COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2013

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. 2012AP2001 **Cir. Ct. No. 1996TR1297**

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

CLARK COUNTY,

PLAINTIFF-RESPONDENT,

V.

REX A. POTTS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed and cause remanded with directions*.

¶1 HIGGINBOTHAM, J.[1] Rex A. Potts appeals a circuit court order denying his motion for relief from an alleged void judgment. Potts contends that the 1996 judgment of conviction entered against him for operating a motor vehicle while intoxicated (OWI) as a first offense is void because the court lacked subject matter jurisdiction to try him for first offense OWI, in violation of Clark County ordinance, in light of the fact that he had two prior convictions for drunk driving in Massachusetts. For the reasons explained below, we reverse and remand with directions to vacate the 1996 judgment.

BACKGROUND

¶2 In June 1996, Potts was arrested in Clark County for operating a motor vehicle while intoxicated. Because his driving record made no indication of prior convictions, Potts was cited with operating a motor vehicle while intoxicated as a first offense, in violation of county ordinance. The court accepted a plea and entered judgment against Potts.

¶3 In April 2012, Potts moved for relief from the judgment on the ground that the judgment was void because the court lacked subject matter jurisdiction. Potts argued that the court lacked subject matter jurisdiction because, at the time of the 1996 offense, he had two prior convictions for operating a motor vehicle while intoxicated, and a third offense must be charged as a criminal offense. *See* WIS. STAT. § 346.65(2)(c) (1995-96). Potts produced documents establishing that, in 1989 and in 1993, Potts was convicted in Massachusetts of drunk driving. Potts contended that, because he should have been charged with a

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

criminal offense, the court lacked subject matter jurisdiction to try him for an ordinance violation.

¶4 The circuit court denied the motion for relief on the ground that it was not brought within a reasonable time, as is generally required under WIS. STAT. § 806.07(2) for motions brought under § 806.07(1). The court acknowledged that in ***Neylan v. Vorwald***, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985), the Wisconsin Supreme Court held that "[a] void judgment may be expunged by a court at any time," thereby rejecting the application of the reasonable time requirement under § 806.07(2) to void judgments. However, the court disregarded the holding in ***Neylan*** and determined that Potts "should not be allowed to benefit from his delay" in waiting approximately sixteen years to move for relief because of the "resulting prejudice" to the County. Potts appeals.

DISCUSSION

¶5 We begin by observing that the parties do not dispute that the circuit court erred in denying Potts' motion for relief from the alleged void judgment on the ground that it was not brought within a reasonable time within the meaning of WIS. STAT. § 806.07(2). We agree.

¶6 Under WIS. STAT. § 806.07(1)(d), a court may "relieve a party … from a judgment" on the ground that "[t]he judgment is void." WISCONSIN STAT. § 806.07(2) states that "[t]he motion shall be made within a reasonable time." However, the Wisconsin Supreme Court in ***Neylan*** stated that the requirement that the motion be brought within a reasonable time does not apply to void judgments because "[i]t is the duty of the court to annul an invalid judgment." ***Neylan***, 124 Wis. 2d at 97 (quoted sources omitted). Accordingly, the supreme court determined that a motion for relief from a void judgment may be brought at any

time, regardless whether the moving party has been "dilatory or lackadaisical in his efforts to overturn the judgment." ***Id.*** (quoted source omitted). Applying that rule here, it is clear that Potts may seek relief from a void judgment at any time, regardless whether he has been "dilatory or lackadaisical" in seeking relief.[2]

¶7 Because Potts was entitled to bring his motion for relief from the alleged void judgment at any time, the question turns to whether the judgment of conviction for first offense OWI is void.

¶8 Potts argues, relying on ***County of Walworth v. Rohner***, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), that the 1996 judgment is void because the court lacked subject matter jurisdiction. In ***Rohner***, a defendant was charged with drunk driving as a first offense in violation of a county ordinance and moved to dismiss the charge on the ground that the court lacked subject matter jurisdiction. ***Id.*** at 715. The defendant argued the court lacked subject matter jurisdiction because he had a conviction for drunk driving within the previous year, and, therefore, under Wisconsin's drunk driving statutes, he should have been charged with second offense OWI in violation of state statutes. ***Id.*** The circuit court denied the motion, determining that it had jurisdiction to proceed under the ordinance violation. ***Id.*** On review, the supreme court concluded that criminal

[2] The circuit court in this case opined that "it might be time for [the rule in ***Neylan***] to change" and stated its belief that the rule in ***Neylan*** is contrary to the plain language of the statute. However, the circuit court was strictly bound by the decision of the Wisconsin Supreme Court, "regardless of the extent of [its] agreement, or [its] disagreement, with it." ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580-81, 427 N.W.2d 427 (Ct. App. 1988). Moreover, the reasoning the ***Neylan*** court relied on in ruling that a motion for relief from a void judgment may be brought at any time recognized that a void judgment is a "legal nullity;" in other words, a void judgment is legally invalid, and the time limitations set forth in WIS. STAT. § 806.07(2) for moving for relief from judgment apply only to legally valid judgments. ***Neylan v. Vorwald***, 124 Wis. 2d 85, 99, 368 N.W.2d 648 (1985) (quoted source omitted).

proceedings and penalties were required for the second drunk driving 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.

