Appeal No. 2020AP1213-CR **Cir. Ct. No. 2018CF840**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

COREY T. RECTOR,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2019-20),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

The sex-offender-registration statute, WIS. STAT. § 301.45(5)(b)1, requires mandatory lifetime registration for a person who "has, on 2 or more separate occasions, been convicted" of a sex offense. The ordinary meaning of "separate occasions" would seem to require that the convictions occur at different times

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

instead of at the same time—the same occasion. However, in ***State v. Wittrock***, 119 Wis. 2d 664, 671-74, 350 N.W.2d 647 (1984), and ***State v. Hopkins***, 168 Wis. 2d 802, 808-09, 484 N.W.2d 549 (1992), the supreme court determined the phrase "separate occasions" in WIS. STAT. § 939.62(2) (the repeater statute) was ambiguous and, after reviewing legislative history and intent, decided the phrase meant *each* separate *conviction* even when multiple convictions occurred in the same proceeding, at the same time, and on the same occasion. Both ***Wittrock*** and ***Hopkins*** skipped the court of appeals, with the supreme court accepting ***Wittrock*** via a bypass petition and ***Hopkins*** via a certification request.

In this case, we are tasked with defining the same phrase—separate occasions—that ***Wittrock*** and ***Hopkins*** have already defined. The State contends that these decisions constitute binding supreme court precedent. Rector argues the plain, ordinary meaning of "separate occasions" compels a conclusion different than the meaning given in ***Wittrock***/***Hopkins***. He says "separate occasions" means two separate temporal events—two separate proceedings occurring at different times—not simultaneous convictions occurring all at the same time, on one occasion.

The issue here is whether the plain meaning of "separate occasions" in the sex-offender-registration statute means that the two convictions must have occurred at *different* times in two separate *proceedings* so that the qualifying convictions occurred sometime before a defendant is convicted in the current case. Stated otherwise, can the qualifying convictions occur simultaneously, as they did in this case, and as ***Wittrock*** and ***Hopkins*** held?

We respectfully request that the supreme court accept our certification, as resolution of this issue will have a statewide impact and will likely recur until it is

resolved by the supreme court. *See* WIS. STAT. RULE 809.62(1r)(c)3 (satisfying criteria for supreme court review).

BACKGROUND

On August 2, 2018, law enforcement executed a search warrant at the home of Corey T. Rector after connecting electronic devices in his home to a report from the National Center for Missing and Exploited Children that 715 suspected child pornography video files were associated with a Dropbox account connected to one of Rector's email addresses. Rector, a married father of six, had no prior record and worked a full-time job to support his family.

The State charged Rector with ten counts of possession of child pornography contrary to WIS. STAT. §§ 948.12(1m), (3)(a) and 939.50(3)(d), and he accepted the State's offer to plead guilty to five counts in exchange for dismissing the other five counts.[2] Each of the ten counts in the Complaint and Information lists "on or about Thursday, August 2, 2018" as the date Rector possessed the child pornography. At the plea hearing on January 17, 2019, when asking Rector for his plea to each count individually, the circuit court tied each of the counts to "August 2nd, 2018."

On May 30, 2019, the circuit court sentenced Rector to eight years' initial confinement and ten years' extended supervision on each of the five counts to be served concurrently. The court then asked whether sex-offender registration was required. The prosecutor did not know if it was, so the court looked to the

[2] The State also agreed to dismiss a separate matter and that it would not issue additional charges related to other images discovered at the same time.

presentence investigation report, which recommended sex-offender registration for fifteen years. The court ordered sex-offender registration for fifteen years. A single judgment was entered reflecting Rector's convictions on the five counts to which he pled, listing the date committed for each as August 2, 2018, and the date convicted for each as January 17, 2019.

