

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2016

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. 2015AP1838-CR

Cir. Ct. No. 2009CT1159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY A. GIESE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
THOMAS J. WALSH, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Timothy Giese appeals the circuit court's order denying a motion to void his 2009 conviction for second-offense operating a motor vehicle while intoxicated (OWI). Giese challenges the circuit court's subject matter

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

jurisdiction to enter a judgment of conviction, as the State concedes he was improperly charged with a criminal second-offense OWI rather than a civil first offense. Based upon the supreme court’s recent decision in *City of Eau Claire v. Booth Britton*, 2016 WI 65, ___ Wis. 2d ___, ___ N.W.2d ___, we conclude the circuit court properly exercised subject matter jurisdiction, despite the State’s failure to properly charge the OWI penalty enhancer, and affirm.

¶2 On May 29, 2009, Giese was charged with second-offense OWI in Brown County Circuit Court. The complaint alleged:

Count 1: OPERATING A MOTOR VEHICLE WHILE INTOXICATED – 2ND OFFENSE

The above-named defendant on or about Sunday, March 22, 2009, in the Village of Allouez, Brown County, Wisconsin, did operate a motor vehicle on a highway while under the influence of an intoxicant, contrary to sec. 346.63(1)(a), 346.65(2)(am)2 Wis. Stats., a Misdemeanor, and upon conviction shall, for the second offense within ten (10) years, be fined not less than Three Hundred and Fifty Dollars (\$350) nor more than Eleven Hundred Dollars (\$1,100), and imprisonment for not less than five (5) days nor more than six (6) months.

The complaint further alleged: “Pursuant to [WIS. STAT.] 343.44(2g), the defendant is subject to the mandatory minimums because *he was convicted of Operating While Intoxicated on 12/18/1989 with offense date(s) of 12/04/1989* and suspended as a result.” (Emphasis added.) On October 13, 2009, Giese entered a no contest plea and was convicted of criminal OWI as a second offense. He was sentenced to twenty days in jail. Giese did not appeal the judgment.

¶3 On March 12, 2015, Giese filed a motion to void the judgment on the ground the circuit court lacked the criminal subject matter jurisdiction necessary to enter a judgment of conviction. At the time the complaint was filed, the prior qualifying offense had to be less than ten years old. *See* WIS. STAT.

§ 346.65(2)(am)2. (2007-08). The complaint alleged that Giese’s first offense OWI occurred more than twenty years before his second offense. Therefore, as a matter of law, Giese should not have been charged or convicted of second-offense OWI. In response, the State filed a motion to reopen the case and amend the judgment to non-criminal first-offense OWI, conceding the case should not have been charged as a criminal offense.

¶4 On June 9, 2015, after a hearing on both motions, the circuit court issued a written decision and order denying Giese’s motion to void the judgment. The court agreed the case should not have been charged as a criminal offense. However, the court held that, while it “may not have specifically had criminal subject matter jurisdiction,” it nonetheless had “authority to hear the case” because the complaint “still allege[d] an offense: first offense OWI.” Therefore, the court held that the judgment was not void for lack of subject matter jurisdiction. Nevertheless, the court did “believe it [was] appropriate to reopen [the] case” and offered to amend the judgment to a first-offense OWI if Giese agreed to do so. In the June 9, 2015 order, the court held the State’s motion to amend in abeyance, pending Giese’s decision on whether he accepted the court’s offer. Giese subsequently declined the court’s offer to amend, and on July 30, 2015, the court entered a final order denying Giese’s motion to void the judgment.

¶5 On appeal, Giese argues the circuit court lacked criminal subject matter jurisdiction because the complaint on its face failed to allege a crime, since it correctly stated that his first OWI conviction occurred more than ten years before his second offense. Giese therefore argues the judgment is void.

¶6 Criminal subject matter jurisdiction is the “power of the court to inquire into the charged crime, to apply the applicable law and to declare the

punishment.” *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994) (citation omitted). A judgment is void if the court lacked jurisdiction. *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998), *aff’d*, 228 Wis. 2d 1, 596 N.W.2d 786 (1999). A judgment or order which is void may be expunged by a court at any time. Such right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments. *State v. Banks*, 105 Wis. 2d 32, 43, 313 N.W.2d 67 (1981).