¶9 Applying the supreme court's holding in ***Rohner*** to the facts of this case, we conclude that the 1996 judgment against Potts for first offense OWI is void because the court lacked subject matter jurisdiction to try Potts under the Clark County ordinance.

¶10 The County argues that Potts was properly charged with first offense OWI because the Massachusetts convictions do not count as prior convictions under Wisconsin law. According to the County, the Massachusetts convictions do not count because the drunk driving law in Massachusetts must be "substantially similar" to the drunk driving law in Wisconsin for Potts' Massachusetts convictions to count as prior convictions, and Potts has not shown that Massachusetts' drunk driving law was "substantially similar" to Wisconsin's drunk driving law at the time of Potts' convictions in Massachusetts. *See* WIS. STAT. § 343.307(1)(d) (1995-96). The County contends that, because Potts has not shown that the laws were "substantially similar," Potts should not have been charged for OWI under Wisconsin's criminal drunk driving statutes. We disagree.

¶11 We stated in ***State v. White***, 177 Wis. 2d 121, 126, 501 N.W.2d 463 (Ct. App. 1993), that another state's drunk driving statute is "substantially similar" to Wisconsin's drunk driving statute as long as that state's statute "prohibit[s] the use of a motor vehicle while intoxicated." The requirement that the laws be "substantially similar" does not mean that the drunk driving statute of another state must contain the same elements as Wisconsin's drunk driving statute. *See* ***State v.***

Puchacz, 2010 WI App 30, ¶12, 323 Wis. 2d 741, 780 N.W.2d 536. Indeed, "Wisconsin even counts prior offenses committed in states with OWI statutes that differ significantly from our own." ***Id.*** It is important that we count prior convictions from another state as long as that state prohibits the use of a motor vehicle while intoxicated because doing so "effectuates the purposes of the drunk driving laws generally." ***Id.***

¶12 Turning to Massachusetts' drunk driving laws in effect at the time of Potts' 1989 and 1993 convictions, Massachusetts law prohibited an individual from operating a motor vehicle while under the influence of an intoxicant.[3] *See* MASS. GEN. LAWS ch. 90 § 24(1)(a)(1) (1989); MASS. GEN. LAWS ch. 90 § 24(1)(a)(1) (1993). Based on the general prohibition under Massachusetts' law for driving while under the influence of an intoxicant, we conclude that Massachusetts' OWI law in effect at the time of Potts' OWI convictions in that state was "substantially similar" to Wisconsin law. Accordingly, Potts' prior convictions in Massachusetts should have been counted for purposes of determining the proper charge under which to prosecute Potts for OWI in Wisconsin for the 1996 offense, and that the prior OWI convictions in Massachusetts prevented the circuit court here from trying Potts for first offense OWI under Clark County's OWI ordinance.

¶13 Finally, the County argues that, because Potts was likely aware of his prior Massachusetts OWI convictions when he was charged for the 1996 offense but failed to disclose them, and because the prosecutor and the court were

[3] WISCONSIN STAT. § 902.02(1) allows us to take judicial notice of the statutes of another state.

not aware of the Massachusetts convictions despite good faith efforts by the County to determine whether Potts had any prior OWI convictions, Potts is not entitled to the relief he seeks here. The County points out that the officer who cited Potts with first offense OWI in 1996 reasonably tried to determine whether Potts had any prior convictions but failed to discover the Massachusetts convictions because Potts' driving record did not indicate that he ever lived out of state, and because there was no central database in 1996 from which to determine whether a defendant had a prior conviction in any other state. We understand the County to be asking us to adopt a good faith exception to the general rule that a defendant is entitled to relief from a judgment that is void.[4] We decline to do so. The County cites to no legal authority to suggest that such a good faith exception exists.

CONCLUSION

¶14 In sum, we conclude that the 1996 judgment of conviction for first offense OWI entered against Potts was void because the court lacked subject matter jurisdiction to try Potts for first offense OWI in violation of Clark County's OWI ordinance. Accordingly, we reverse and remand with directions to vacate the 1996 judgment of conviction.

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

[4] We appreciate the circuit court's and the County's frustration with Potts' failure to disclose his prior Massachusetts OWI convictions. However, the County does not cite any legal authority showing that a defendant, such as Potts, is required to disclose his prior convictions from another state.

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