

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2003

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. 03-0534 thru 03-0553

STATE OF WISCONSIN

**Cir. Ct. Nos. 00FO000567 thru 00-FO000580
00-TR003333 thru 00TR003338**

**IN COURT OF APPEALS
DISTRICT III**

VILLAGE OF TREMPÉALEAU,

PLAINTIFF-RESPONDENT,

v.

MIKE R. MIKRUT,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ This case presents the issue of whether the Village of Trempealeau's failure to comply with WIS. STAT. § 66.0113(1)(c) and

¹ These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

TREMPEALEAU, WIS., ORDINANCE § 1-2-1 (2000)² deprived the circuit court of competency to proceed against Mikrut for twenty-one municipal ordinance violations. Because Mikrut failed to raise this issue in the circuit court or in his initial appeal, we hold Mikrut has waived the issue. Therefore, we affirm the decision of the circuit court.

BACKGROUND

¶2 Mikrut owned and operated a salvage yard in the Village of Trempealeau for approximately fifty years. Mikrut owns two other properties near the salvage yard. On these properties, the Village cited Mikrut for twenty-one ordinance violations: five violations for the storage of junked vehicles on private property, contrary to TREMPEALEAU, WIS., ORDINANCE § 8-4-8; eight violations for failing to obtain a conditional use permit for the operation of a junk and salvage yard in an industrial district, contrary to TREMPEALEAU, WIS., ORDINANCE § 10-1-28; and seven uniform traffic citations for the illegal storage of junked vehicles, contrary to TREMPEALEAU, WIS., ORDINANCE § 9-1-1. Mikrut was found guilty of each violation and was ordered to pay forfeitures exceeding \$104,000.

¶3 Mikrut appealed the judgments, arguing that he did not need a conditional use permit because he was engaged in the permitted use of a warehouse, the properties were legal nonconforming uses, deficiencies in the citations affected personal jurisdiction over him, there was insufficient evidence to support the circuit court's findings, the forfeitures assessed were erroneous, and

² All references to the TREMPEALEAU, WIS., ORDINANCES are to the 2000 version.

the Village was equitably estopped from enforcing the ordinances because he had moved the vehicles to the properties at the Village's request. In *Village of Trempealeau v. Mikrut*, Nos. 01-3471-90, unpublished slip op. (Wis. Ct. App. May 14, 2002), we rejected all of these arguments and affirmed the circuit court. Notably, Mikrut never challenged the circuit court's competency to decide these violations. The supreme court denied Mikrut's petition for review.

¶4 Mikrut then, for the first time, filed a motion to vacate the judgments in the circuit court on grounds that the Village did not follow statutory mandates when it chose to enforce certain violations by citations. Mikrut argued that this rendered the circuit court incompetent to exercise its subject matter jurisdiction over the citations. Consequently, Mikrut argued the resulting judgments were void. The circuit court denied Mikrut's motion on grounds that he waived any objections to the court's competency to proceed by failing to raise the issue during the trial or in his original appeal.

¶5 Mikrut now appeals that decision. Specifically, Mikrut argues: (1) the Village's failure to adopt a schedule of cash deposits, as required by WIS. STAT. § 66.0113, is a prerequisite to the circuit court exercising jurisdiction, (2) the Village issued citations for ordinances that had a statutory counterpart in violation of its own ordinance, and (3) the Village issued uniform traffic citations for ordinances it was prohibited from enforcing by uniform traffic citations. As such, Mikrut argues, the circuit court did not have competence to litigate this matter. Mikrut then contends that because competence affects the subject matter jurisdiction of the court, it is immaterial that this issue is being raised for the first time on this second appeal because it can never be waived. We disagree.

¶6 We hold that objections to competence can be waived and have been waived in this case. Because of this, we do not reach the merits of Mikrut’s arguments.

DISCUSSION

¶7 Whether a circuit court has lost competency to proceed presents a question of law that we review de novo without deference to the determination of the circuit court. *State v. Kywanda F.*, 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996).

¶8 Mikrut argues the circuit court did not have competence to proceed in this matter because the Village did not strictly comply with mandatory statutory provisions when it chose to enforce ordinance violations by use of a citation. As a consequence, he reasons that the circuit court could not exercise jurisdiction over the case because lack of competency is a jurisdictional defect. We disagree.

¶9 At the outset, we must distinguish “subject matter jurisdiction” from “competence.” *Tridle v. Horn*, 2002 WI App 215, ¶7, 257 Wis. 2d 529, 652 N.W.2d 418. As has been declared in other cases, the two concepts have been used inconsistently. *See id.* The two concepts are not, however, synonymous and the distinction is crucial to this case.

¶10 Subject matter jurisdiction refers to “the power of a court to hear and decide a particular case or controversy.” *Id.* This power is conferred to the circuit courts by our state constitution, and not by acts of the legislature. *Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 705 n.1, 495 N.W.2d 660 (1993); *see also* WIS. CONST. art. VII, § 8. It extends to all circuit courts such that “No circuit court is

without subject matter jurisdiction to entertain actions of any nature whatsoever.” *Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982).

¶11 Apart from subject matter jurisdiction stands the concept of competence. Competence is defined as “the ability of a court to exercise its subject matter jurisdiction in regard to particular issues in specific cases.” *Tridle*, 257 Wis. 2d 529, ¶8. The critical difference between competency and subject matter jurisdiction is that while subject matter jurisdiction stems from the constitution and cannot be stripped by legislative acts, a court gains competence by following statutory requirements established by the legislature. *See id.* A court could lose competence to proceed in a matter if statutory requirements are not followed. *Miller Brewing Co.*, 173 Wis. 2d at 706. Stated differently, a failure to abide by statutory requirements does not in any way affect a circuit court’s subject matter jurisdiction; that is, its ability to adjudicate the kind of controversy before it. But a failure to follow statutory requirements may result in the court’s “loss of competence” to proceed in the matter; that is, it may prevent the circuit court from adjudicating the specific case before it. *Green County DHS v. H.N.*, 162 Wis. 2d 635, 656, 469 N.W.2d 845 (1991).

