STATE OF WISCONSIN
IN SUPREME COURT

CITY OF EAU CLAIRE,

Plaintiff-Appellant,

v. Appeal No.: 15 AP 869

MELISSA M. BOOTH
n/k/a/ MELISSA M. BOOTH BRITTON,

Defendant-Respondent.

AMICUS BRIEF

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF EAU CLAIRE COUNTY CASE NO 2014GF804 THE HONORABLE WILLIAM M. GABLER PRESIDING

Respectfully submitted,

WACDL, Amicus Curiae

TRACEY WOOD & ASSOCIATES
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: SARAH SCHMEISER
State Bar No. 1037381

TABLE OF CONTENTS

IDENTITY AND INTERESTS OF AMICI CURIAE

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is an organization composed of criminal defense attorneys practicing in the State of Wisconsin with a membership of both private and public defender attorneys totaling more than 400 attorneys and whose members appear regularly before all courts of this State. WACDL, by its charter, is organized to foster and maintain the integrity of the criminal defense bar, to promote the proper administration of criminal justice, and to uphold the protection of individual rights and due process of law.

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

Does a circuit court lack subject matter jurisdiction to enter an OWI 1st offense civil judgment if a defendant has a prior OWI conviction?

Can a driver be prosecuted for a first offense OWI when he or she has a prior OWI within the statutory time period?

STANDARD OF REVIEW
AND STATEMENT OF CASE AND FACTS

Amici Curiae adopts the defendant-respondent's Statement of the Case and Facts. There is apparently no dispute as to the facts in this case.

Where material facts are undisputed, the question of whether a judgment is void for lack of jurisdiction is a matter of law that is reviewed de novo. *State ex rel. R.G. v. W.M.B.,* 159 Wis. 2d 662, 666, 465 N.W.2d 221, 223 (Ct. App. 1990) citing to *State v. Big John*, 146 Wis. 2d 741, 748, 432 N.W.2d 576, 579 (1988).

ARGUMENT

The two issues raised here are intertwined but separate from each other. One is whether a court has subject matter jurisdiction over a first offense OWI when the driver has a prior offense within the counting period. The other question is whether a municipality can bring a first offense OWI ticket when the driver has a prior offense within the counting period.

I. There is a lack of subject matter jurisdiction when a ticket is written, but the charge must be brought as a crime under the law because there is a prior offense countable under the statute.

A. *County of Walworth v. Rohner* is still good law.

If *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982) remains good law, then the court here lacked subject matter jurisdiction. *Rohner* was decided in 1982 by the Wisconsin Supreme Court. In that case, the defendant was cited for first offense operating while intoxicated in 1980 by the County of Walworth. *Id.* at 715. However, he had a previous conviction for operating while intoxicated in 1979. *Id.* Prior to the start of the trial, the defendant moved to dismiss the citation for lack of subject matter jurisdiction, because there was a prior conviction. *Id.* Whether the County knew prior to that point that Mr. Rohner had a prior conviction is not stated in the decision, but the County then

requested to be able to proceed by charging a criminal second offense operating while intoxicated; and the trial court denied that motion. *Id.* The Court held that *"*the state has exclusive jurisdiction over a second offense for drunk driving.*" Id.* at 716.

The Court went on to explain its reasoning by holding up the language of the statute as mandatory, pointing to prior cases including *State v. Banks* and *City of Lodi v. Hine*, and citing legislative intent. *Id.* at 717-8. 105 Wis. 2d 32, 39, 313 N.W.2d 67 (1981); 107 Wis. 2d 118, 122-23, 318 N.W.2d 383 (1982). Ultimately, the Wisconsin Supreme Court held that *"*Walworth 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.*" Id.* at 721. The conviction for a civil drunk driving was declared null and void and ordered vacated. The Court noted that because the judgment was void, the criminal charge could be brought against Mr. Rohner.

