COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2273 **Cir. Ct. No. 2014CV96**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN N. NAVRESTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County: J. DAVID RICE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] John Navrestad appeals a final circuit court order denying his motion to "void" and "vacate" his 1992 conviction for a first offense

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

of operating a motor vehicle while under the influence in violation of a local ordinance. I affirm.

¶2 As I understand it, Navrestad's argument consists of the following four assertions, which incorporate the necessary background facts:

> (1) Under ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), when a defendant has a countable prior intoxicated driving offense, a state statute directs that a subsequent offense be charged as a crime; if the subsequent offense is incorrectly charged as a first offense ordinance violation, the circuit court lacks "subject matter jurisdiction."
>
> (2) At the time of his 1992 prosecution, Navrestad had a countable prior offense, but was charged with and convicted of a first offense ordinance violation.
>
> (3) The circuit court thus lacked subject matter jurisdiction under ***Rohner***, and, as a result, the 1992 conviction was void.
>
> (4) Although Navrestad did not object on subject matter jurisdiction grounds during the 1992 prosecution, Navrestad may move now to void and vacate the 1992 conviction on those grounds because objections to subject matter jurisdiction cannot be forfeited or waived.

¶3 Navrestad correctly points to two unpublished decisions in which a court of appeals judge agreed with the ***Rohner***-based argument that Navrestad makes here. *See* ***City of Stevens Point v. Lowery***, No. 2014AP742, unpublished slip op. ¶¶1, 7-9, 13-14 (WI App Feb. 5, 2015); ***Clark County v. Potts***, No. 2012AP2001, unpublished slip op. ¶¶1, 6-9, 14 (WI App March 28, 2013).[2]

[2] There are at least two additional unpublished decisions reaching the same result as ***City of Stevens Point v. Lowery***, No. 2014AP742, unpublished slip op. (WI App Feb. 5, 2015), and ***Clark County v. Potts***, No. 2012AP2001, unpublished slip op. (WI App March 28, 2013). *See* ***La Crosse Cnty. v. Pettis***, No. 2008AP2075, unpublished slip op. ¶¶1, 5-8, 11 (WI App April 9, 2009); ***County of Pierce v. Shulka***, No. 2006AP1294, unpublished slip op. ¶¶1, 6-9 (WI App Oct. 24, 2006). However, those additional decisions may not be cited for persuasive value because they were issued before July 1, 2009. *See* WIS. STAT. RULE 809.23(3)(a) and (b). (continued)

¶4 Courts are not bound by unpublished decisions, *see* WIS. STAT. RULE 809.23(3)(b), and here, like the circuit court, I do not follow ***Lowery*** and ***Potts***. Rather, for the reasons I now explain, I agree with the State and with the circuit court's persuasive analysis that Navrestad's argument is defeated by ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, a supreme court case that came after ***Rohner***.

¶5 In ***Rohner***, a defendant who had a countable prior intoxicated driving offense was charged with a first offense ordinance violation. ***Rohner***, 108 Wis. 2d at 715-16. Rohner argued that the circuit court lacked subject matter jurisdiction in this circumstance. ***Id.*** at 715. The supreme court in ***Rohner*** agreed. ***Id.*** at 722. The supreme court reasoned that statutes give the State exclusive authority over second offense intoxicated driving crimes, and, therefore, the circuit court was without subject matter jurisdiction to try the defendant's case brought under a local ordinance. *See* ***id.*** at 716, 718, 722. The ***Rohner*** court held that, "[b]ecause the complaint is to be dismissed for want of subject-matter-jurisdiction, there could not have been a valid proceeding." ***Id.*** at 722.

¶6 Putting aside that ***Rohner*** addresses a timely objection situation, ***Rohner*** does seem to support Navrestad's argument. Specifically, ***Rohner*** supports Navrestad's assertion that, when a defendant has a countable prior intoxicated driving offense and a subsequent offense is charged as a first offense ordinance violation, the circuit court lacks subject matter jurisdiction over the first offense charge. Indeed, that is how the unpublished ***Lowery*** and ***Potts*** decisions

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Because Navrestad's counsel cites ***Pettis*** as well as ***Lowery*** and ***Potts***, I take this opportunity to remind counsel of the rule.

read ***Rohner***. *See* ***Lowery***, No. 2014AP742, ¶¶7-9; ***Potts***, No. 2012AP2001, ¶¶8-9.

¶7 This brings me to ***Mikrut***. Although ***Mikrut*** had nothing to do with intoxicated driving offenses, the supreme court in ***Mikrut*** made a pronouncement that "a circuit court is *never* without subject matter jurisdiction." ***Mikrut***, 273 Wis. 2d 76, ¶1 (emphasis added). The ***Mikrut*** court concluded that, although a court's "competency," or power to *exercise* jurisdiction, can be limited by statute, subject matter jurisdiction cannot. ***Id.***, ¶2. The ***Mikrut*** court further concluded that objections to competency can be forfeited. *See* ***id.***, ¶3 & n.1.

¶8 It is true that ***Mikrut***'s discussion of subject matter jurisdiction did not expressly overrule or even cite ***Rohner***. However, as the circuit court here recognized, ***Mikrut***'s pronouncement that a circuit court is "never without subject matter jurisdiction" is categorical and conflicts with the part of ***Rohner*** that matters here. Given this conflict, I am bound to follow the more recent supreme court pronouncement in ***Mikrut*** and conclude that Navrestad's 1992 conviction presents no problem of subject matter jurisdiction. *See* ***Spacesaver Corp. v. DOR***, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987) ("When the decisions of our supreme court appear to be inconsistent, we follow its most recent pronouncement.").

