

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 2014

Diane M. Fremgen
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. 2014AP954

Cir. Ct. No. 2014CV147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF KAUKAUNA,

PLAINTIFF-RESPONDENT,

V.

GRANT R. LOESCHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Grant Loescher appeals a circuit court order denying his motion to reopen and vacate his 1997 conviction for operating while intoxicated (OWI), first offense. Loescher argues he was erroneously charged and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 versions unless otherwise noted.

convicted of first-offense OWI in 1997. He contends he should have been charged with second-offense OWI as a matter of law, due to an existing 1992 OWI conviction. He argues his 1997 conviction is void because the City of Kaukauna Municipal Court lacked subject matter jurisdiction over criminal second and subsequent OWI offenses. We affirm.

¶2 The facts are undisputed. On April 16, 1992, Loescher was convicted of first-offense OWI in Dane County for a March 28, 1992 offense. On April 16, 1997, Loescher was again arrested for OWI. He was convicted a second time of first-offense OWI on April 29, 1997, this time in the Kaukauna Municipal Court.

¶3 On November 4, 2013, Loescher moved to vacate his 1997 OWI conviction in the Kaukauna Municipal Court. Loescher argued his 1997 first-offense OWI conviction violated WIS. STAT. § 346.65(2), which delineates the escalating penalty scheme for violating the intoxicated driving statute. The Kaukauna Municipal Court denied Loescher's requests to reopen the 1997 case and vacate the judgment as void. Loescher appealed to the Outagamie Circuit Court, which affirmed the denial to reopen. He now appeals to this court.

¶4 Under WIS. STAT. § 346.65(2), a first-offense OWI is a civil violation punishable by forfeiture, whereas subsequent offenses within a ten-year period are exclusively criminal violations punishable by fines and imprisonment. *See County of Walworth v. Rohner*, 108 Wis.2d 713, 722, 324 N.W.2d 682 (1982). Loescher argues his 1997 offense was required by law to be charged as a criminal second-offense OWI. Therefore, Loescher alleges, the municipal court's judgment is void because the court did not have subject matter jurisdiction to

convict him of a criminal OWI offense. *See City of Kenosha v. Jensen*, 184 Wis. 2d 91, 99, 516 N.W.2d 4 (Ct. App. 1994).

¶5 However, Loescher aptly notes in his appellate brief² that when he was convicted in 1997, the applicable penalty provision actually had a five-year time period for the purposes of counting prior convictions that would trigger escalated charges and penalties.³ This information, combined with our examination of the record, leads us to conclude that this case can be resolved quite simply. WISCONSIN STAT. § 346.65(2c) (1995-96), provided “the 5-year ... period shall be measured from the dates of the refusals or violations that resulted in the revocation or convictions.” Loescher’s offenses, dated March 28, 1992 and April 16, 1997, narrowly fall outside the five-year time period. As a result, Loescher was properly charged with first-offense OWI in 1997, and the Kaukauna Municipal Court had jurisdiction to adjudicate the charge. Therefore, the judgment is valid.

By the Court.—Order affirmed.

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

² We only consider Loescher’s main brief, as he failed to file his reply brief on time. Accordingly, Loescher’s reply brief is stricken.

³ In relevant part, the applicable WIS. STAT. § 346.65(2) (1995-96), provides:

Any person violating s. 346.63 (1): **(a)** Shall forfeit not less than \$150 nor more than \$300, except as provided in pars. (b) to (f). **(b)** Except as provided in par. (f), shall be fined not less than \$300 nor more than \$1,000 and imprisoned for not less than 5 days nor more than 6 months if the total number of suspensions, revocations and convictions counted under s. 343.307 (1) equals 2 in a 5-year period. Suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

