

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2015

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. 2014AP742

Cir. Ct. No. 2010TR664

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF STEVENS POINT,

PLAINTIFF-RESPONDENT,

V.

JARED T. LOWERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
THOMAS B. EAGON, Judge. *Reversed and cause remanded with directions.*

¶1 HIGGINBOTHAM, J.¹ Jared Lowery appeals a circuit court order denying his motion to vacate a conviction for operating while intoxicated (OWI),

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

first offense, under the City of Steven Point's OWI ordinance. Lowery argues that the court lacked subject matter jurisdiction to hear the City's charge of OWI, first offense, because the instant offense is factually a third offense, a crime, which only the State can prosecute. Lowery contends that because the court lacked subject matter jurisdiction, his conviction is void. We agree, and accordingly, reverse and remand with directions to vacate the conviction.

BACKGROUND

¶2 In 2010, Lowery was issued a traffic citation in Portage County for OWI, first offense, in violation of the City of Stevens Point ordinance 9.01, adopting WIS. STAT. § 346.63(1)(a). Following a bench trial, the Portage County Circuit Court convicted Lowery of OWI, first offense. The court ordered an eight-month revocation of Lowery's operating privileges. Afterward, according to Lowery, the Wisconsin Department of Transportation notified him that his privileges were to be revoked for two years, rather than eight months, because the Department regarded the 2010 conviction as a third offense under WIS. STAT. § 343.307.

¶3 In 2013, Lowery filed a motion to vacate the 2010 judgment on the ground that the judgment of conviction was void because the circuit court lacked subject matter jurisdiction. Lowery argued that he should have been charged criminally with a third offense OWI pursuant to WIS. STAT. § 346.65(2)(am)(3), rather than a first offense, because he had two other convictions that counted as prior offenses under WIS. STAT. § 343.307(1)(a) and (d). Lowery submitted to the court his driving record as proof of the two prior convictions with his motion. The driving record indicates that Lowery was convicted in 1996 of operating a motor vehicle while intoxicated in Milwaukee County and in 2002 under Florida's

implied consent law. Lowery argued that because he should have been charged with a criminal offense, the court lacked subject matter jurisdiction to try him for an ordinance violation, relying on *County of Walworth v. Rohner*, 108 Wis. 2d 713, 722, 324 N.W.2d 682 (1982).

¶4 After the hearing, the circuit court denied Lowery’s motion on the ground that Lowery’s objections went to the court’s competency, not subject matter jurisdiction, and that Lowery had forfeited his right to challenge the court’s competency when he failed to raise the alleged defect in the City’s citation for a first offense in the circuit court. In reaching its decision, the circuit court relied on *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.

¶5 Lowery appeals.

DISCUSSION

¶6 “[W]hen the facts are not in dispute, whether a judgment is void for lack of jurisdiction is a question of law subject to de novo review.” *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998).

¶7 As we indicated, Lowery argues that the City of Stevens Point lacked jurisdiction to charge and prosecute him for first offense OWI under its ordinance and therefore, under *Rohner*, the circuit court lacked subject matter jurisdiction. *See Rohner*, 108 Wis. 2d 722. Specifically, Lowery contends that because he has two convictions that count as prior offenses under WIS. STAT. § 343.307, the City lacked jurisdiction to charge or prosecute his factually third OWI as a city ordinance violation because only the State can prosecute crimes, and accordingly, the State has exclusive jurisdiction over second and subsequent

OWI offenses.² Thus, applying the holding in *Rohner*, Lowery argues that the circuit court lacked subject matter jurisdiction to try and convict him for OWI first offense, and therefore his conviction is void. We agree.

