

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1021-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES M. WIEST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of conviction of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman P.J., Eich and Deininger, JJ.

PER CURIAM. James Wiest appeals a judgment of conviction for possession of marijuana with intent to deliver. Wiest contends that the trial court improperly admitted his privileged medical records into evidence. We conclude that Wiest waived his privilege in a prior trial on the same charges and that the

privilege could not be reasserted in the subsequent trial. We therefore affirm Wiest's conviction.

In 1990, Wiest was convicted of possession of marijuana with intent to deliver, as a repeater, contrary to §§ 161.41(1m)(h)1, 161.14(4)(t), and 939.62(1)(b) STATS., 1989-90. He was placed on probation, but his probation was later revoked, and he was sent to prison. In 1994, Wiest appealed his conviction. The court reporter who had recorded Wiest's 1990 trial had retired and refused to transcribe the trial. The trial court determined that Wiest's appeal would be inhibited by the lack of a transcript and granted Wiest a new trial. He was convicted again.

Wiest now appeals the second conviction. He contends that the trial court improperly admitted his medical records, which were privileged under § 905.04, STATS.¹ The trial court determined that Wiest had waived his privilege by using his medical records in his defense in the first trial.

The first issue on appeal is whether Wiest waived his privilege in the first trial. According to § 905.11, STATS., a patient waives his or her privilege by

¹ Section 905.04(2), STATS., provides:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

voluntarily disclosing, or consenting to disclosure, a significant part of the privileged material.² Whether Wiest waived his privilege depends on historical facts, and we will not disturb the trial court's findings of historical fact unless clearly erroneous. *See State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832-33 (1987).

It is undisputed that Wiest's strategy in the first trial was to use his medical records to show that he had a personal need for the marijuana he possessed. Before the second trial, Wiest conceded that he had waived his privilege in his medical records at the first trial. He contended, however, that he should be permitted to change his mind and reassert the privilege in the second trial. As a result of his concession, the question of whether Wiest waived his privilege in the first trial was never squarely presented to the second trial court. Accordingly, Wiest has not properly preserved this issue for appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).

We note that, even if the issue had been preserved for appeal, we would not disturb the trial court's finding that Wiest had waived his privilege in the records. The record of the hearing on Wiest's motion in limine indicates that Wiest voluntarily waived his privilege at his first trial. According to the assistant district attorney who prosecuted Wiest in both trials, Wiest's attorney in the first

² Section 905.11, STATS., provides:

A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

trial disclosed copies of Wiest's medical records before the first trial. The first defense attorney provided copies of the records to the prosecution in advance of trial so that he could introduce them without calling an authenticating witness, pursuant to § 908.03(6m)(b), STATS. Wiest's attorney in the second trial did not challenge the prosecutor's explanation, and admitted "I think he definitely did waive his right at the last trial as apparent by [the first attorney's] correspondence." Defense counsel also stated that it may have been the prosecution who actually introduced Wiest's medical records in the first trial. But it was Wiest, through his first attorney, who first disclosed the privileged records. Accordingly, we conclude that the trial court's finding that Wiest waived his privilege in his medical records at the first trial is not clearly erroneous.

The second issue on appeal is whether Wiest could revoke his waiver and reassert his privilege in his medical records. This is a question of law, which we review de novo. See *State v. Hydrite Chem. Co.*, No. 96-1780, slip op. at 6 (Wis. Ct. App. May 7, 1998, ordered published June 24, 1998).

We are aware of no Wisconsin precedent regarding whether the physician-patient privilege can be reasserted after it has been waived in a previous trial of the same case. Wisconsin courts have held, however, that once waived, the physician-patient privilege may not be reasserted in related proceedings. In *State v. Johnson*, 133 Wis.2d 207, 225-26, 395 N.W.2d 176, 185 (1986), the supreme court held that once the defendant had waived his physician-patient privilege in a post-conviction hearing, he could not reassert that privilege in a subsequent proceeding.

Johnson conforms to the general rule in other jurisdictions that once waived, the physician-patient privilege may not be reasserted.³ In *Hamilton v. Verdow*, 414 A.2d 914, 919 (Md. 1980), the Maryland court of appeals stated the general rule as follows:

In certain circumstances ... a waiver of a privilege may be limited to a specific use or purpose. However, courts have generally held that once a person waives his privilege by revealing, or permitting to be revealed, certain information, then the privilege will no longer be permitted to protect that same information from use or disclosure to the same or a similarly situated party who will use the information for the same purpose. In these circumstances, therefore, a prior waiver of the privilege is generally regarded as a waiver to the subsequent discovery or use of that information at a later trial of the same issues, or even unrelated issues.

None of the circumstances surrounding Wiest's case suggest that his waiver was for a limited purpose. Accordingly, we apply the general rule and conclude that the trial court properly held that Wiest could not reassert his privilege in his medical records in his second trial.

³ The general rule is also endorsed by Professor Wigmore:

A waiver at a *former trial* should bar a claim of the privilege at a later trial, for the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege. To enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only.

8 WIGMORE, EVIDENCE § 2389(4) (McNaughton rev. 1961).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(5),
STATS.