On June 11, 2019, the circuit court received a letter from the Department of Corrections ("DOC") seeking a "clarification on the duration of Mr. Rector's sex offender registration requirement." The letter requested the judgment be amended to require lifetime-sex-offender registration for Rector instead of the fifteen years. The basis for this request was the DOC's opinion that because Rector was convicted of "more than two sex offense convictions," WIS. STAT. § 301.45(5)(b)1, mandated lifetime registration. The DOC's opinion relied on a 2017 Attorney General opinion ("AG opinion") that interpreted the phrase "on 2 or more separate occasions" as used in WIS. STAT. § 301.46(2m)(am) as referring "to the number of convictions, including multiple convictions imposed at the same time and based on the same complaint."[3] *See* Wis. Op. Att'y Gen. to Jon E. Litscher, Secretary of the Wisconsin DOC, OAG-02-17, ¶2 (Sept. 1, 2017).

At a July 2019 hearing scheduled to address the DOC letter, Rector's lawyer advised that the State Public Defender believed this to be an issue of first impression that was likely to recur and therefore SPD would be assigning an

[3] The AG opinion can be found at: https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/2017/2017.pdf (last visited Oct. 25, 2021). WISCONSIN STAT. § 301.46(2m)(am) addresses circumstances under which an agency releasing a sex offender into the community is required to send a notification bulletin to local law enforcement.

appellate lawyer to handle the matter. The circuit court adjourned the hearing on that basis.

In September 2019, Rector's newly appointed appellate lawyer wrote to the court summarizing his research on the DOC's position that Rector was subject to lifetime registration. The letter provided:

- No court decision exists that has adopted the DOC's new reading of WIS. STAT. § 301.45; "for the previous 20 years the department has regarded the requirement of having been convicted 'on 2 or more separate occasions' as requiring more than one case; i.e. recidivism" and the circuit court "remains free to interpret the law according to the usual principles."

- ***Wittrock***'s interpretation of similar language in the repeater enhancement statute, WIS. STAT. § 939.62(2) (1979-80), does not apply.

- "DOC's new interpretation conflicts with the plain-English meaning of this phrase. Why, if the statute merely required two convictions, would it include the phrase 'separate occasions'? Why not simply say 'has been convicted of 2 or more offenses'? The DOC's reading makes meaningless surplusage of the phrase 'separate occasions'—a result to be avoided."

- He has never seen a possession of child pornography case involving only one image. "There are always more, often many more. The practical result [of DOC's opinion] is that the vast majority of people convicted of this offense will be required to

> register for life—while those convicted of some hands-on sex offenses are not."

At the October 2019 hearing on this issue, the circuit court addressed the AG opinion upon which the DOC relied. The circuit court did not see the AG opinion as controlling because it involved WIS. STAT. § 301.46(2m)(am), which is a different, albeit related, statute. The circuit court also discounted the AG opinion because it relied heavily on ***Wittrock*** and ***Hopkins***, where our supreme court said "occasion" was ambiguous, which caused the supreme court to turn to legislative history and intent of the repeater enhancement statute.

The circuit court decided to do a "fresh analysis" of WIS. STAT. § 301.45 and found "separate occasions" to be ambiguous. It then concluded that "separate occasions" in this statute means "the number of times that it had previously occurred" and that "just by simply looking at how the sentence is structured, the way to give meaning to what appears to be the intent of [the] legislature, since it's a nonrestrictive clause, is to indicate that it means two separate occasions" rather than two separate convictions. The circuit court found, therefore, that the statute required Rector to register as a sex offender only for the fifteen years already ordered, and it subsequently entered an order denying the "request for lifetime sex offender registr[ation]."

After the circuit court's decision, Rector appealed on a sentencing issue and the State cross-appealed, arguing the circuit court should have ordered lifetime sex-offender registration.[4]

DISCUSSION

The State's Position

The State's position is that each conviction constitutes a separate occasion—that "occasion" in the statute means "conviction." It contends the supreme court's determination to that effect in ***Wittrock*** and ***Hopkins*** should control.

