

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1353

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF WAUKESHA,

PLAINTIFF-RESPONDENT,

V.

KATHLEEN M. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

BROWN, J. Kathleen M. Allen appeals from an order of the circuit court affirming an order of the municipal court for the City of Waukesha. The municipal court dismissed Allen's first operating while intoxicated (OWI) charge for lack of probable cause, unaware of the fact that she had since been convicted for a second OWI. When the conviction was brought to the municipal court's attention, the municipal court vacated the dismissal order because, upon

Allen's conviction, the municipal court had lost subject matter jurisdiction over the first OWI. Allen appealed to the circuit court, arguing that the municipal court could not lose jurisdiction over the first offense due to a conviction on a second offense. The circuit court affirmed the municipal court's order to vacate. We agree that the municipal court lost subject matter jurisdiction over the first offense when Allen was convicted of the second. Allen also argues that the City provided no proof that there existed a conviction for the second offense. Allen has waived this issue. We thus affirm the circuit court's order.

Allen was cited for OWI and operating with a prohibited blood alcohol content (PAC) on November 9, 1996. Later, on July 25, 1997, Allen was again cited for OWI-PAC. She was convicted of OWI for this second offense on August 29, 1997, and paid a forfeiture of \$622.¹ The related PAC charge was dismissed. On September 12, 1997, the municipal court dismissed the November 9, 1996 OWI-PAC charge for lack of probable cause. At that time, the municipal court was unaware of the intervening OWI conviction. The city attorney later informed the municipal court of the August 29, 1997 conviction and presented the municipal court with an order vacating, for lack of subject matter jurisdiction, the September 12, 1997 dismissal. After a hearing on the pending order to vacate, the municipal court signed the order.

A municipal court is without subject matter jurisdiction over a second or subsequent OWI offense. See *County of Walworth v. Rohner*, 108 Wis.2d 713, 722, 324 N.W.2d 682, 686 (1982); *City of Kenosha v. Jensen*, 184 Wis.2d 91, 99, 516 N.W.2d 4, 8 (Ct. App. 1994). Allen argues that because the

¹ The only documentation in the record of Allen's conviction and forfeiture for the July 25, 1997 offense is a letter from the city attorney to the municipal court judge.

charge before the municipal court was actually the “first” violation, the municipal court had jurisdiction; a subsequent event cannot affect established jurisdiction. The City responds that it is not the order of violations that is dispositive, but rather the existence of another conviction. According to the City, the municipal court lost jurisdiction over the first case the moment Allen was convicted of the second.

The holding in *State v. Banks*, 105 Wis.2d 32, 313 N.W.2d 67 (1981), controls in this case, though the sequence of events differs. In *Banks*, the defendant was charged with one OWI offense in October and another in December. *See id.* at 36, 313 N.W.2d at 69. Banks pled to the second charge before the court commissioner, who was unaware of the first conviction. *See id.*² The commissioner vacated the second conviction upon learning of the first, treating it as a nullity due to lack of subject matter jurisdiction. *See id.* The State then brought criminal charges for OWI, second offense. *See id.* The circuit court dismissed the criminal charges, finding that the penalty enhancer did not apply since Banks had not been convicted of the first offense when he committed the second. *See id.* at 36-37, 313 N.W.2d at 69. The court of appeals affirmed, but the supreme court reversed. *See id.* at 38, 51, 313 N.W.2d at 70, 76. For the penalty enhancer to apply, it is not necessary for there to have been a conviction for the first offense when the second offense occurs. *See id.* at 50, 313 N.W.2d at

² We note for clarity’s sake that the City misreads the facts in *State v. Banks*, 105 Wis.2d 32, 313 N.W.2d 67 (1981). The City interprets the statement of facts in *Banks* to describe a case parallel to the case at bar: one where the defendant is convicted of a second offense before conviction of the first offense. The statement in *Banks* leading to this confusion is: “At the time Commissioner Northrup accepted Banks’ plea to the second drunk driving charge he was unaware of Banks’ OMVWI conviction of January 10, 1980 (October 15, 1979 offense).” *Id.* at 36, 313 N.W.2d at 69. The October offense was the first offense. Thus, Banks pled to the second offense after having been convicted of the first offense. The issue in *Banks* was whether the penalty enhancer applied when Banks had not been convicted of his first offense before committing his second. Banks was not convicted of his second offense before conviction for the first offense—the situation Allen is in here.

75. However, once there is a conviction, suspension or revocation for either offense, jurisdiction to proceed on other offenses lies exclusively with the circuit court. *See id.* at 40-41, 313 N.W.2d at 71 (holding that court commissioner was without jurisdiction to hear or enter judgment in a criminal proceeding). The *Banks* court specifically noted that the order of the offenses and convictions was not the controlling factor when determining applicability of the penalty enhancer. *See id.* at 48, 313 N.W.2d at 74. It follows that the order of offenses and convictions is not dispositive of the jurisdictional question, as jurisdiction in municipal court does not extend to matters that require criminal penalties. *See Rohner*, 108 Wis.2d at 720-22, 324 N.W.2d at 685-86 (noting that “the legislature intended to remove from local jurisdiction traffic regulations that require criminal penalties” and thus jurisdiction for a second OWI offense lies exclusively with the State). *See also* § 755.045(1), STATS. (granting municipal courts jurisdiction over forfeiture actions). Municipal court jurisdiction is lost once the penalty enhancer becomes applicable. *See Rohner*, 108 Wis.2d at 717, 324 N.W.2d at 683. Thus, the municipal court loses jurisdiction over an OWI offense once a conviction for another OWI offense is entered, regardless of whether the conviction is for the first, second or subsequent offense.

Here, when Allen was convicted of OWI on August 29, 1997, the municipal court lost jurisdiction to proceed on her other offense. Because the municipal court had lost subject matter jurisdiction over Allen’s first offense, its dismissal of the first offense was properly vacated as null and void. *See Banks*, 105 Wis.2d at 43, 313 N.W.2d at 72; *Jensen*, 184 Wis.2d at 98, 516 N.W.2d at 7.

Allen next argues that the City submitted no evidence to prove that a prior conviction existed. First, Allen’s argument is based on the misunderstanding that the order of offenses is significant. Allen stresses that the City failed to prove

a *prior* conviction. We have discussed above that the order of the offenses is irrelevant. Second, Allen has waived this issue. Allen asserts that a review of the transcript of the November 7, 1997 motion hearing shows that there was no proof of the conviction. However, we have reviewed that transcript and find no mention of this assertion. If Allen wished to preserve the issue for appeal, it was her duty to make a record of raising it. See *State v. Caban*, 210 Wis.2d 597, 605, 563 N.W.2d 501, 505 (1997). A reviewing court need not address issues raised for the first time on appeal. See *C.A.K. v. State*, 154 Wis.2d 612, 624, 453 N.W.2d 897, 902 (1990).

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.