COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1265-CR **Cir. Ct. No. 2013CT1609**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN J. STROHMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded with directions*.

¶1 HRUZ, J.[1] Benjamin Strohman appeals a judgment of conviction for operating while intoxicated (OWI), second offense, and an order denying his

[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 version unless otherwise noted.

postconviction motion. Strohman argues his conviction was improper as a matter of law because the applicable statute of limitations barred the State's prosecution in 2013 for his 2005 offense. We agree and reverse.

BACKGROUND

¶2 The relevant facts are undisputed. In 1999, Strohman was convicted in Illinois for an OWI-related offense. In 2005, he was arrested in Green Bay for OWI. Because the Illinois conviction qualified as a valid prior offense, Strohman should have been charged with a criminal second-offense OWI in accordance with the escalating penalty scheme delineated in WIS. STAT. § 346.65(2). Under that statute, a first-offense OWI is a civil violation punishable by forfeiture. WIS. STAT. § 346.65(2)(am)(1). Subsequent offenses within a ten-year period are necessarily criminal violations exclusively under state jurisdiction. ***Walworth Cnty. v. Rohner***, 108 Wis. 2d 713, 716, 324 N.W.2d 682 (1982). Furthermore, because a municipal court has no authority to try and convict a criminal-offense OWI, "[a]ny such municipal action is null and void." ***City of Kenosha v. Jensen***, 184 Wis. 2d 91, 99, 516 N.W.2d 4 (Ct. App. 1994) (citing ***Rohner***, 108 Wis. 2d at 722; ***State v. Banks***, 105 Wis. 2d 32, 40-41, 313 N.W.2d 67 (1981)).

¶3 Nevertheless, Strohman's 2005 offense was adjudicated in the Green Bay Municipal Court as a civil first-offense OWI. Consequently, in 2013 Strohman moved to reopen and vacate his 2005 first-offense forfeiture, arguing the fact of his prior offense in 1999 had necessitated a criminal second-offense OWI adjudication in 2005. In March 2013, the Green Bay Municipal Court granted Strohman's motion and vacated his 2005 first-offense OWI, finding it was void.

¶4 In October of 2013, the State filed criminal charges against Strohman in relation to the 2005 offense. The State charged Strohman with

OWI-second and operating with a prohibited alcohol concentration (PAC), also as a second offense. Strohman moved to dismiss, arguing the three-year statute of limitations for those misdemeanor offenses had expired. *See* WIS. STAT. § 939.74(1).[2] The circuit court denied Strohman's motion to dismiss and his subsequent motion for reconsideration. In doing so, the circuit court adopted the State's argument that Strohman had a duty in 2005 to inform the municipal court he had a prior, qualified offense under WIS. STAT. § 343.307 and, by failing to do so, he was equitably estopped from asserting a statute of limitations defense. On February 3, 2014, Strohman was found guilty after a bench trial on stipulated facts. He filed a motion for postconviction relief, which the circuit court denied after a hearing. Strohman now appeals.[3]

STANDARD OF REVIEW

¶5 To determine if the statute of limitations expired for Strohman's 2005 OWI citation, we must examine WIS. STAT. § 939.74. Interpretation of a statute is a question of law that we review de novo. ***West v. Department of Commerce***, 230 Wis. 2d 71, 74, 601 N.W.2d 307 (Ct. App. 1999).

[2] WISCONSIN STAT. § 939.74 is titled "Time limitations on prosecutions" and provides:

> **(1)** Except as provided in subs. (2) and (2d) and s. 946.88(1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

[3] Strohman's sentence of five days in jail, a $350 fine, and twelve months' license revocation was stayed pending this appeal.

DISCUSSION

¶6 Pursuant to WIS. STAT. § 939.74(1), the prosecution of a misdemeanor offense must be commenced within three years of its commission. A court may not exercise personal jurisdiction over a defendant when the relevant criminal statute of limitations has expired. ***State v. Jennings***, 2003 WI 10, ¶15, 259 Wis. 2d 523, 657 N.W.2d 393.

¶7 The State acknowledges these principles. Nonetheless, it argues the statute of limitations had not expired for Strohman's 2005 offense. Based on principles articulated in ***State v. Deilke***, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945, the State asserts the limitations period "was tolled by the prosecution and conviction for [Strohman's OWI-first] offense in municipal court, until the time it was voided at Strohman's request." We disagree.

