**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

NOVEMBER 14, 1995

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.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1420-FT**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**WISCONSIN DEPARTMENT OF CORRECTIONS,**

**Plaintiff-Respondent,**

**v.**

**RICHARD E. ARTISON,**
**Sheriff of Milwaukee County,**

**Defendant-Appellant,**

**MILWAUKEE COUNTY,**

**Defendant.**

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Reversed and cause remanded with directions*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Richard E. Artison, Milwaukee County Sheriff, appeals from a circuit court order denying his motion to vacate a permanent injunction entered in 1987 that prospectively enjoined him from refusing to process and hold persons for five days or less when those persons are detained solely on probation or parole holds issued by the Department of Corrections (DOC). Because this case was initiated in 1975, and because the only significant factual record underlying the circuit court's injunction dates back to 1981, this court concludes that a fresh and complete factual record must be made in order to permit the resolution of the significant legal issues this case raises. Accordingly, we reverse the circuit court's order pursuant to § 752.35, STATS., and remand this cause for further proceedings.

## PROCEDURAL HISTORY

The Wisconsin Department of Health and Social Services (DHSS), DOC's predecessor, initiated an injunction action in 1975 against Sheriff Michael Wolke, Sheriff Artison's predecessor, and Milwaukee County. DHSS sought to enjoin Sheriff Wolke from releasing prisoners detained for more than five days in the county jail on probation or parole holds. The action was venued in Dane County. On September 26, 1975, the Dane County circuit court issued a temporary injunction requested by DHSS. Nothing further occurred in the case until March 1, 1979, when a change of venue to Milwaukee County circuit court was ordered pursuant to § 801.54(2), STATS. (1979-80).

In April 1980, Sheriff Wolke and Milwaukee County moved the Milwaukee County circuit court, the Honorable Hugh R. O'Connell presiding, to dissolve the temporary injunction. The circuit court granted the motion. On appeal, this court reversed the circuit court's order and remanded the case back to the circuit court for trial and the entry of findings of fact and conclusions of law construing the phrase "temporary detention" found in § 53.31, STATS. (1979-80).[1] The circuit court conducted evidentiary hearings in November 1981.

[1] **53.31 Use of jails.** The county jail may be used for the detention of persons charged with crime and committed for trial; for the detention of persons committed to secure their attendance as witnesses; to imprison persons committed pursuant to a sentence or held in custody by the sheriff for any cause authorized by law; for the detention of persons sentenced to imprisonment in state penal institutions or the Milwaukee county house of correction, until

Following the completion of these hearings, Sheriff Wolke and Milwaukee County moved the circuit court, in part, to dismiss the action. The circuit court did not rule on the motion to dismiss, apparently relying on a representation of DHSS that the matter would be settled pursuant to negotiations.

The circuit court's file reflects that the case then entered a six-year period of inactivity that ended in October 1987 when the Honorable Rudolph T. Randa, Judge O'Connell's successor on the case, issued a "DECISION AND ORDER." Judge Randa's order permanently enjoined Sheriff Wolke "from refusing to accept temporary detainees for not more than five days."[2] The circuit court's file does not identify the event triggering the issuance of the permanent injunction. Further, the record does not reflect that the circuit court had before it any evidence or exhibits other than the material and testimony submitted in November 1981.

After the permanent injunction was entered, the case lapsed into a third period of inactivity, this one lasting approximately seven years. The case was reactivated when Sheriff Artison filed a motion in April 1995 to open the October 1987 order and set the permanent injunction aside pursuant to § 806.07(1)(g), STATS.[3] The motion was supported by two affidavits alleging in detail the dangerous and overcrowded conditions at Milwaukee County Jail caused by Milwaukee County's acceptance of DOC's probation and parole

---

> they are removed to said institutions; for the temporary detention of persons in the custody of the department; and for other detentions authorized by law.

[2] Sheriff Artison was elected to the office in 1983. Nevertheless, Sheriff Artison first learned of the October 1987 injunction on January 6, 1995, when he was provided a copy of the injunction by attorneys for the Department of Corrections.

