COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2002

Cornelia G. Clark
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 Nos. 01-2703 & 01-2704 **Cir. Ct. Nos. 01TR17637 & 01TR17638**

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

COUNTY OF MILWAUKEE,

PLAINTIFF-APPELLANT,

V.

JOHN P. BAUMGARTNER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Reversed and cause remanded with directions*.

¶1 CURLEY, J.[1] Milwaukee County (County) appeals from the trial court's dismissal of the municipal ordinance violation charging Baumgartner with operating a motor vehicle under the influence of an intoxicant, contrary to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

STAT. § 346.63(1)(a) (1999-2000).[2] In another case charging Baumgartner, the County also appeals from the trial court's *sua sponte* amendment of the charge of operating a motor vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b), to that of reckless driving – endangering safety, contrary to WIS. STAT. § 346.62(2).[3] Because the trial court lacked both the inherent and statutory power to dismiss a charge on its own motion or to amend the pleadings *sua sponte*, this court reverses and remands and directs the trial court to reinstate the original charges against Baumgartner.

I. BACKGROUND.

¶2 On April 25, 2001, the County charged Baumgartner with both operating a motor vehicle under the influence and operating a motor vehicle with a prohibited alcohol concentration. On April 27, 2001, Baumgartner entered pleas of not guilty to both charges. A jury trial was scheduled for September 17, 2001.

¶3 On September 17, 2001, before the jury was called or any evidence was presented, the trial court met with the parties and decided to dismiss one charge and amend the other charge *sua sponte* over the prosecutor's strenuous objection. Even though there was evidence of an alcohol concentration of .10%, the trial court concluded: "[T]his could conceivably be a reckless driving situation rather than operating while intoxicated." The trial court then decided to "*sua sponte* amend the charge to a violation of 346.62(2), reckless driving."

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[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] The cases were consolidated on appeal.

II. ANALYSIS.

¶4 The County maintains that the authority to file, dismiss, or amend charges lies solely in the discretion of the prosecutor. Thus, the County contends that the trial court erroneously amended the two charges to a single charge of reckless driving. This court concludes that although a trial court may amend or dismiss charges *sua sponte* under certain conditions, those conditions were not met in the instant case. Accordingly, the trial court is reversed and the cause is remanded.

A. The trial court lacked the inherent power to amend or dismiss the charges sua sponte.

¶5 Among the sources from which courts receive their powers are the statutes and their own inherent judicial authority. ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 483, 518 N.W.2d 285 (Ct. App. 1994). Whether a trial court acted within these powers is a question of law which we review *de novo*. *See* ***id.***

¶6 Generally, courts have exercised inherent authority in three areas. The first area of inherent authority is the internal operations of the court. ***Sun Prairie v. Davis***, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999). The power to control the internal operations of the court includes, for example: (1) the authority of a court to retain its judicial assistant; (2) the authority of a court to retain its janitor; and (3) a court's inherent authority over the adequacy of its facilities to carry on its business. *See* ***id.***

¶7 Second, "[c]ourts also have inherent authority to regulate members of the bench and bar." ***Id.*** For example, the supreme court can require disclosure of a judge's assets. ***Id.*** A court also has inherent authority to determine whether attorney's fees are reasonable and to refuse to enforce those that are not. ***Id.***

¶8 "The final area in which the court exercises inherent authority is ensuring that the court functions efficiently and effectively to provide the fair administration of justice." ***Id.*** at 749-50. This power ensures a court the authority to control its docket, including: (1) disposing of constitutional issues raised before it; (2) appointing counsel for indigent parties; (3) determining compensation for court-appointed attorneys; (4) vacating a void judgment because the court had no authority to enter the judgment in the first place; (5) ordering the dismissal of a complaint if an attorney fails to appear for a pretrial conference and the attorney was warned of the possible sanction of dismissal; and (6) ordering parties to exchange names of lay witnesses. *See* ***id.*** at 750.

¶9 However, courts may not exercise inherent authority over matters that concern neither the existence of the court nor the orderly and efficient functioning of the court. *See* ***id.*** at 751. Specifically, this court has held: "The fashioning of a criminal disposition is not an exercise of broad, inherent court powers." ***State v. Amato***, 126 Wis. 2d 212, 216, 376 N.W.2d 75 (Ct. App. 1985). In ***Amato***, this court noted that "if the authority to fashion a particular criminal disposition exists, it must derive from the statutes." ***Id.***

¶10 This court concludes that the amendment and dismissal of the charges in the instant case were not within the trial court's inherent powers. The charges against Baumgartner were not dismissed or amended pursuant to any of the three traditional areas of inherent power. The dismissal and amendment of the charges did not concern the efficient or effective functioning of the trial court, and the trial court never raised such concerns. Thus, if the trial court's authority to amend or dismiss charges *sua sponte* existed, it had to derive from the statutes.

