COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP366 **Cir. Ct. No. 2015GF773**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

EAU CLAIRE COUNTY SHERIFF'S DEPARTMENT,

PLAINTIFF-RESPONDENT,

V.

DUANE D. COLLIER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: BRIAN H. WRIGHT, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Duane Collier appeals an order denying his motion to vacate a 1992 Eau Claire County Circuit Court judgment of conviction for first-offense operating while intoxicated (OWI). He argues this judgment should be

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

vacated because the court lacked competency to exercise subject matter jurisdiction and convict him of first-offense OWI when the offense in question should have been properly charged as a criminal second-offense OWI. Collier also argues the Eau Claire County Sheriff's Department (the County) lacked authority to prosecute the matter. We conclude Collier forfeited his right to challenge both the court's competency to proceed and the County's authority to prosecute this case and, accordingly, affirm.

BACKGROUND

¶2 On July 14, 1992, the Eau Claire County Circuit Court entered a civil forfeiture judgment against Collier for first-offense OWI and revoked his operator's license for six months.[2] However, pursuant to WIS. STAT. § 343.307(1)(d) (1989-90), the State of Wisconsin should have instead criminally charged Collier with second-offense OWI because Collier was convicted of first-offense OWI in Minnesota on February 5, 1992.

¶3 Collier pled guilty to third-offense OWI in Eau Claire County in 2009 and was charged with fourth-offense OWI, within five years of another offense, in 2012 in Dane County. The latter case is unresolved as of this appeal. The 1992 Minnesota and Eau Claire convictions were counted as penalty enhancers for the 2009 and 2012 offenses.

¶4 On June 30, 2015, Collier filed a motion in Eau Claire County Circuit Court to vacate the 1992 Eau Claire conviction. Collier argued the circuit

[2] Collier was identified as Duane Dukeson Mansour on the citation for OWI issued by the County on May 26, 1992. This handwritten ticket is all that remains of the case file for the 1992 Eau Claire conviction.

court could not enter judgment in the 1992 case under ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), because it did not possess subject matter jurisdiction over the mischarged OWI offense. The circuit court denied the motion.[3] Collier appeals.

DISCUSSION

I. Competency

¶5 After the circuit court denied Collier's motion to vacate, but while this appeal was pending, our supreme court decided ***City of Eau Claire v. Booth***, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738. ***Booth*** held a circuit 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. Our supreme court, however, specifically "le[ft] intact ***Rohner***'s holding 'that the state has exclusive jurisdiction over a second offense for drunk driving'" as well as reaffirming this state's

[3] The circuit court was persuaded by ***State v. Navrestad***, No. 2014AP2273, unpublished slip op. (WI App July 2, 2015), in concluding the 1992 Eau Claire judgment was not void. ***Navrestad*** follows the same line of reasoning ultimately adopted by our supreme court in ***City of Eau Claire v. Booth***, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, regarding circuit court competency to enter judgment on mischarged OWIs. Collier and the County have fully argued ***Booth*** in their submissions to this court.

"policy to strictly enforce drunk driving laws." ***Id.*** (citing ***Rohner***, 108 Wis. 2d at 716, 721). Whether a circuit court has lost competency and whether forfeiture applies are questions of law that we independently review. ***Id.***, ¶6.

¶6 Collier moved the circuit court to vacate the 1992 Eau Claire conviction pursuant to WIS. STAT. § 806.07(1)(d), claiming it was void. Collier argues, and the County concedes, the circuit court lacked competency to proceed to judgment. Collier's Minnesota conviction should have been counted under Wisconsin's escalating OWI penalty scheme and resulted in a mandatory criminal charge in the 1992 Eau Claire action, rather than a civil forfeiture. *See* ***Booth***, 370 Wis. 2d 595, ¶¶22-23. The parties instead dispute whether Collier forfeited any objection to lack of competency.

¶7 The facts of Collier's case are almost identical to those of ***Booth***. The defendant in ***Booth*** was convicted of first-offense OWI in Eau Claire in 1992 when she should have been charged with second-offense OWI due to a prior Minnesota OWI conviction. ***Id.***, ¶2. She moved to vacate the 1992 offense in 2014, twenty-two years after the judgment was rendered, while she had seventh-, eighth-, and ninth-offense OWI charges pending against her. ***Id.***, ¶3. Under these facts, our supreme court concluded the defendant forfeited an objection to the circuit court's lack of competency in entering the 1992 conviction, stating that the "considerable delay in raising the issue suggests an attempt to play fast and loose with the court system, which is something this court frowns upon." ***Id.***, ¶25. Collier likewise waited twenty-three years before bringing a motion to vacate and only did so with a fourth-offense OWI pending in Dane County. Similarly, we conclude Collier forfeited his objection to the court's lack of competency to proceed to judgment on the 1992 Eau Claire conviction because the objection was filed too late and under questionable circumstances.

¶8 Collier claims he could not have forfeited the objection because there is nothing in the record indicating he knew or should have earlier known about the 1992 Eau Claire conviction or its procedural deficiencies.[4] His argument is unavailing. Collier certainly would have known about the 1992 Eau Claire judgment when it resulted in a civil forfeiture and the suspension of his operator's license for six months. *See* WIS. STAT. § 343.30(1q)(b), § 346.65(2) (1989-90). Collier also cannot claim he was oblivious to the 1992 Eau Claire conviction because he pled guilty to the 2009 third-offense conviction for OWI, in which both the Minnesota and Eau Claire convictions were counted.