In ***Wittrock***, decided in 1984, the issue presented involved the language of WIS. STAT. § 939.62 (1979-80), the repeater enhancement statute. ***Wittrock***, 119 Wis. 2d at 665. On April 21, 1981, Wittrock pled guilty to four misdemeanor counts in three different cases. ***Id.*** He had been convicted previously of two counts of disorderly conduct in 1980 and one count of disorderly conduct in 1977. ***Id.*** at 666. The issue was whether he could be sentenced as a repeater under § 939.62 (1979-80), which allowed the enhanced penalty "if he was convicted of a misdemeanor on 3 separate occasions during" "the 5-year period immediately preceding the commission of the crime for which he presently is being sentenced." ***Wittrock***, 119 Wis. 2d at 666-67. The key to the case was the meaning of "3

[4] Rector appealed the circuit court's decision denying him eligibility for the Substance Abuse Program. Rector contends the denial constituted an unlawful preconceived sentencing policy. This issue involves the exercise of the sentencing court's discretion, and we therefore do not explicitly certify it. We provide this information to the court so it has a full understanding as to the posture of Rector's case.

separate occasions." Wittrock argued "occasion" meant each court appearance and the State argued "occasion" meant each separate offense. ***Id.*** at 667.

The ***Wittrock*** court concluded the term "occasion" was ambiguous and thus turned to legislative history to determine the legislature's intent. ***Id.*** at 669-74. It concluded that revisions to the repeater statute showed the legislature was concerned "with the quantity of crimes rather than with the time of conviction," ***id.*** at 674, and believed this interpretation was "consistent with the policy purpose behind the repeater statutes," ***id.***, which it identified as:

- "[I]ncreasing the punishment of those persons who do not learn their lesson or profit by the lesser punishment given for their prior violations of criminal laws."

- "[T]o serve as a warning to first offenders. The infliction of more severe punishment for a repeater is based upon his [or her] persistent violation of the law after conviction for previous infractions."

Id. at 675 (citations omitted). As a result, ***Wittrock*** held the repeater status statute applied because Wittrock had three prior misdemeanor convictions from 1980 and 1977 that were within the five-year period at the time he was sentenced on the crimes he pled guilty to in April 1981. ***Id.*** at 665.

Hopkins, decided in 1992, also involved the repeater statute and relied heavily on ***Wittrock***. ***Hopkins***, 168 Wis. 2d at 805-09. Hopkins argued he did not qualify as a repeater for his (current) 1992 crime because two of his three prior convictions used by the circuit court in applying the repeater statute arose out of "a single course of conduct." ***Id.*** at 805, 813. Hopkins was convicted of three

misdemeanors in December 1989, two of which occurred on June 8, 1989. ***Id.*** at 806. On June 8, 1989, Hopkins was arrested for possession of cocaine and gave a false name, which resulted in a second charge of obstructing an officer. ***Id.*** at 806-807. The ***Hopkins*** court rejected Hopkins' argument, agreeing with the ***Wittrock*** court's conclusion that the legislative history, intent, and purpose show that "occasion" "did not require that the three convictions occur in three separate court appearances." ***Id.*** at 808. The ***Hopkins*** court held "each conviction of a misdemeanor constitutes a separate occasion for purposes of" the repeater statute, and that "[t]his is true regardless of whether the misdemeanors were committed on separate occasions and regardless of the number of court proceedings." ***Id.*** at 808-09. The ***Hopkins*** court concluded that because Hopkins had three prior misdemeanors from 1989, he qualified as a repeater when he was sentenced on his 1992 crime. ***Id.*** at 805.

Both ***Wittrock*** and ***Hopkins*** involved defendants who were in court on a subsequent offense to the three previously-acquired, qualifying convictions. So each defendant had "one opportunity to learn his or her lesson before committing a fourth misdemeanor." ***Hopkins***, 168 Wis. 2d at 812.

