipal judgment having no force or effect, it is as if it never took place." *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 99, 516 N.W.2d 4 (Ct. App. 1994)

After Singh's prior *coram nobis* appeal was decided, the Wisconsin Supreme Court abrogated the reasoning of *Rohner* and *Jensen* in *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. *Booth* held a court's ability to enter judgment on a mischarged OWI offense was properly understood to affect competency to exercise subject matter jurisdiction, granted by WIS. STAT. § 346.65 in this context, rather than subject matter jurisdiction itself.

Booth, 370 Wis. 2d 595, ¶¶19, 22. Because a lack of competency to exercise subject matter jurisdiction is a non-jurisdictional defect, *Booth* held an objection to the circuit court's lack of competency on a mischarged OWI offense may be forfeited if not timely raised in the circuit court. See *id.*, ¶¶14, 25. *Booth* thus abrogated *Rohner*'s holding that a judgment resulting from a mischarged OWI offense was void for lack of subject matter jurisdiction. *Id.*, ¶15.

Under *Booth*, there was a competency defect in Singh's first offense prosecution, but the conviction was still a judgment on the merits and the state had no authority to proceed with a second prosecution. The trial court held [R22:4] that retrial was permitted because a timely competency objection was raised. Singh argues that this is not true because the county could only make a timely competency objection **before** conviction. Had the county raised this issue before trial, it could have successfully dismissed and recharged. However, once jeopardy attached and the trial was completed, that is determinative as far as the state's lack of authority to recharge.

Citing *Rohner*, the trial court held that no jeopardy can attach if there is a competency violation. [R22:4] This is simply not true. *Rohner* and *Jensen* only held that jeopardy cannot attach if there is a subject matter jurisdiction defect because the entire proceeding is void. ""Jeopardy" means exposure to the risk of determination of guilt." *State v. Seefeldt*, 2003 WI 47, ¶ 16, 261 Wis. 2d 383, 661 NW2d 822. Unlike a subject matter jurisdiction defect, a competency objection may be waived so Singh was exposed to this risk of determination of guilt in the first offense proceeding. Successive convictions to increase penalties for the same offense is quintessentially what Double Jeopardy prohibits. Because of this, the only timely competency objection that the county could make must be before jeopardy attaches.

If this occurred in a municipal court as is typical of ordinance violations, the county could not proceed. "For whatever reason, perhaps inartful drafting, the municipality has been afforded no right by statute to seek relief from judgments in municipal actions." *Jensen* at 96. It is not

clear what provision of § 806.07 authorizes a county to raise a post-verdict competency objection either, especially given that the verdict – a conviction – was not adverse to the county in any way. "...the general rule that if a benefit received is dependent upon, or was granted as a condition of, the order or judgment attacked, the party receiving that benefit ought not be permitted to carry on his challenge." *Estreen v. Bluhm*, 79 Wis. 2d 142, 150-51, 255 N.W.2d 473 (1977) [The first offense conviction might be considered adverse to the state, but the state was not a party to the first proceeding and has no right to seek relief from that judgment.] Simply put, the county got the judgment it set out for, so it is an oxymoron to permit it *relief* after verdict. Similarly, since the post-verdict dismissal was not adverse to Singh, he also had no ability to appeal that decision on any ground whatsoever. Just as Singh could not challenge the post-verdict dismissal, the County could not challenge its own conviction after the fact either.

A post-verdict motion for relief is a collateral challenge, and caselaw does not permit competency challenges to be raised for the first time via collateral relief. "*Mueller* and *G.L.K.* conflict to the extent that the former allows competency to be raised for the first time on direct appeal (**but not collaterally**) and the latter does not allow unpreserved competency challenges to be raised for the first time on appeal as of right. We conclude that *G.L.K.* states the better rule: the waiver rule applies to challenges to the circuit court's competency." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 29, 273 Wis.2d 76, 681 N.W.2d 190. Dane County could never appeal a conviction it successfully secured so it could never collaterally challenge competency post-verdict either.

In any event, the competency issue is a red herring here. Competency is not a jurisdictional defect; so even if the first court lacked it, the conviction is still every bit a "judgment on the merits". In fact, because jeopardy had attached, the post-verdict dismissal functions as an acquittal, which is also a judgment on the merits. Competency has no relevance to Singh's § 345.52(1) claim because a lack of competency does not affect the only two facts that matter: 1) Singh was placed

in jeopardy, and 2) a judgment on the merits was issued. [A second trial might only have been permitted if Singh, not the county, had raised the competency objection post-verdict because affirmatively doing so himself would have negated his own jeopardy.]

A prosecutor cannot do an end-run around § 345.52(1) by petitioning for a post-conviction dismissal as was done here because double jeopardy protections apply with equal force to convictions and acquittals. For example, had Singh been found "not guilty" in the first trial instead, the state would have had no authority to seek retrial by moving to dismiss that judgment either on competency grounds. The state has no right to appeal if it results in a retrial following a post-verdict dismissal once jeopardy has attached. § 974.05(1)(a). [State may only appeal "Final order or judgment adverse to the state, whether following a trial or a plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy."]

CONCLUSION

§ 345.52(1) barred the state from prosecuting Singh for OMVWI after he was placed in jeopardy, tried and convicted by Dane County for the same violation. The county had no statutory authority to raise a competency objection after verdict. Even if it did, jeopardy had attached so the post-verdict dismissal operates as a functional acquittal. Once attached, a competency defect does not negate jeopardy. Either way, this second prosecution was in excess of that allowed by law and must be vacated pursuant to § 973.13.

Dated this 15th day of January 2018,

Aman Deep Singh