

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 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. 97-3015-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUANITA K. VON RUDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Reversed and cause remanded for further proceedings.*

ROGGENSACK, J.¹ Juanita Von Ruden appeals her conviction of contributing to the delinquency of a child, a misdemeanor under § 948.40(1), STATS. Von Ruden contends that her conviction by a jury of six persons should be

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

reversed because § 756.096(3)(am), STATS., which provides for six-person juries in criminal misdemeanor cases, violates art. I, § 7 and art. I, § 5 of the Wisconsin Constitution. We conclude that § 756.096(3)(am) violates art. I, § 7 of the Wisconsin Constitution and that the right to a twelve-person jury extends to defendants charged with misdemeanors. Therefore, we reverse Von Ruden's conviction and remand the cause to the circuit court for a new trial.

BACKGROUND

Von Ruden was charged with two misdemeanors: contributing to the delinquency of a child, contrary to § 948.40(1), STATS., for encouraging a fight between her child and another child; and failure to aid a victim or report a crime, contrary to § 940.32(2)(a), STATS. One day before her trial, Von Ruden requested a twelve-person jury. The circuit court denied the request, reasoning that Von Ruden was charged with misdemeanors and under § 756.096(3)(am), STATS., “[a] jury in misdemeanor cases shall consist of 6 persons.” On June 5, 1997, the parties selected a six-person jury. That same day the jury found Von Ruden guilty of contributing to the delinquency of a child and not guilty of failing to aid a victim or report a crime. This appeal followed.

DISCUSSION

Standard of Review.

We review challenges to the constitutionality of a statute without deference to the decision of the circuit court. *State v. Smith*, 215 Wis.2d 84, 90, 572 N.W.2d 496, 497 (Ct. App. 1997) (citing *State v. Bertrand*, 162 Wis.2d 411, 415, 469 N.W.2d 873, 875 (Ct. App. 1991)).

Constitutionality of § 756.096(3)(am), STATS.

Section 756.096(3)(am), STATS., provides that “[a] jury in misdemeanor cases shall consist of 6 persons.” Von Ruden contends that § 756.096(3)(am) violates art. I, § 7² and art. I, § 5³ of the Wisconsin Constitution.

The Wisconsin Supreme Court recently decided the issue of the constitutionality of § 756.096, STATS., in *State v. Hansford*, No. 97-0885, 1998 WL 321718, at *1 (Wis. June 19, 1998). In *Hansford*, Ronald Hansford was charged with three misdemeanor offenses: battery, contrary to § 940.19(1), STATS.; obstructing an officer, contrary to § 946.41(1), STATS.; and bail jumping, contrary to § 946.49(1)(a), STATS. *Id.* at *2.

Hansford waived his right to a jury trial on the bail jumping charge, and he also filed a motion requesting that the battery and obstructing charges be tried to a jury of twelve persons. Hansford argued that § 756.096(3)(am), STATS.,

² Article I, § 7 of the Wisconsin Constitution states:

In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

³ Article I, § 5 of the Wisconsin Constitution states:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

violates art. I, § 7 of the Wisconsin Constitution. The circuit court denied Hansford's motion, concluding that he had not proved § 756.096(3)(am) is unconstitutional beyond a reasonable doubt. *Id.*

The charges of battery and obstructing an officer were tried to a six-person jury. The jury acquitted Hansford of the battery charge, and convicted him of the obstructing charge. Subsequently, the circuit court convicted Hansford of bail jumping, citing Hansford's conviction for obstructing as a violation of the terms of his bond. Hansford appealed his convictions, and we certified the case to the supreme court. *Id.*

The supreme court concluded that § 756.096(3)(am), STATS., is unconstitutional because a criminal defendant's right to a trial by jury, as guaranteed by art. I, § 7 of the Wisconsin Constitution, is the right to a jury of twelve persons, regardless of whether he has been charged with a misdemeanor or a felony. *Id.* at *6. Because Hansford was not afforded that right, the supreme court reversed his conviction for obstructing an officer and remanded the cause to the circuit court. The supreme court also reversed and remanded the bail jumping conviction. *Id.* at *7.

The facts of Von Ruden's case are on all fours with *Hansford*. Therefore, we conclude that Von Ruden's rights under art. I, § 7 of the Wisconsin Constitution were violated when she was not afforded a twelve-person jury. We do not address whether § 756.096(3)(am), STATS., also violates art. I, § 5 of the Wisconsin Constitution. Because Von Ruden was not afforded her constitutional right to a twelve-person jury at her trial, we reverse her conviction of contributing to the delinquency of a child and remand the cause to the circuit court for further proceedings.

CONCLUSION

We reverse Von Ruden's conviction of contributing to the delinquency of a child because § 756.096(3)(am), STATS., which limited the size of the jury at Von Ruden's trial to six persons, violated Von Ruden's art. I, § 7 right to have a twelve-person jury.

By the Court.—Judgment reversed and cause remanded to the circuit court for further proceedings consistent with this opinion.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