¶9 We also reject Collier's argument in his reply brief that the County must prove he was aware of and knowingly surrendered his challenge to competency. Collier relies on the use of the term "waiver" to support his argument, *see* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶16, 28, 273 Wis. 2d 76, 681 N.W.2d 190273 Wis. 2d 76, but ***Booth*** refers to "forfeiture" of a challenge to circuit court competency, ***Booth***, 370 Wis. 2d 595, ¶¶6, 25. "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.' Properly construed, although ***Mikrut*** says 'waiver' it means 'forfeiture.'" ***Booth***, 370 Wis. 2d 595, ¶11 n.5 (quoting ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612). As such, Collier has forfeited his objection, and the

[4] On this point, Collier also alleges it would violate due process to hold a pro se defendant without notice responsible for raising an objection to competency at the time of the 1992 Eau Claire conviction. This constitutional argument is unsupported by citations to facts in the record and legally undeveloped, and we shall not address it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

County had no obligation to prove Collier was aware of and knowingly failed to earlier assert his objection to competency.

II. Authority to Prosecute

¶10 Collier also argues the County lacked statutory authority to charge and prosecute the 1992 Eau Claire conviction under ***Rohner***. Collier claims that because statutory intent clearly indicates the State has exclusive jurisdiction to charge second-offense OWI, *see* ***Rohner***, 108 Wis. 2d at 718, the County acted without force of law when it improperly charged him with first-offense OWI. He argues voiding an improper charge would allow the State to re-prosecute the case rather than be left with an incorrectly charged offense and a lower penalty.

¶11 We reject Collier's argument. First, vacating Collier's 1992 Eau Claire conviction is inconsistent with proper OWI enforcement policy. Under virtually identical circumstances in ***Booth***, our supreme court allowed an erroneously entered conviction for first-offense OWI to stand, despite the circuit court's lack of competency in entering the judgment and the City of Eau Claire mischarging the OWI offense in the first instance. *See* ***Booth***, 370 Wis. 2d 595, ¶¶13, 24-25. The court stated that dismissing the defendant's "1992 conviction with prejudice would do nothing to further our state's policy of strictly enforcing OWI laws" because the dismissed offense could neither be recharged nor counted for the purposes of future OWI convictions.[5] ***Id.***, ¶15 n.9. Vacating Collier's conviction for the reasons he argues, whether with or without prejudice, would

[5] This court may not dismiss a statement in a supreme court decision by concluding it is dictum. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

allow defendants to bypass a forfeited competency challenge and effectively nullify ***Booth***.

¶12 Second, there are significant factual differences between ***Booth*** and ***Rohner***. In ***Rohner***, the prosecutor for Walworth County, knowing the defendant had a prior OWI conviction, chose to prosecute a first-offense OWI to avoid imposition of court costs for dismissing the action and filing a complaint charging a second-offense OWI on the morning of trial. ***Rohner***, 108 Wis. 2d at 715; *see also* ***Booth***, 370 Wis. 2d 595, ¶9. In ***Booth***, our supreme court noted ***Rohner*** "did not appear to involve an unknown out-of-state prior OWI conviction" unlike the circumstances in ***Booth***. ***Booth***, 370 Wis. 2d 595, ¶13 n.6 (citing ***Rohner***, 108 Wis. 2d at 715). The supreme court also noted that the defendant in ***Rohner*** objected to the mischarged OWI "in a timely manner by raising it in the original circuit court action instead of waiting 22 years and many OWI convictions later." ***Id.*** (citing ***Rohner*** 108 Wis. 2d at 715). Summarizing and ultimately affirming the ***Rohner*** court's reasoning, separate from its reliance on jurisdiction, our supreme court stated "under our OWI statutes, a prosecutor has no discretion to charge what is factually a second-offense OWI as a first-offense municipal ordinance OWI." ***Id.***, ¶10 (citing ***Rohner***, 108 Wis. 2d at 721).

¶13 We read ***Rohner***, in light of ***Booth***, to hold a prosecutor has no discretion to intentionally ignore a prior OWI offense when charging a subsequent OWI violation. *See* ***Rohner***, 108 Wis. 2d at 715, 721; ***Booth***, 370 Wis. 2d 595, ¶¶10, 15. Additionally, a defendant may forfeit a challenge to an OWI judgment charged and prosecuted without statutory authority if the challenge was not timely brought and the conviction was not a result of the improper use of prosecutorial discretion. *See* ***Booth***, 370 Wis. 2d 595, ¶¶15, 23-25; ***Rohner***, 108 Wis. 2d at 717, 721-22. Applying these principles to the instant case, Collier forfeited any

challenge to the County's authority to charge and prosecute the 1992 Eau Claire OWI offense.

¶14 Collier nevertheless contends his case is indistinguishable from ***Rohner*** because the County produced no evidence that it was unaware of the prior Minnesota conviction. He baldly asserts that lack of evidence permits us to assume "the prosecution was aware of that prior offense and proceeded as a first offense anyway."

¶15 Collier's position is baseless. He incorrectly argues the County had the burden to prove it did not know of his prior Minnesota conviction when it argued he forfeited his objection. The burden of proof in a motion to vacate is on the moving party. ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 200, 496 N.W.2d 57 (1993). Collier also cites no evidence to show the County was aware of the Minnesota OWI conviction when it prosecuted the offense. Instead, Collier merely asserts that "[w]hat the County knew is an unknown." The circuit court found at the motion hearing that the County had no knowledge of the prior OWI conviction in Minnesota when it charged Collier of first-offense OWI in Wisconsin. Collier does not argue that finding is clearly erroneous. *See* WIS. STAT. § 805.17(2). He cannot carry his burden.

¶16 Collier forfeited his objections to the circuit court's lack of competency to proceed to judgment on the 1992 Eau Claire conviction and the County's lack of authority to prosecute that action. We therefore conclude the circuit court properly denied Collier's motion to vacate the 1992 Eau Claire conviction.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.