

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1294

Cir. Ct. No. 1996TR1557

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF PIERCE,

PLAINTIFF-RESPONDENT,

V.

ROGER J. SHULKA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.¹ Roger Shulka appeals an order denying his motion to reopen and dismiss his 1997 conviction for operating while intoxicated, first offense. Shulka argues the 1997 Pierce County conviction was void because the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

County charged the offense as a civil forfeiture first offense when it was actually his second offense. Shulka argues that an OWI second offense must be charged criminally and therefore the circuit court lacked jurisdiction to enter a civil conviction. Because the circuit court lacked jurisdiction to try a second offense OWI as a first offense, the judgment is void and must be vacated. We therefore reverse and remand with directions that the conviction be vacated.

BACKGROUND

¶2 Shulka was convicted of an OWI in North Dakota in April of 1996. This was his first OWI conviction. On September 22, 1996, Shulka received an OWI citation in Pierce County. Unaware of the prior conviction in North Dakota, Pierce County charged the case as a civil forfeiture, first offense. On February 21, 1997, Shulka was convicted in Pierce County for the OWI, first offense.²

¶3 In 2006, Shulka filed a motion with the Pierce County Circuit Court to reopen and dismiss the 1997 conviction, alleging the court lacked jurisdiction. Shulka argued that an OWI second offense must be charged criminally, and the court lacked jurisdiction to enter a civil conviction. The court denied Shulka's motion concluding it was not brought within a reasonable length of time and it would be unfair to reward Shulka for failing to inform the court of his prior conviction.

² Pierce County Case No. 1996TR1557.

DISCUSSION

¶4 Shulka argues the Pierce County Circuit court lacked jurisdiction to convict him of OWI as a civil offense. The State claims Shulka cannot challenge this conviction because the challenge “functions as a collateral attack of a prior conviction during an anticipated sentencing for a future OWI.” While the outcome of this decision may impact Shulka’s sentencing in another OWI case, this challenge is not a collateral attack. In *State v. Hahn*, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528, the court held:

[A] circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding.

Shulka did not bring this challenge as part of an enhanced sentence proceeding; rather, he brought a motion to reopen and dismiss his 1997 conviction based on lack of jurisdiction. Under WIS. STAT. § 806.07(1)(d), a party may bring a motion requesting relief from a judgment if the judgment was void.

¶5 The State further argues Shulka’s judgment was not brought within a reasonable time as required by WIS. STAT. § 806.07(2), and therefore, Shulka had no statutory basis to attack the original conviction. However, the Wisconsin Supreme Court held the reasonable time requirement in § 806.07(2) does not apply to void judgments. *Neylan v. Vorwald*, 124 Wis. 2d 85, 100, 368 N.W.2d 648 (1985).

¶6 The issue is whether the 1997 conviction is void. When the facts are not disputed, whether a judgment is void for lack of jurisdiction is a question of law we review without deference. *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998), *affd*, 228 Wis. 2d 1, 596 N.W.2d 786 (1999). In this case, the facts are not in dispute. Shulka was convicted in Pierce County Circuit Court of an ordinance violation for OWI after he had already been convicted of drunk driving in North Dakota.

¶7 In similar cases, the courts have held a second judgment void. In *State v. Banks*, 105 Wis. 2d 32, 36, 313 N.W.2d 67 (1981), a court commissioner accepted Banks's plea to a civil forfeiture for drunk driving. At the time Banks entered his plea, the court commissioner was unaware that Banks had been convicted of OWI two weeks earlier. *Id.* The supreme court held the commissioner "was without jurisdiction to hear or enter judgment in a criminal proceeding and since the second violation of [WIS. STAT.] sec. 346.63(1) is a criminal proceeding his entry of judgment is a nullity" *Id.* at 40. The court further held that the trial court did not have "the discretion to treat the second offense as anything but a second offense." *Id.* at 42.

¶8 In *Walworth County v. Rohner*, 108 Wis. 2d 713, 715-16, 324 N.W.2d 682 (1982), the defendant was convicted of an ordinance violation for OWI in the Walworth County Circuit Court even though he had a previous OWI conviction. Unlike in *Banks*, the defendant in *Walworth County* appeared before a judge. The supreme court held the trial court was "without jurisdiction to proceed under the county ordinance because such a local traffic regulation can have no application to a second or subsequent offense for drunk driving within five years." *Id.* at 722.

¶9 Therefore, even when the trial court is unaware of a previous conviction, and the defendant appears in circuit court, the court has no jurisdiction over a second offense OWI charged as an ordinance violation. Although we agree with the circuit court that it seems unfair to dismiss a ten-year-old OWI conviction where the defendant obtained the advantage of receiving a forfeiture and not a criminal conviction, and it appears unlikely the State will now be able to prosecute the offense, we have no choice under the present law. Because the circuit court had no jurisdiction to proceed under the ordinance violation, the judgment is void and must be vacated on remand.

By the Court.—Order reversed and cause remanded with directions.

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