The State buttresses its argument by noting that the legislature enacted WIS. STAT. § 301.45(5)(b)1 *after* the ***Wittrock***/***Hopkins*** cases, and because the legislature is presumed to act "with full knowledge of existing statutes and how the courts have interpreted" them, the legislature must have chosen the term "separate occasion" in the sex offender statute to mean "conviction." *See* ***State v. Victory Fireworks, Inc.***, 230 Wis. 2d 721, 727, 602 N.W.2d 128 (Ct. App. 1999). Further, the State finds support in the 2017 AG opinion, which interpreted "separate occasion" in WIS. STAT. § 301.46(2m)(am)—another sex offender-related statute enacted at the same time as § 301.45(5)(b)1—to mean

"conviction."[5] Section 301.46(2m)(am) governs when agencies must send bulletins to notify law enforcement that a sex offender will be released from confinement into their community. The law enforcement notice is mandatory for "offenders with sex offense convictions 'on 2 or more separate occasions,'" but optional "if the offender has a conviction 'on one occasion only.'" *See* Wis. Op. Att'y Gen. to Jon E. Litscher, Secretary of the Wisconsin DOC, OAG-02-17, ¶¶7-8 (citation omitted).

The AG opinion determined the supreme court's definition of "separate occasions" in ***Wittrock*** and ***Hopkins*** controlled the meaning of "separate occasions" in the sex offender notification statute. Specifically, the AG concluded the "language referring to convictions 'on 2 or more separate occasions' refers to the number of convictions, including multiple convictions imposed at the same time and based on the same complaint." *See* Wis. Op. Att'y Gen. to Jon E. Litscher, Secretary of the Wisconsin DOC, OAG-02-17, ¶2.

Rector's Position

Rector's position is that the plain meaning of the words "separate occasions" is so ordinary and well-known that "everyone knows what they mean." According to Rector, "separate occasions" must mean at different times because plain English dictates that "two things that happen at the same time don't happen on '2 occasions.'" Adopting the State's interpretation, he argues, "drain[s] the phrase of any meaning" and renders the statutory language "on 2 or more separate occasions" surplusage, which courts avoid. *See* ***Donaldson v. State***, 93 Wis. 2d

[5] *See* 1995 Wis. Act 440.

306, 315, 286 N.W.2d 817 (1980) ("A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect.").

Rector suggests that use of "separate occasions" within WIS. STAT. § 301.45(5)(b)1 more logically denotes a temporal distinction instead of the word "occasion" meaning "conviction." He continues that had the legislature wanted lifetime reporting after two convictions—regardless of the timing of the convictions—it certainly could have simply said: two or more convictions requires mandatory lifetime reporting.

Rector argues that if "occasion" actually means "conviction," then "what the statute prescribes is mandatory lifetime registration for a person who 'has, on 2 or more separate [convictions], been convicted' of a sex offense." (Alteration in original.) Rector posits: "How can one be convicted on a conviction?"

Rector notes that both ***Wittrock*** and ***Hopkins*** preceded, by more than a decade, what he contends is the supreme court's articulation of a "more textually-focused approach to statutory construction" in ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. Rector emphasizes ***Kalal***'s directive that the courts are to "assume that the legislature's intent is expressed in the statutory language," ***id.***, ¶44, and contends that the ***Wittrock*** and ***Hopkins*** decisions failed to reflect the supreme court's caution that "[s]tatutory interpretation involves the ascertainment of meaning, not a search for ambiguity," ***Kalal***, 271 Wis. 2d 633, ¶47 (citation omitted).

Rector also points out that failing to adopt the plain meaning of these words will impose lifetime registration in nearly every possession of child pornography

case because even first-time offenders almost always have more than a single image—and each image translates to a separate count/conviction.

Rector's plain meaning interpretation would afford first-time offenders the opportunity to learn from their mistake and not reoffend, as ***Wittrock*** and ***Hopkins*** suggest, and the harsher registration requirement would apply only if a previously convicted defendant reoffends on a separate occasion, resulting in another conviction at a different proceeding and time *after* his first conviction. This graduated registration scheme only works if there is actually a *second* opportunity. Here, interpreting the statutory text as the State proposes, and as ***Wittrock***/***Hopkins*** require, means Rector had no second opportunity. Because he possessed more than one image on his first offense—and pled to possession of five counts during this, his first and only criminal case—he qualifies for lifetime registration under ***Wittrock***/***Hopkins*** without ever having the opportunity to learn from this offense.

In Rector's case, a single circuit court accepted Rector's guilty pleas to five counts of possession of child pornography on the same day in a single court appearance, resulting in a single judgment, which arose from a single case and prosecution. Rector argues "separate occasions" is nowhere to be found under this factual scenario.