¶8 In *Rohner*, the defendant committed a second offense OWI, however he was charged and convicted of first offense OWI under Walworth County's first-offense ordinance. See *Rohner*, 108 Wis. 2d at 715. Rohner sought to dismiss the charge on the ground that the court lacked subject matter jurisdiction because only the State can enact and prosecute crimes, and argued that the State had exclusive jurisdiction over second and subsequent offense OWIs. See *id.* The supreme court concluded that criminal proceedings and penalties were required for the second OWI offense, and that, "[b]ecause in Wisconsin only the state has the power to enact and prosecute crimes and criminal penalties are required, the trial court was without jurisdiction to try the defendant under the Walworth county ordinance." *Id.* at 718. Thus, according to the court in *Rohner*, a circuit court lacks subject matter jurisdiction over a second and subsequent offense OWI charged under a county's or municipality's first-offense ordinance.

¶9 Applying the supreme court's holding in *Rohner* to the facts of this case, we conclude that the 2010 judgment against Lowery for first offense OWI is void because the court lacked subject matter jurisdiction to try and convict Lowery under the Portage County first-offense OWI ordinance.

² Under WIS. STAT. § 346.65(2), a first offense OWI is civil in nature and subsequent offenses are criminal. *County of Walworth v. Rohner*, 108 Wis. 2d 713, 716-17, 324 N.W.2d 682 (1982).

¶10 The City argues that the supreme court’s holding in *Rohner* was modified by the supreme court’s holding in *Mikrut*. The City cites *Mikrut* for the proposition that circuit courts are never without subject matter jurisdiction “to entertain actions of any nature whatsoever,” and that “[c]ircuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over all matters civil and criminal.” See *Mikrut*, 273 Wis. 2d 76, ¶1 (citation omitted). The City referred to the *Rohner* court’s statement that “[t]he legislature intended that a second offense for drunk driving be exclusively within the province of the state” to prosecute as a crime, *Rohner*, 108 Wis. 2d at 717, and then asserted that Lowery here is arguing that this court should “curtail” the circuit court’s subject matter jurisdiction over OWI violations, which, the City argues, is in direct conflict with the court’s holding in *Mikrut*. Although the City concedes that second and subsequent offense OWI violations must be prosecuted by the State, the City asserts that “a violation of this rule cannot deprive the circuit court of its subject matter jurisdiction.” Rather, the City argues, the requirement that the State prosecute second and subsequent OWI violations as criminal matters affects only a court’s competency to proceed, and here, Lowery forfeited any objection to the court’s competency.

¶11 We reject the City’s argument that *Mikrut* modified *Rohner*. The court in *Mikrut* made no reference to its earlier holding in *Rohner* in discussing the distinction between a court’s subject matter jurisdiction and competency. And we do not read *Mikrut* as modifying *Rohner* in any way. The court’s holding in *Rohner* that we apply here continues to be good law in Wisconsin and the City fails to persuade us otherwise.

¶12 In addition, the City’s reliance on *Mikrut* is misplaced. In *Mikrut*, the supreme court addressed a circuit court’s noncompliance with statutory

requirements pertaining to the invocation of its subject matter jurisdiction over cases validly before it. *Mikrut*, 273 Wis. 2d 76, ¶2. Here, however, the City's charge of first offense OWI was never valid under *Rohner*, and thus this case was never validly before the circuit court in the first instance. See *Rohner*, 108 Wis. 2d at 721-22.

¶13 As we indicated, the City contends that Lowery forfeited his right to challenge the circuit court's competency by failing to raise a timely objection in the circuit court. "[A] challenge to the circuit court's competency is [forfeited] if not raised in the circuit court." *Mikrut*, 273 Wis. 2d 76, ¶3. The problem with this argument, however, is that the court never had competency because the court did not have subject matter jurisdiction, and objection to a court's subject matter jurisdiction may be brought at any time. See *Kohler Co. v. DILHR*, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1997) (a challenge to a court's subject matter jurisdiction may be brought at any time). "A void judgment cannot be validated by consent, ratification, [forfeiture], or estoppel." *Id.*

¶14 Accordingly, we reverse and remand with directions to vacate the 2010 judgment of conviction for first-offense OWI under Portage County's ordinance.

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

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