¶7 The question of whether the circuit court had subject matter jurisdiction is a question of law that we review de novo. *State v. Schroeder*, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999). “The party claiming that a judgment is void for lack of subject matter jurisdiction has the burden of proving subject matter jurisdiction did not exist.” *State ex rel. R.G. v. W.M.B.*, 159 Wis. 2d 662, 668, 465 N.W.2d 221 (Ct. App. 1990).

¶8 Article VII section 8 of the Wisconsin Constitution vests all circuit courts with jurisdiction to hear “all matters civil and criminal within this state[.]” “Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over ‘all matters civil and criminal.’” *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190 (quoting WIS. CONST. ART. VII, § 8). “Accordingly, a circuit court is never without subject matter jurisdiction.” *Id.*

¶9 While factually somewhat different from this case, our decision here is controlled by *Booth Britton*. In that case, Booth Britton was convicted in 1990 in Minnesota of a first-offense OWI. In 1992, the Eau Claire County Circuit Court entered a civil forfeiture judgment against Booth Britton for another first-offense

OWI. The Eau Claire City Attorney prosecuted Booth Britton in the 1992 OWI action. The 1990 Minnesota conviction was unknown to the City Attorney's office when it prosecuted the 1992 OWI as a first offense. *Booth Britton*, 2016 WI 65, ¶2.

¶10 In 2014, Booth Britton filed a motion to reopen and vacate her 1992 Eau Claire County first-offense OWI civil forfeiture judgment because “it was [a] second OWI offense improperly charged as a first offense.” She argued that because the 1992 OWI should have been charged as a criminal second-offense OWI, the circuit court must void her 1992 judgment for lack of subject matter jurisdiction. The City responded that any “[a]lleged defects in the 1992 action may have implicated court competency, but did not implicate subject matter jurisdiction.” *Id.*, ¶3. The circuit court in *Booth Britton* voided the 1992 conviction on subject matter jurisdiction grounds. *Id.*, ¶4. It relied on *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), and concluded that “[s]ince a second offense OWI cannot be prosecuted as a civil action in Wisconsin, the Court Commissioner did not have the proper jurisdiction in the 1992 prosecution to render a civil judgment.” *Booth Britton*, 2016 WI 65, ¶4. The supreme court reversed, determining the circuit court had subject matter jurisdiction to enter a civil forfeiture under a municipal ordinance for a first-offense OWI that factually should have been criminally charged as a second-offense OWI due to an undiscovered prior countable conviction. *See id.*, ¶19.

¶11 Here, the complaint alleged that Giese's first-offense OWI occurred more than twenty years before his second offense. Therefore, as a matter of law, Giese should not have been charged or convicted of second-offense OWI. However, under the holding in *Booth Britton*, the circuit court in this case had both civil and criminal subject matter jurisdiction. As noted by the circuit court,

the complaint against Giese correctly charged an offense of operating while intoxicated. Regardless of whether Giese was charged with a criminal or civil offense of operating while intoxicated, there is no doubt that the circuit court had subject matter jurisdiction over either type of offense.

¶12 The *Booth Britton* court clarified the difference between subject matter jurisdiction and the competency of a circuit court to proceed with a case, holding that any defect caused by noncompliance with the applicable ordinances affected the court's competency but not its subject matter jurisdiction. See *id.* The *Booth Britton* court went on to hold that the "circuit court lacked competency to proceed to judgment in Booth Britton's 1992 OWI case because mischarging a second-offense OWI as a first-offense OWI results in a failure to abide by mandatory OWI penalties central to the escalating penalty scheme."² *Id.*, ¶22. However, the court also concluded that challenges to court competency are forfeited if not timely raised in the circuit court, and Booth Britton forfeited the challenge through her twenty-two year delay in bringing the motion. *Id.*, ¶25.

¶13 While in *Booth Britton* the first-offense OWI offense should have been charged as a second offense, here the second OWI offense by Giese should have been charged as a first offense. However, that factual distinction is without a substantive difference. As in *Booth Britton*, the circuit court had subject matter jurisdiction to convict Giese of second-offense OWI. We therefore affirm the denial of Giese's motion to void the OWI conviction.

² Giese does not argue that the circuit court lacked competency to proceed with the OWI charge against him. We therefore decline to address that issue. We do note that even if Giese had made that argument on appeal, he waived the argument by pleading no contest. The general rule is that a plea of guilty or no contest constitutes a waiver of non-jurisdictional defects and defenses. *State v. Bangert*, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

By the Court.—Order affirmed.

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