B. *Village of Trempealeau v. Mikrut* does not supersede, abrogate or overrule *Rohner*

In 2004, the Wisconsin Supreme Court decided *Village of Trempealeau v. Mikrut*, 273 Wis. 2d 76, 681 N.W.2d 190 (2004). That case involved a salvage yard and numerous citations issued to the owner of the salvage yard by the Village, resulting in a large

monetary forfeiture. *Id*. at 84. After moving for reconsideration and losing on appeal, Mr. Mikrut challenged whether the court was competent to proceed against him based on issuing traffic citations when there were ordinance violations the Village could have pursued instead. *Id*. at 85. The situation there is not analogous to this situation where the question is whether a second or subsequent operating while intoxicated charge can be brought as a civil offense instead of a criminal offense. To some extent, it is actually the opposite. Mr. Mikrut was challenging whether the Village could prosecute a traffic citation in the circuit court when an ordinance was available.

Further, *Mikrut* does not address or acknowledge *Rohner* in any way; *Rohner* is not cited in *Mikrut*. *Mikrut* was addressing some statutes and determining whether the circuit court had competency to proceed against Mr. Mikrut. *Id.* at 100-01. *Mikrut* holds that, *if* there was a lack of competency, that challenge was waived by *Mikrut,* because he did not raise it in circuit court or at any point until six months after the Court of Appeals decision against him. *Id*. at 84 and 101. Further, the Court held that competency is a narrower concept and involves a lesser power than subject matter jurisdiction. *Id.* at 89, citations omitted. Consequently, "[i]f 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." *Id*. citing *Mueller v. Brunn,* 105 Wis. 2d 171, 177-78, 313 N.W.2d 790 (1982).

The distinction is that between the two cases there was no subject matter jurisdiction in this case because the City has no discretion to charge under an ordinance when there is criminal jurisdiction. This Court so held in *Rohner*, and that case remains unreversed. In *Rohner*, this Court clearly lists the reasons why jurisdiction resides in the state alone, citing to Wis. Stat. § 346.65(2)(a) and the use of the mandatory word "shall", the reasoning in prior case law and the legislative intent, concluding that the state has exclusive jurisdiction over a second offense for drunk driving. *Rohner* at 716. The question here is whether the *City* was without jurisdiction. It was.

A survey of drunk driving cases citing to either *Rohner* or *Mikrut* uphold this argument. *State v. Krahn*[1], attached, upheld *Rohner* and its reasoning. *Clark County v. Potts*[2], attached, overturned a circuit court decision declining to vacate a judgment in a similar situation and upheld *Rohner*, further rejecting arguments

[1] Unpublished but citable pursuant to *Wis. Stat.* §809.23(3), 346 Wis. 2d 281 (Ct. App. 2013).
[2] Unpublished but citable pursuant to *Wis. Stat.* §809.23(3), 347 Wis. 2d 551 (Ct. App. 2013).

similar to those cited in *Mikrut* (rejecting claims that the request to vacate was untimely and citing to *Neylan v. Vorwald*, 124 Wis. 2d 85, 368 N.W.2d 648 (1985) for the proposition that a motion to vacate a void judgment can be made at any time). *State v. Strohman*[3], attached, upheld *Rohner* and further cited to *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994) for the proposition that because there was no subject matter jurisdiction and the matter was null and void, jeopardy did not attach. Consequently, Mr. Strohman could be properly charged for the criminal offense. *City of Stevens Point v. Lowery*[4], attached, also upheld *Rohner*, and analyzed application of *Mikrut* to *Rohner*. That case held that reliance on *Mikrut* in such cases is misplaced. *Id*. at ¶11. There the Court held that the City's argument, following *Mikrut*, that the defendant had lost competency by failing to previously raise the issue failed because an objection to subject matter jurisdiction can be brought at any time, and a void judgment cannot be validated by consent, ratification, forfeiture or estoppel. *Id.* at ¶13. The court held that in *Mikrut*, the Supreme Court was addressing non-compliance with statutory requirements regarding

[3] Unpublished but citable as persuasive authority pursuant to *Wis. Stat.* §809.23(3), 361 Wis. 2d 286 (Ct. App. 2015).
[4] Unpublished but citable as persuasive authority pursuant to *Wis. Stat.* §809.23(3d), 361 Wis. 2d 285 (Ct. App. 2015).

cases validly before the Court, but in situations like *Rohner*, the case was never validly before the Court in the first place. *Id*. at ¶12.

