

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 1997

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. 97-1261

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT W. THURSTON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County:
GREGORY A. PETERSON, Judge. *Reversed and cause remanded with
directions.*

HOOVER, J. The State appeals an order dismissing a criminal complaint against Robert Thurston. It contends that the trial court erred by dismissing an operating while intoxicated (OWI) criminal charge where Thurston had been convicted of a municipal charge for the same incident and that conviction had not been vacated. This court concludes that the municipal charge

was null and void and that the State could proceed with the criminal charge even though the municipal charge was not yet vacated. The order dismissing the criminal complaint is therefore reversed and remanded for further proceedings.

On February 19, 1996, Thurston was arrested in the City of Altoona for first offense OWI, contrary to § 346.63(1)(a), STATS. A first OWI offense is civil in nature and is punishable by forfeiture and license revocation. Section 346.65(2)(a)-(b), STATS. Thurston pled guilty to the municipal charge in circuit court, paid a forfeiture, and his license was revoked for an unspecified time.

The State later discovered that the February 19 incident was in fact Thurston's third alleged OWI. Section 346.65, STATS., requires that criminal penalties be imposed upon a second or subsequent conviction for operating a motor vehicle while intoxicated within a given period.¹ *County of Walworth v. Rohner*, 108 Wis.2d 713, 716-17, 324 N.W.2d 682, 683 (1982). Consistent with this mandate, and without moving to vacate the prior municipal judgment, the State issued a criminal complaint charging Thurston with OWI, third offense, on November 21, 1996.

On March 11, 1997, Thurston brought a motion to dismiss the complaint on the grounds that he had already pled and been sentenced for the same incident in the civil case. He asserted that the State was precluded from bringing criminal charges against him.² The State argued that, because the offense was

¹ Section 346.65(2j)(c), STATS., establishes the potential penalties for a person convicted of three OWI offenses within a period of 10 years.

² Thurston further argued that § 345.51, STATS., prevented the State from proceeding because the State waited eight months to file a criminal complaint against him. That section reads:

(continued)

actually criminal in nature rather than civil, the judgment obtained by the City of Altoona was null and void for lack of subject matter jurisdiction. It contended it was not therefore prohibited from issuing a criminal charge.

In reaching its decision, the trial court emphasized that a circuit court, unlike a municipal court, had subject matter jurisdiction to hear criminal cases in addition to municipal cases. It therefore reasoned that the civil judgment entered by the circuit court against Thurston, even if wrongfully entered, was not null and void. Concluding that the judgment had not been vacated, it granted Thurston's motion to dismiss. The State filed a motion to reconsider, arguing that the court's ruling contradicted established case law. On April 8, 1997, after Thurston responded, the court issued a written judgment denying the State's motion. It concluded that the State violated Thurston's due process right to fundamental fairness by proceeding with the criminal prosecution without seeking vacation of the original civil conviction.

This case involves the application of law to undisputed facts. This court must decide questions of law independently without deference to the decisions of the trial court. *Ball v. District No. 4, Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). The trial court relied on two cases in reaching its decision, *Rohner* and *City of Kenosha v. Jensen*, 184 Wis.2d 91, 516 N.W.2d 4 (Ct. App. 1994). For purposes of this analysis, it is helpful to discuss both in greater detail.

Except as provided in ss. 345.36 and 345.37, there shall be no reopening of default judgments unless allowed by order of the trial court after notice and motion duly made and upon good cause shown. The notice of motion must be filed within 6 months after the judgment is entered in the court record.

The trial court concluded that *Jensen* precluded the State from proceeding until the municipal conviction was vacated. In *Jensen*, a municipal court prosecuted a drunk driving case that, because it was the defendant's second offense, should have been criminally charged. The appellate court held that the district attorney could proceed with criminal charges without waiting for the municipal attorney to seek vacation of the judgment. *Id.* at 98-99, 516 N.W.2d at 7. Here, the trial court concluded that *Jensen's* underlying rationale was that municipal courts not have subject matter jurisdiction to hear criminal cases; however, because circuit courts do have such jurisdiction, even a wrongfully entered municipal judgment in such court is not null and void.

Rohner refutes this conclusion. In *Rohner*, the defendant was given a municipal citation for drunk driving, a charge for which he had previously been convicted. *Id.* at 715, 324 N.W.2d at 682. During trial in *circuit court*, Rohner made a motion asserting that the court lacked subject matter jurisdiction on the municipal charge because he should have been charged with a second offense with state law. *Id.* The court ruled that it had jurisdiction to proceed under the ordinance violation; the defendant pled guilty and forfeited \$284. *Id.* at 715-16, 324 N.W.2d at 683. The finding of guilty and the three-month revocation of operating privileges were stayed pending appeal. *Id.*

Our supreme court held that the State has exclusive authority to prosecute criminal drunk driving offenses and that therefore the circuit court lacked jurisdiction. *Id.* at 722, 324 N.W.2d at 686. Therefore, it held that the judgment of conviction entered by the court on the municipal charge was an *invalid adjudication* and that no jeopardy attached; the State was at liberty to commence a criminal action. *Id.*

The trial court in this case concluded that because there had been no existing judgment in *Rohner*, no failure to vacate a prior judgment.³ It prevented the State's prosecution because the civil conviction was still of record. However, as *Rohner* demonstrates, the conviction, while of record, was invalid. Although the appellate court in *Rohner* reversed the conviction so that no conviction remained of record, this court sees no requirement that an invalid municipal adjudication be vacated prior to the State filing a criminal complaint. Indeed, *Jensen* pointedly permits the district attorney to proceed with a criminal charge even though the null and void municipal judgment has not been vacated. *Jensen*, 184 Wis.2d at 98-99, 516 N.W.2d at 7. The municipal judgment having no force or effect, it is as if it never existed. *Id.* at 99-516 N.W.2d at 7. The circuit court's jurisdiction over criminal cases is irrelevant; it has no jurisdiction to enter judgment on a drunk driving charge improperly filed municipally and any such judgment is invalid. While it would be preferred practice for the district attorney to move to vacate the municipal conviction before filing a criminal charge, there appears to be no requirement that it do so.⁴ Finally, the § 345.51, STATS., time limits for reopening a default judgment do not apply; the judgment was invalid from the moment of entry.

In conclusion, this court holds that the circuit court lacked jurisdiction over the wrongly charged municipal complaint. Its judgment was

³ The trial court apparently reached this conclusion because the appellate court overturned the municipal conviction before any criminal charges were filed.

⁴ Of course, the defendant has a right to request expungement of an invalid conviction at any time. Furthermore, any penalties the defendant incurred on the invalid municipal conviction, including civil forfeiture and license suspension, should be applied against any future punishment on the criminal charge. The government cannot impose penalties upon an invalid judgment. This would avoid the fairness concerns that, although undeveloped in the briefs, guided the trial court's determination.

therefore null and void and the State could proceed with the criminal charge even though the municipal charge was not yet vacated.

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

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

