

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 9, 2009**

David R. Schanker  
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. 2008AP2075**

**Cir. Ct. No. 2008GF4**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**LA CROSSE COUNTY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NORMAN D. PETTIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County:  
DALE T. PASELL, Judge. *Reversed and cause remanded with directions.*

¶1 DYKMAN, J.<sup>1</sup> Norman Pettis appeals from an order denying his motion to vacate his conviction for operating a motor vehicle while intoxicated (OWI) first offense. Pettis argues that the circuit court lacked subject matter

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

jurisdiction to hear La Crosse County's charge of first offense OWI, because his offense was factually his second OWI. Because only the State has jurisdiction to charge for second or subsequent OWI's, Pettis asserts, his judgment of conviction for OWI first offense in this case is void as a matter of law. We agree, and accordingly reverse and remand with directions to vacate the conviction.

### ***Background***

¶2 The following facts are undisputed. Pettis committed two OWI's in 1992, first in Indiana and then in La Crosse County. La Crosse County erroneously charged Pettis with OWI first offense, a civil ordinance violation. Pettis pled guilty, resulting in a civil forfeiture of \$583 and a six-month suspension.

¶3 In May 2008, Pettis commenced this action to vacate his La Crosse County judgment of conviction for OWI first offense. Pettis argued that the State has exclusive jurisdiction to prosecute criminal OWI second offenses, and thus the circuit court lacked subject matter jurisdiction to hear his second offense as a civil action based on the County's OWI first offense ordinance. The circuit court denied Pettis's motion, invoking judicial estoppel to bar Pettis's claim. Pettis appeals.

### ***Standard of Review***

¶4 “[W]hen the facts are not in dispute, whether a judgment is void for lack of jurisdiction is a question of law subject to de novo review.” *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 128, 586 N.W.2d 68 (Ct. App. 1998).

### *Discussion*

¶5 Pettis argues that the circuit court lacked subject matter jurisdiction to enter his 1992 La Crosse conviction, citing *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). There, Rohner committed a second OWI, but the circuit court entered a judgment convicting him under Walworth County’s OWI first-offense ordinance. *Id.* at 715-16. Recognizing the mandatory word “shall” in WIS. STAT. § 346.65(2)(a), the Wisconsin Supreme Court found that second and subsequent OWI offenses must be charged as crimes, not as civil ordinance violations. *Id.* at 717. Since only the State can enact and prosecute crimes, the State has exclusive jurisdiction over second and subsequent OWI offenses.<sup>2</sup> *Id.* at 718; *see also State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 87, 28 N.W.2d 345 (1947) (only the State can create a crime). Thus, the court held that Walworth County lacked jurisdiction to prosecute Rohner’s criminal act, which, in turn, deprived the circuit court of subject matter jurisdiction over the case. *Rohner*, 108 Wis. 2d at 721-22. Under *Rohner*, then, a circuit court lacks subject matter jurisdiction over an OWI second offense erroneously charged under a county’s OWI first-offense ordinance.

¶6 The County responds that *Rohner*’s holding was modified by more recent supreme court case law holding that circuit courts are never without subject matter jurisdiction. It cites *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190, for the proposition that “[c]ircuit courts in Wisconsin are constitutional courts with general original subject matter

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<sup>2</sup> Under WIS. STAT. § 346.65(2), a first offense OWI is civil in nature and subsequent offenses are criminal. *County of Walworth v. Rohner*, 108 Wis. 2d 713, 716-17, 324 N.W.2d 682 (1982).

jurisdiction over all matters civil and criminal.” (Citation omitted.) Thus, the County asserts, only the court’s competency to exercise its jurisdiction, not its jurisdiction, may be challenged. *See id.*, ¶2. Moreover, the County argues, Pettis has missed his chance to raise this issue because competency arguments may be waived, and Pettis did not bring a timely challenge to the court’s competency. *See id.*, ¶3.

¶7 The problem with the County’s argument is that *Mikrut* addressed a court’s “noncompliance with statutory requirements pertaining to the invocation of [its subject matter] jurisdiction” over cases validly before it. *Id.*, ¶2. Here, the charge of first offense OWI was not valid, and thus the case was never validly before the court in the first instance. *See Rohner*, 108 Wis. 2d at 721-22. The court did not lose competency to exercise its jurisdiction; an invalid charge is never validly before the court. *See State v. Bush*, 2005 WI 103, ¶18, 283 Wis. 2d 90, 699 N.W.2d 80 (“Circuit courts have original jurisdiction over all matters civil and criminal, except as otherwise provided by law. If a complaint fails to state an offense known at law, no matter civil or criminal is before the court, resulting in the court being without jurisdiction in the first instance.”).

¶8 The County argues, however, that even if the trial court lacked jurisdiction to enter the 1992 La Crosse OWI first-offense conviction, it acted within its discretion in refusing to vacate the conviction. We disagree. Because the court lacked jurisdiction to enter the 1992 La Crosse conviction, the conviction is void. The United States Supreme Court has determined that void judgments, such as those rendered without subject matter jurisdiction, are nullities without further action. *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54 (1920). Wisconsin has followed this rule. *See Halbach v. Halbach*, 259 Wis. 329, 333, 48 N.W.2d 617 (1951) (“[T]he court was without jurisdiction to render

its judgment. The judgment so rendered was void *ab initio* and it is the court's duty to vacate it."). Therefore, vacating a void judgment is mandatory, not discretionary.

¶9 The County advances several unpersuasive arguments as to why we should not follow this rule.<sup>3</sup> First, the County argues that because the supreme court has denied defendants' collateral attacks on void judgments during sentencing, the court has indicated its willingness to uphold void judgments. *See, e.g., State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528. However, *Hahn* and its progeny only disallow collateral attacks during sentencing, and explicitly direct defendants to challenge void judgments directly. *See id.*, ¶28 ("[T]he offender may use whatever means available under state law to challenge the validity of a prior conviction ... in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence."). That is exactly what Pettis has done here, and thus we reject the County's argument that *Hahn* bars Pettis's motion.

¶10 Next, the County argues that public policy dictates Pettis not be allowed to challenge his 1992 conviction. It argues that Wisconsin case law evidences a strict public policy against drunk driving, barring Pettis's attack on his 1992 conviction. While we may agree with the County's policy argument, it cannot overcome controlling authority to the contrary. If the County seeks to

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<sup>3</sup> Additionally, we ordered supplemental briefing on whether judicial estoppel applies to the facts of this case to bar Pettis's argument. After reviewing the parties' supplemental briefs, we agree with Pettis that the record does not establish the elements of judicial estoppel. Also, the County told us as much in its original reply brief, where it said: "The County agrees with the Appellant that a judgment that is void due to the lack of subject matter jurisdiction can be challenged at any time and will not be presenting a judicial estoppel or laches argument in its reply brief."

challenge substantive law on policy grounds, the supreme court, not this court, is the proper venue. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶11 Finally, the County argues that because the supreme court has said that void judgments “may” be expunged at any time, trial courts have discretion whether to vacate or uphold void judgments. *See State ex rel. Wall v. Sovinski*, 234 Wis. 336, 342, 291 N.W. 344 (1940). The County’s reasoning is flawed. The fact that courts may declare judgments void at any time—as opposed to being limited to a particular time frame—does not mean that courts may also uphold void judgments at any time. Case law establishes that they may not do so. Accordingly, we reverse and remand with directions to vacate the 1992 OWI first offense conviction in this case.

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

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