Finally, there is *State v. Navrestad*[5], attached. There the single judge unpublished decision held that *Mikrut* did supersede *Rohner* and refused to vacate the conviction for a civil drunk driving that should have been charged as criminal case. That is the only case that has held *Rohner* is no longer good law, and it is an unpublished, single judge Court of Appeals decision. It can be cited as persuasive authority under current statute, but it is not binding on any court. *Wis. Stat.* §809.23(3)(b). As described above, all case law except one unpublished decision upholds *Rohner* as good law. However, *Mikrut* has been called into doubt, declined to be extended and distinguished by at least six cases, including *State v. Lowery*, discussed above, which does also address both *Rohner* and *Mikrut*.

The statutes and case law cited in *Rohner*, have not substantially changed since that time. The specific, on-point reasoning in that case is good law and should be applied to this case. Legislative intent and statutory authority can deprive a court of subject matter jurisdiction. *Kett v. Cmty. Credit Plan, Inc.* 222 Wis. 2d 117, 129, 586 N.W. 2d 68, 74 (Ct. App. 1998) *aff'd.* 228 Wis. 2d

[5] Unpublished but citable as persuasive authority pursuant to *Wis. Stat.* §809.23(3), 364 Wis. 2d 759 (Ct. App. 2015).

1, 596 N.W.2d 786 (1999). In *Kett*, the Court held that statutory authority based on legislative intent can create an exception to the general rule that a defect in venue is not jurisdictional and so does not affect the validity of a judgment. *Id. Rohner* and caselaw following have held that the legislature, in enacting the counting statute for OWI cases, requires that all second and subsequent offenses under that statute be brought as criminal charges. Any charge not brought in such a manner is void for lack of subject matter jurisdiction.

If this were not so, then an erroneously brought municipal citation for operating while intoxicated as a first offense could be challenged, but it would not be actually void. If the error were discovered after the close of the case, the prosecutor could not simply declare the erroneous judgment void and properly bring prosecution for a criminal charge. That is the power the prosecution currently has but which would be removed by any ruling that there is subject matter jurisdiction but loss of competency. So, while it seems

contrary to public policy to allow a drunk driver to "escape" prosecution for a prior offense, the legislative intent is actually furthered by ensuring that prosecution can be properly brought. In a case such as *Rohner* that would mean that the prosecutor would be precluded from proceeding against the offender criminally and would be stuck with the results of the case as a first offense. Therefore, the fact that *Rohner* held that legislative intent and statutory authority led to a ruling that there was no subject matter jurisdiction over the individual, in spite of the general rule that circuit courts have original jurisdiction, furthers the legislative intent to aggressively and properly prosecute those accused of drunk driving.

This is precisely the point that is made when the Wisconsin Constitution, art. VII § 8 states that circuit court has original jurisdiction over all matters criminal and civil, except as otherwise provided by law. The law that applies the exception can be statutory, as provided by *Kett, supra*. Wis. Stat. § 346.65 establishes an escalating penalty scheme for those convicted of drunk driving under Wis. Stat. § 346.63. The language used is mandatory, and subsequent case law has emphasized the requirement that any second offense within the counting period of Wis. Stat. § 346.65 be brought by the State as a criminal offense. See *City of Lodi v. Hine*, 107 Wis.

2d 118, 122-23, 318 N.W.2d 383 (1982) and *State v. Banks*, 105 Wis. 2d 32, 39, 313 N.W.2d 67 (1981). The power to regulate criminal conduct was removed from local governments and can only be exercised by the State. *Rohner* at 719. Nothing in *Mikrut* has overruled the statutes and policy as outlined by *Rohner*. Nor has there been a policy shift to either return criminal jurisdiction to municipalities or to allow a person with a prior offense within the counting period to be pursued civilly, rather than as a criminal offender when accused again of drunk driving.

II. A driver cannot be prosecuted for first offense drunk driving when he or she has a prior offense within the counting period.