¶12 A failure to follow a statutory requirement, though, does not always result in a circuit court’s loss of competence. When analyzing a failure to follow a statutory requirement, “the critical focus is not ... on the terminology used to describe the court’s power to proceed in a particular case.” *Miller Brewing Co.*, 173 Wis. 2d at 706 n.1. Rather, “The focus is on the effect of non-compliance with a statutory requirement on the circuit court’s power to proceed.” *Id.*

¶13 Applying this “effect” test, courts have routinely held that failure of the parties or courts to act within mandated statutory time limits results in a court’s

loss of competence to hear the specific case before it. *See Green County DHS*, 162 Wis. 2d at 656 (circuit court lost competence to exercise jurisdiction when a hearing contesting a CHIPS dispositional order was not held within the maximum thirty-day extension period allowed by WIS. STAT. § 48.365(6)); *Miller Brewing Co.*, 173 Wis. 2d at 706-07 (circuit court lost competence where adverse parties were not brought into an action as defendants within the thirty-day period as required by WIS. STAT. § 102.23(1)(a)). Put simply, mandatory statutory time limits must be strictly complied with or competence to proceed will be lost. However, courts have been reluctant to extend this strict compliance principle to areas outside of time restrictions. *See Kywanda F.*, 200 Wis. 2d at 34-35 (circuit court's failure to advise a juvenile defendant of her statutory right to judicial substitution, despite a statutory mandate to do so, did not result in the circuit court's loss of competency to proceed). In these cases, it is for the courts to determine if the failure to follow a statutory mandate warrants reversal. *Id.* at 33.

¶14 Applying these principles to this case, it is apparent the circuit court had subject matter jurisdiction over the matter despite the Village's failure to follow statutory requirements. Quite plainly, "No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever." *Mueller*, 105 Wis. 2d at 176. As to whether the court had competence to proceed under the effects test, the Village's failure to follow the statutory requirements for establishing the means for enforcing ordinance violations may have resulted in the court's loss of competence to proceed in the matter. However, we do not reach the merits of this argument because we hold that Mikrut has waived them.

¶15 Although objections to subject matter jurisdiction can never be waived and can be raised at any time by any party, *Tridle*, 257 Wis. 2d 529, ¶7, there is conflicting authority in Wisconsin on whether this same principle holds

true for the circuit court's loss of competence. *Compare Wall v. DOR*, 157 Wis. 2d 1, 7, 458 N.W.2d 814 (Ct. App. 1990) (failure to object to improper service of petition for review resulted in waiver of circuit court's loss of competency) and *Mueller*, 105 Wis. 2d at 177-78 (“[E]ven where a court lacks only the competency, not jurisdiction, to deal with a particular type of problem, a judgment may be void. ... If a court truly lacks only competency, its judgment is invalid only if the invalidity of the judgment is raised on direct appeal.”), with *Sallie T. v. Milwaukee Cty. DHHS*, 219 Wis. 2d 296, 303-04, 581 N.W.2d 182 (1998) (“like issues of subject matter jurisdiction, a court's loss of competence to adjudicate a matter cannot be waived by the parties.”).

¶16 Mikrut argues that recent language in the supreme court's holding in *Sallie T.* stands for the categorical proposition that competency can never be waived. Mikrut correctly points out that the court did in fact say that “like issues of subject matter jurisdiction, a court's loss of competence to adjudicate a matter cannot be waived by the parties.” *Sallie T.*, 219 Wis. 2d at 303-04. However, that case dealt with the expiration of a CHIPS dispositional order and how that deprived a foster parent from objecting to the replacement of a child with its biological mother. As such, the *Sallie T.* case is more properly framed as one involving a nonjusticiable claim to appeal on the grounds of mootness as opposed to the competency of the circuit court to proceed in the first place. Therefore, when viewed in its proper context, any language extrapolated from that case is not controlling here.

¶17 Consistent with the holdings of *Wall* and *Mueller*, we hold that Mikrut's failure to timely object to the circuit court's competence to proceed constitutes a waiver of the issue. As the supreme court noted, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice. *State*

v. Huebner, 2000 WI 59, ¶¶11-12, 235 Wis. 2d 486, 611 N.W.2d 727. The waiver rule serves many important objectives. It “promotes both efficiency and fairness, and ‘go[es] to the heart of the common law tradition and the adversary system.’” *Id.* (citation omitted). Moreover, it allows the circuit court an opportunity to deal with the alleged error, thereby helping to eliminate the need for appeals. Perhaps most importantly, it encourages diligent preparation of cases on the part of the attorneys. *Id.*

¶18 These principles apply here. At Mikrut’s trial, he never challenged the circuit court’s competency to proceed, and on his first appeal he again failed to raise the issue. Now, the second time this case has been appealed, Mikrut finally raises the issue of competency. There is no reason this issue was not raised earlier. We will not allow parties to participate in a trial without objecting to the court’s competency and then, after receiving an adverse decision from the circuit court and the court of appeals, raise the competency issue for the first time in a second appeal.

¶19 Accordingly, we hold that objections to the competence of the circuit court to proceed can be and, in this case, have been waived. Therefore, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

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