¶8 Foremost, the State's argument never adequately accounts for the relevant statutory provision. Namely, WIS. STAT. § 939.74(3) describes when the limitations period is tolled in a criminal matter: "In computing the time limited by this section, the time … during which a prosecution against the actor for the same act was pending shall not be included. A prosecution is pending when a warrant or a summons has been issued, an indictment has been found, or an information has been filed."

¶9 Strohman's citation in 2005 was adjudicated by a municipal court that imposed a civil forfeiture. A civil forfeiture is not a criminal proceeding, *see* WIS. STAT. §§ 346.65(2)(am)1., 939.12. Strohman was never criminally prosecuted or convicted for his 2005 offense until 2013, and this fact matters, despite the State's protests otherwise. Strohman's civil forfeiture proceeding cannot constitute a pending prosecution under WIS. STAT. § 939.74(3) because no

warrant, summons, indictment, or information was involved. It is noteworthy that the language in § 939.74(3) defining when a prosecution is "pending" for tolling purposes is identical (but for the tense of the verbs used) to the language in that same statute's subsection defining when a prosecution has "commenced." *See* WIS. STAT. § 939.74(1). In both instances, only criminal prosecutions are contemplated. This makes sense, given that the statute's concern is with timely establishing a circuit court's personal jurisdiction over a criminal defendant. Accordingly, Strohman's civil forfeiture proceedings could not toll the applicable limitations period in § 939.74(1).

¶10 Our analysis in ***State v. Faber***, No. 2010AP2324, unpublished slip op. (WI App Mar. 23, 2011), supports this conclusion. *See* WIS. STAT. RULE 809.23(3)(b) (unpublished authored opinions issued on or after July 1, 2009 may be cited for persuasive value). In ***Faber***, two first-offense OWI citations were issued to the defendant in late 2005 and early 2006, respectively, but neither was ever resolved. ***Id.***, ¶3. Four years later, after Faber had acquired several other OWI charges that were resolved by a forfeiture judgment and criminal convictions, the State brought criminal charges for the 2005 and 2006 incidents. ***Id.*** Faber moved to dismiss, arguing the statute of limitations for those offenses had expired. ***Id.***, ¶4. The State responded that the original civil forfeiture actions were still pending, which tolled the statute of limitations under WIS. STAT. § 939.74(3). ***Id.*** The circuit court and this court rejected the State's position. ***Id.***, ¶10. We "beg[a]n by stating the obvious—*criminal* charges were not 'commenced' against Faber for his November 2005 and February 2006 OWI citations until May 10, 2010. This is the date when the State filed the criminal summons and complaint in the circuit court …." ***Id.***, ¶8. As such, the court held there had been no tolling because "a municipal traffic citation [wa]s not enough to confer

personal jurisdiction in criminal proceedings before a circuit court." ***Id.***, ¶9 (citing ***State v. Banks***, 105 Wis. 2d 32, 40, 313 N.W.2d 67 (1981)). The court noted OWI-first offenses were forfeiture actions and were not criminal proceedings, concluding, "[t]herefore, the tolling provision of WIS. STAT. § 939.74(3) does not apply to the City's prosecution of Faber's November 2005 and February 2006 OWI-first offense ordinance violations because the circuit court did not exercise personal jurisdiction over those citations." ***Id.***

¶11 Likewise, here the circuit court never obtained personal jurisdiction over Strohman in relation to his 2005 municipal citation and, thus, the statute of limitations was never tolled so as to allow for the commencement of criminal proceedings in 2013. In addition, the State fails to provide any reason or authority to support the notion that the earlier municipal proceeding remained "pending" after it was finally adjudicated in 2005.

¶12 Perhaps given the foregoing, the State attempts to analogize Strohman's circumstances to ***Deilke***. There, the State was allowed to reinstate a 1993 PAC charge in 2001, after the defendant successfully collaterally attacked his 1993 criminal OWI conviction, which attack itself constituted a substantial breach of his plea agreement. ***Deilke***, 274 Wis. 2d 595, ¶31. The Wisconsin Supreme Court held, under the circumstances in the case, "that prosecution for the act in question tolls the statute of limitations that otherwise would apply." ***Id.***, ¶28.

¶13 However, the State's analogy fails. Again, as discussed above, in this case, there was no criminal prosecution for the purpose of a tolling analysis.[4] In addition, ***Deilke*** was, first and foremost, a case about the effect of a breached plea agreement. ***Id.***, ¶¶13-26. There was no such breach here. The State acknowledges this, as it must, and accordingly qualifies and explains its position:

> Although there was not a violation of a plea agreement with the State here, like there was in ***Deilke***, there certainly was subsequent action taken by Strohman that undermined the conviction obtained by the prosecuting agency in that case. Strohman's action, of accepting a first OWI offense when it was actually his second, led the State 'to refrain from prosecuting' this case criminally.