B. The trial court lacked the statutory power to amend or dismiss the charges sua sponte.

¶11 "[T]he amendment of pleadings in traffic cases involving [a] violation of a state statute prescribing a forfeiture are governed by the civil statutes." ***State v. Peterson***, 104 Wis. 2d 616, 621, 312 N.W.2d 784 (1981). Baumgartner has offered two statutory sections to justify the trial court's actions – WIS. STAT. §§ 967.055 and 802.09. This court concludes that neither is applicable.

¶12 First, WIS. STAT. § 967.055 states, in relevant part:

> **Prosecution of offenses; operation of a motor vehicle or motorboat; alcohol, intoxicant or drug.**
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> ….
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> **(2)** DISMISSING OR AMENDING CHARGE. (a) [I]f the *prosecutor* seeks to dismiss or amend a charge under s. 346.63 (1) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) … the *prosecutor* shall apply to the court. The application shall state the reasons for the proposed amendment or dismissal. The *court* may approve the application only if the *court* finds that the proposed amendment or dismissal is consistent with the public's interest….

(Emphasis added.)

¶13 In ***State v. Dums***, 149 Wis. 2d 314, 440 N.W.2d 814 (Ct. App. 1989), this court determined that a trial court's *supervision* of prosecutorial motions to dismiss or amend pursuant to WIS. STAT. § 967.055(2) does not violate separation of powers:

> Dums contends that sec. 967.055(2) violates the separation-of-powers doctrine because the statute mandates judicial interference in the exercise of executive power….

> Wisconsin's separation-of-powers principle prohibits a substantial encroachment by one branch of government on a function that has been delegated to another branch. The issue in separation-of-powers cases is whether the statute in question "materially impairs or practically defeats" the proper function of a particular branch and the exercise of powers delegated to it. A statute may not allow one branch of government to unduly burden or substantially interfere with another branch's exercise of authority. Governmental branches nevertheless may share similar powers without interfering with another branch's exercise of authority.
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> ….
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> After prosecution is commenced, the trial court under its own power may refuse a prosecutor's motion to dismiss or amend the charge if it determines the motion was not in the public interest. In Wisconsin, it is equally clear that the legislature may, if it desires, spell out the limits of the prosecutor's discretion and can define the limits of that discretion. Thus, a trial court may review the exercise of prosecutorial discretion to terminate or amend pending prosecution pursuant either to its own power or to a legislative standard for limited judicial supervision of prosecutorial motions to dismiss or amend.
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> … By enacting sec. 967.055(2), the statute in question, the legislature mandated judicial supervision of prosecutorial motions to dismiss or amend OWI charges to ensure the vigorous prosecution of drunk driving offenses. Thus, when the court scrutinizes the district attorney's application to amend or dismiss the charge, it is merely executing both its and the legislature's permitted shared power with the executive branch under the separation-of-powers doctrine.

Id. at 320-22 (footnote and citations omitted).

¶14 Thus, according to ***Dums***, a trial court's review and supervision of a prosecutor's discretion to dismiss or amend charges does not violate separation of powers. ***Dums*** illustrates that the power to dismiss or amend charges for operating while intoxicated is a shared power – the prosecutor has the power to seek a dismissal or amend the charges and the court has the power to approve or reject said request. However, this court concludes that a trial court's absolute usurpation

of the prosecutor's discretion under WIS. STAT. § 967.055(2), as occurred in the instant case, is a violation of separation of powers. The legislature's permitted shared power pursuant to § 967.055(2) does not include the trial court's direct dismissal or amendment because such actions would directly interfere with a prosecutor's exercise of authority.

¶15 Additionally, this court concludes that the trial court may not amend a party's pleading *sua sponte* under WIS. STAT. § 802.09(1). Section 802.09(1) states, in relevant part:

> AMENDMENTS. A *party* may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a *party* may amend the pleading only by leave of *court* or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

(Emphasis added.) Section 802.09(1) only applies to a party's amendment of his or her own pleadings. The trial court's only role in the process pursuant to § 802.09(1) is to either grant or deny the party's motion to amend. Thus, a trial court may not amend pleadings *sua sponte* under § 802.09(1).

¶16 Finally, while WIS. STAT. § 802.09(2) provides that a trial court may amend pleadings *sua sponte* to conform to the proof presented at trial, *see* ***Peterson***, 104 Wis. 2d at 626-27, here, the essential requirement of § 802.09(2) has not been satisfied. Namely, there was no trial. Accordingly, no issues were tried either expressly or implicitly, and the trial court erred in amending the charges.

¶17 Based on the foregoing, the trial court is reversed and the cause remanded with directions to reinstate the original charges against the defendant.

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

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