¶9 Navrestad points out that there is a supreme court decision after ***Mikrut***, ***State v. Bush***, 2005 WI 103, 283 Wis. 2d 90, 699 N.W.2d 80, that, according to Navrestad, modifies ***Mikrut*** or calls ***Mikrut*** into question. In ***Bush***, the supreme court stated that a facial constitutional challenge to a statute "is a matter of subject matter jurisdiction and cannot be waived." *See* ***Bush***, 283 Wis. 2d 90, ¶17.

¶10 However, I agree with the circuit court that Navrestad reads too much into ***Bush***. ***Bush*** is most reasonably read as carving out or reviving an exception to ***Mikrut*** in the context of facial constitutional challenges, not as a broader overruling of ***Mikrut***. *See* ***Bush***, 283 Wis. 2d 90, ¶¶14-19. The court in ***Bush*** seemed to take a pass on that broader topic. The court in ***Bush*** acknowledged ***Mikrut***'s categorical approach but concluded that the court's jurisprudence in the specific area of facial constitutional challenges had been resolved otherwise. *See* ***Bush***, 283 Wis. 2d 90, ¶¶14-17. It is true that the ***Bush*** court also said the following: "If a complaint fails to state an offense known at law, no matter civil or criminal is before the court, resulting in the court being without jurisdiction in the first instance." ***Id.***, ¶18. But, as the circuit court correctly observed, a first offense intoxicated driving ordinance violation *is* an offense known to law. For that matter, in my view there can be no doubt that circuit courts generally have subject matter jurisdiction over all intoxicated driving offenses. Thus, I fail to see how ***Bush*** supports Navrestad's argument.

¶11 I acknowledge that my analysis directly contradicts the analysis in the unpublished ***Lowery*** decision. In ***Lowery***, the court concluded that ***Mikrut*** did not modify ***Rohner*** "in any way" and that ***Rohner*** remains good law. *See* ***Lowery***, No. 2014AP742, ¶11. However, I agree with the circuit court that the more reasonable reading of the ***Mikrut*** decision is that ***Mikrut***'s holding supersedes the ***Rohner*** court's conclusion that subject matter jurisdiction is implicated in a circumstance like Navrestad's.

¶12 My analysis contradicts the ***Lowery*** decision in another way. In ***Lowery***, the court appeared to distinguish ***Mikrut*** as involving an action that was valid *when commenced*, with the circuit court in ***Mikrut*** losing competency based on the failure to comply with a statutory requirement during the course of validly

commenced proceedings. *See* ***Lowery***, No. 2014AP742, ¶12. The ***Lowery*** decision contrasted this valid-when-commenced scenario with a "charge of first offense OWI [that] was never valid under ***Rohner***, and thus … never validly before the circuit court in the first instance." ***Id.*** I fail to see how this distinction matters given ***Mikrut***'s categorical approach. The distinction that ***Lowery*** draws may suggest that ***Mikrut***'s categorical pronouncement went beyond what was necessary. Nonetheless, I am bound by it. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 ("[T]he court of appeals may not dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum.").[3]

¶13 Accordingly, Navrestad's argument fails because one of his underlying assertions fails, namely, the assertion that the circuit court lacked subject matter jurisdiction in his 1992 prosecution and conviction. Once that assertion is taken away, Navrestad presents no other complete argument as to why he should not be deemed to have forfeited his objection to his 1992 conviction. In addition, Navrestad fails to refute the circuit court's persuasive explanation of why

[3] On June 12, 2015, the supreme court denied a petition for review in ***Lowery***. *See* ***Lowery***, No. 2014AP742, *review denied* (WI June 12, 2015). Navrestad's case was placed on hold pending supreme court action on the petition. The sole argument in the ***Lowery*** petition is essentially the argument based on ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190, that I adopt here. *See* Petition for Review, at 2-5, in ***Lowery***. Apparently, the supreme court did not see this argument as a persuasive reason to accept review of ***Lowery***. But the supreme court's denial of review is not a ruling on the merits and therefore does not change the binding nature of ***Mikrut***. *See* ***W.W.W. v. M.C.S.***, 156 Wis. 2d 446, 458, 456 N.W.2d 899 (Ct. App. 1990) ("A supreme court denial of a petition for review … carr[ies] no implication of approval or agreement."), *aff'd*, 161 Wis. 2d 1015, 468 N.W.2d 719 (1991); *see also* ***Southern Cross, Inc. v. John***, 193 Wis. 2d 644, 648, 533 N.W.2d 188 (1995) ("The parties are cautioned … to infer nothing from the denial of this petition for review about this court's view on the merits of this issue."); ***State v. Nye***, 105 Wis. 2d 63, 65, 312 N.W.2d 826 (1981) (United States Supreme Court's denial of writ of certiorari contains no implication of approval of lower court decision).

the policies behind the forfeiture rule apply here. I therefore agree with the circuit court that Navrestad's objection is forfeited.

¶14 In sum, for the reasons stated, I affirm the circuit court's order denying Navrestad's motion to vacate his 1992 conviction as void for lack of subject matter jurisdiction.

By the Court.—Order affirmed.

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