¶14 Herein lies a fundamental problem with the State's position. Throughout its brief, the State mischaracterizes Strohman's no-contest plea as a "misrepresentation" that the State "relied upon" to its detriment. Under the facts of record, however, Strohman never made any "representation," much less a misrepresentation, regarding his prior offenses. Rather, Strohman was charged with an OWI offense to which he merely pleaded no contest. Defendants have no obligation to disclose prior offenses, and the establishment of prior offenses is unquestionably a duty belonging to the State. *See* ***State v. Wideman***, 206 Wis. 2d 91, 94-95, 556 N.W.2d 737 (1996) (the State bears the burden of establishing prior offenses as the basis for the imposition of enhanced penalties under WIS. STAT. § 346.65(2)); *see also* ***State v. Spaeth***, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996) (proof requirement on the State to show defendant is a repeat offender for the purposes of § 346.65).

[4] Thus, even if the State were to argue that by voiding the judgment Strohman's offense reverted back to a pending status, it was still never a pending criminal matter, as it had been charged and resolved as a civil municipal forfeiture offense.

¶15 This is especially so when a defendant, like Strohman, is never asked about any prior OWI or alcohol-related offenses. As our supreme court stated in ***Wideman***,

> If the accused or defense counsel challenges the existence or applicability of a prior offense, or asserts a lack of information *or remains silent about a prior offense*, the State must establish the prior offenses for the imposition of the enhanced penalties of [WIS. STAT.] § 346.65(2) by presenting 'certified copies of conviction or other competent proof … before sentencing.'

Wideman, 206 Wis. 2d at 95 (quoting ***State v. McAllister***, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982) (emphasis added)).

¶16 The State also cites ***State ex rel. Susedik v. Knutson***, 52 Wis. 2d 593, 596-98, 191 N.W.2d 23 (1971), for the proposition that Strohman "should be equitably estopped from asserting the statute of limitations to prevent him [from] receiving a conviction for the March 23, 2005 OWI offense, as the statute of limitations time period was tolled based on the defendant's bad acts." As just explained, the State has failed to point to any "bad acts" on Strohman's part, at least in the form of a fraud or misrepresentation. In any event, ***Knutson*** was a paternity case holding that a party's conduct reasonably inducing someone not to bring a paternity action earlier in time can, in certain circumstances, bar that party from asserting a statute of limitations defense. ***Id.*** at 598. Beyond the decidedly different facts generating the "outrageous situation" found in ***Knutson***, 52 Wis. 2d at 597, the State provides no authority that equitable estoppel can be applied to toll limitations periods in criminal cases, especially in light of WIS. STAT. § 939.74(3). We need not consider arguments that are unsupported by legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶17 Finally, we note the incongruity of the State's position in this case relative to existing law, most notably ***Jensen***, 184 Wis. 2d at 99, which the State ignores in its brief. As alluded to above, in ***Jensen***, we adopted the State's argument that, because an offense that is actually a qualified second (or greater) OWI offense can only be criminally prosecuted, any municipal proceeding regarding such an offense is "null and void[,]" with any such municipal judgment "having no force or effect, [such that] it is as if it never took place." ***Id.*** Thus, ***Jensen*** held the State may criminally prosecute such offenses regardless of whether a municipal forfeiture judgment for that same offense has been vacated. ***Id.*** at 98-99. These holdings generate two important conclusions here. First, if Strohman's civil forfeiture judgment was null and void, such that the State always had a right to bring the criminal prosecution at issue, then the applicable statute of limitations for such a prosecution governs without regard to the municipal proceedings. Second, and related, contrary to the State's central premise, neither Strohman nor the governing law ever prevented the State from timely bringing the criminal prosecution at issue.[5]

¶18 Ultimately, the State commenced an untimely criminal prosecution, and the circuit court erred in upholding such a prosecution. Accordingly, we reverse the judgment of conviction and remand with instructions that the State's prosecution be dismissed with prejudice.

[5] Because we rule in Strohman's favor on the grounds indicated, we do not reach his alternative arguments that the State could not have reasonably relied upon any alleged representations he may have made, and that the State has no standing to assert estoppel as a basis to defeat Strohman's statute of limitations defense. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (If a decision on one point is dispositive, we need not address other issues raised.).

By the Court.—Judgment and order reversed and cause remanded with directions.

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