Under Rector's argument, the plain meaning of "separate occasions" would not equate "occasions" with "convictions," but instead would give "separate occasions" its ordinary meaning and require a sex offender to have been convicted of a sex offense at a time prior to the offense currently before the court. "Separate occasions" should mean a separate case, separate court appearance, and more than one prosecution.

Conflict Needing Wisconsin Supreme Court Resolution

As set forth, Rector's proposed interpretation of WIS. STAT. § 301.45(5)(b)1's "on 2 or more separate occasions" language directly conflicts with the ***Wittrock*** and ***Hopkins*** decisions defining the same language in a similar statute addressing multiple offenses as ambiguous and to mean number of *convictions* rather than, as argued by Rector, affording the plain meaning temporal distinction to the term.

This conflict calls for resolution by the supreme court. The ***Wittrock*** and ***Hopkins*** court determined the phrase was ambiguous and employed a legislative intent analysis when it interpreted the phrase "separate occasions" to mean separate convictions. The DOC has since adopted a new interpretation of the "separate occasions" language found in WIS. STAT. § 301.45(5)(b)1 based on the 2017 AG opinion that relied on these cases in interpreting another closely related statute containing the "separate occasions" language. This interpretation extends far beyond the repeater statute at issue in ***Wittrock***/***Hopkins***, as the DOC is now applying it to the sex-offender-registration statutes.

Thus, this case presents the issue of whether the arguably plain meaning of "separate occasions" in the sex-offender-registration statute conflicts with what our supreme court said "separate occasions" means in ***Wittrock*** and ***Hopkins***. Alternatively, even if the term "occasions" is ambiguous, Rector argues for an interpretation at odds with the supreme court's prior interpretation of the same word as it pertains to multiple offenses. Rector has five convictions, but all five convictions arose from Rector's first and only criminal prosecution involving *one* Complaint/Information listing images from a single day ("August 2nd"), *one* plea hearing, and a *single* judgment. On *one* occasion, Rector was convicted of five

counts. The State contends that we are bound to follow ***Wittrock***/***Hopkins***, where the supreme court adopted a legislative intent interpretation saying "occasions" meant "convictions." Utilizing the ***Wittrock***/***Hopkins*** definition of "occasions" means Rector's five convictions—entered simultaneously in a single prosecution—qualify him for lifetime sex-offender registration even though he has no *prior* convictions.

CONCLUSION

We respectfully request that the supreme court accept this certification to resolve the meaning of "separate occasions" in the sex-offender-registration statute. Should Rector's proposed plain, ordinary meaning of "separate occasions control over ***Wittrock***/***Hopkins***'s interpretation? As noted, the supreme court decided both ***Wittrock*** and ***Hopkins*** without a court of appeals decision by taking both cases on bypass and certification, respectively.[6] Resolution of this issue will both have a statewide impact and will likely recur until it is resolved by the supreme court.

[6] We also note that the United States Supreme Court heard argument in ***United States v. Wooden***, 945 F.3d 498 (6th Cir. 2019), *cert. granted in part*, 141 S. Ct. 1370 (2021), on October 4, 2021, which involves how to interpret the term "occasions" in the Armed Career Criminal Act. The issue there is "whether offenses that were committed as part of a single criminal spree, but sequentially in time, were 'committed on occasions different from one another.'" John Elwood, *Disputes over church property and ACCA ambiguity*, SCOTUSblog (Feb. 18, 2021, 4:39 PM), https://www.scotusblog.com/2021/02/disputes-over-church-property-and-acca-ambiguity/. The ***Wooden*** case could be instructive in how to define "occasions," which could impact the definition of "occasions" in Wisconsin Statutes. The Wisconsin Supreme Court could consider the Supreme Court's definition in ***Wooden*** as it has authority to modify or overrule ***State v. Wittrock***, 119 Wis. 2d 664, 350 N.W.2d 647 (1984), and ***State v. Hopkins***, 168 Wis. 2d 802, 484 N.W.2d 549 (1992), whereas the court of appeals could not.