If it is not mandatory to charge a second or subsequent offense for operating while intoxicated as a criminal offense, then a prosecutor could choose to reduce a criminal case to a civil ticket or could choose to charge the case as a civil offense even when there is a prior offense. A prosecutor would then have discretion as to whether to charge a criminal or civil case, which is what the Court was trying to avoid in the *Rohner* decision. A decision overturning *Rohner* would mean that discretion could be exercised and a civil ticket brought rather than a criminal charge. Further, upon completion of that case, if a state prosecutor discovered the error of the municipal prosecutor, there would still be a judgment and, if not

automatically void of lack of subject matter jurisdiction, the prosecutor could not pursue a criminal charge.

The City argues that it would be unfair and absurd to void the judgment at this late date and after other convictions have been entered against Ms. Booth. However, the City did not punish Ms. Booth for a criminal offense in 1992, presumably because the City was unaware of her prior conviction in Minnesota. Had the City not prosecuted and instead the State instituted a criminal proceeding, Ms. Booth would have had the right to an attorney even if she could not afford one. She would have had the absolute right to a jury trial, and the State would have had to prove the charge against her beyond reasonable doubt. Instead, the City cited her for a traffic ticket and could even have asked for a default judgment to be entered without Ms. Booth being present[6]. The City's mistake could well cut both ways; perhaps there was an iron clad defense that any defense attorney could have recognized at the time but which Ms. Booth did

[6] The idea that a driver be responsible for providing information to the prosecutor about prior convictions is absurd. Would any prosecutor really rely on the word of a person cited for drunk driving to determine whether they did or did not have prior convictions? More importantly, a person has a Fifth Amendment right to remain silent if any speech or admission could lead to a criminal charge.

not raise because it was a just a traffic ticket. The circumstances simply cannot be reconstructed at this time. The City cannot say it would have been as easy to convict Booth of a criminal charge as a traffic citation, as the burdens and responsibilities are far different. In the escalating scheme of penalties established by Wisconsin law, the value of increasing penalties and requiring criminal prosecution of second and subsequent offenses is not outweighed by the fact that on rare occasions a prior improperly brought ticket will be void by law.

The prosecutor, whether municipal or State, has the burden to properly bring a charge. In this very limited circumstance, where the legislature has determined it is most important to be able to prosecute alleged drunk drivers with escalating penalties and criminal charges for higher level offenses, if the prosecutor does not meet the burden to properly bring a charge, the judgment is void for lack of subject matter jurisdiction. This is a rare occurrence. Currently the computerization of records, the sharing of data between states and the overall easy access to information means that prosecutors are generally easily able to determine how many prior offenses for drunk driving, if any, are on a driver's record. However, in the past electronic records were not available, and sharing of information between states was more difficult and slower.

Consequently, prosecutors may have been mistaken about whether a person had a prior countable offense under the statute.

Because Wisconsin law mandates looking back to January 1, 1989 to determine what prior convictions are countable, old convictions are brought into the analysis. That does not change the burden on the prosecutor to properly bring charges. Again, the legislative intent and policy is to keep all prior convictions for drunk driving on the driver record and hold them against a driver in an escalating scheme. This policy is strengthened by the ability to bring in out-of-state convictions currently, even when they were not previously used against a person because of the lack of information. However, a prosecutor cannot choose to use it or not at his or her discretion. The law mandates that the prior conviction be counted properly. This results in more prior offenses being used against driver and tougher escalating penalties. On rare occasions it also has the effect of requiring a judgment be declared void for lack of jurisdiction when the case was improperly charged. Only when the date of the incident is outside the statute of limitations will that result in a potential prior offense not counting against a driver.

CONCLUSION

The ruling of the circuit court should be upheld. For the reasons stated in this Amicus Brief, WACDL respectfully requests the Wisconsin Supreme Court find that the City lacked subject matter jurisdiction to ticket Ms. Booth for a first offense OWI and find that a driver must be charged with a criminal second offense when there is a prior offense within the statutory counting period.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

WACDL, Amicus Curiae

TRACEY WOOD & ASSOCIATES
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: _____
SARAH SCHMEISER
State Bar No. 1037381

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. A copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) is included in the appendix. The length of this brief is 2891 words.

I also certify I have submitted an electronic copy of this brief, which complies with the requirements of Wisconsin Statutes § 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this _____ day of _____, 2016.

Signed,

_____
SARAH M. SCHMEISER
State Bar No. 1037381

APPENDIX TABLE OF CONTENTS