

Sheboygan County judge rebuked for overriding prosecutor's discretion to dismiss charges

Bruce Vielmetti

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A Sheboygan County judge was rebuked by the Court of Appeals recently for rejecting a prosecutor's intention to dismiss, then reduce, charges against a woman who fought with another woman.



Circuit Judge Daniel Borowski "erroneously exercised (his) discretion by not properly considering the public interest," the court wrote.

Even though Borowski said, "Courts shouldn't be prosecutors," that's kind of what he became when denied the state's motions to dismiss a pair of misdemeanors without prejudice, and then to amend the charges to county ordinance violations.

Esmeralda Rivera-Hernandez got into a fight with another woman in 2016 and was charged with two misdemeanors: battery and disorderly conduct. At a hearing three months later, the prosecutor said she had planned a deferred prosecution but decided to just **dismiss the case** because the victim was uncooperative and was texting threats to Rivera-Hernandez.

Borowski asked for a written motion and the prosecutor responded, laying out more details about the case and concluding it was not in the public interest to prosecute it. Rivera-Hernandez was only 22 with no prior record. She and the other woman had a history of bad blood. Borowski denied the motion in April 2017.

Later, the state tried to amend the case to two tickets, but **the judge denied that, too.**

Rivera-Hernandez eventually pleaded no contest to battery and bail jumping, was sentenced to two years probation and appealed.

"In this case, **the court infringed on the discretion of the prosecutor** by concluding that the prosecutor had enough to go to trial despite the prosecutor's contradictory finding that he or she did not," Judge Paul Reilly wrote for the District II appeals court.

"The prosecutor may have information that it did not wish to share in a public courtroom regarding its ability or desirability to prosecute."

Borowski focused on only one of two parts of the test for when a judge can deny a prosecutor's motion to dismiss "in the public interest" the fair enforcement of the law. The other is the public's interest in deferring to legitimate prosecutorial discretion.

"The court explained, 'I'm not sure that the discretion has been thoroughly and completely exercised here,' but what the court really meant was that it disagreed with the State's exercise of discretion, not that it had not been exercised," Reilly wrote.

Reilly wrote that he didn't need to address Rivera-Hernandez's other claim that Borowski had improperly called her an illegal immigrant at the 2017 hearing.

He sent the case back to Borowski to reconsider the state's motions to dismiss the case.

Former Gov. Scott Walker appointed Borowski to the bench in 2016. He had been a longtime member of the Milwaukee law firm von Briesen and Roper, specializing in representing municipalities, school districts and quasi-governmental groups in his civil practice.

Contact Bruce Vielmetti at (414) 224-2187 or bvielmetti@jrn.com. Follow him on Twitter at [@ProofHearsay](https://twitter.com/ProofHearsay).

Judge Borowski's action and criminal abuse of the judicial system continue to this day.