[3] **806.07 Relief from judgment or order.** (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

. . . .

(g) It is no longer equitable that the judgment should have prospective application.

detainees as necessitated by the injunction.[4] DOC filed two affidavits in opposition to the motion. Upon considering the affidavits and briefs of the parties, the trial court denied Sheriff Artison's motion to set the permanent injunction aside. This appeal followed.

## DISCUSSION

The initial issue presented by this appeal is whether the trial court misused its discretion in determining that it remains equitable within the meaning of § 806.07(1)(g), STATS., for the injunction issued in 1987 to have continued prospective application. *See* ***Town of Seymour v. City of Eau Claire,*** 112 Wis.2d 313, 322, 332 N.W.2d 821, 825 (Ct. App. 1983). The central conflict between the parties is whether § 302.31, STATS.,[5] the successor to § 53.31, STATS. (1979-80), overrides Sheriff Artison's constitutional authority to control and maintain the Milwaukee County Jail.

---

[4] On January 3, 1995, Sheriff Artison informed the Department of Corrections that he would no longer book and hold prisoners taken into custody solely on probation or parole holds when doing so would cause the Milwaukee county jail population to exceed 1000 prisoners. The new Milwaukee County jail facility was opened in 1993 and was designed and built to accommodate 744 residential beds and fifty-four short term beds for special needs.

[5] **302.31 Use of Jails.** The county jail may be used for the detention of persons charged with crime and committed for trial; for the detention of persons committed to secure their attendance as witnesses; to imprison persons committed pursuant to a sentence or held in custody by the sheriff for any cause authorized by law; for the detention of persons sentenced to imprisonment in state penal institutions or a county house of correction, until they are removed to those institutions; for the detention of persons participating in the intensive sanctions program; for the temporary detention of persons in the custody of the department; and for other detentions authorized by law. The county jail may be used for the temporary placement of persons in the custody of the department, and persons who have attained the age of 18 years but have not attained the age of 25 years who are in the legal custody of the department of health and social services under s. 48.355(4) or 48.366 and who have been taken into custody pending revocation of aftercare supervision under s. 48.357(5) or 48.366(5) or corrective sanctions supervision under s. 48.357(5).

Section 302.31, STATS., permits DOC to use county jails to detain temporarily certain persons, including, for example, persons participating in the intensive sanctions program and persons subject to probation or parole holds. At the same time, however, the constitutional powers of the sheriff include the responsibility to maintain "'the custody of the common jail and of the prisoners therein.'" ***Wisconsin Professional Police Ass'n v. County of Dane,*** 106 Wis.2d 303, 310, 316 N.W.2d 656, 659 (1982) (citation omitted).[6] In 1987, the circuit court concluded that § 53.31, STATS. (1979-80), allowed DHSS "the right to order the sheriff to detain probationers and parolees in county facilities[.]" Accordingly, this lawsuit presents the question of whether it continues to be equitable to compel Sheriff Artison to take state prisoners under § 302.31 when, in his judgment, the addition of the state prisoners to Milwaukee County Jail's population will violate his duty to control and maintain the Milwaukee County Jail.

A prospective injunction, like the one under scrutiny here, is an equitable remedy. *See* ***Nelson v. Taff,*** 175 Wis.2d 178, 187-88, 499 N.W.2d 685, 689 (Wis. App. 1993). An equitable remedy, like a prospective injunction, "must, of necessity, place heavy reliance on the facts of the particular controversy." ***Prince v. Bryant,*** 87 Wis.2d 662, 667-68, 275 N.W.2d 676, 678 (1979). It follows, therefore, that a judicial exercise of discretion to determine the continuing equity of a prospective judgment challenged under § 806.07(1)(g), STATS., must also "place heavy reliance on the facts of the particular controversy." ***Id.***

This lawsuit is entering its third decade; the injunction will shortly be entering its second decade. Significant gaps in time exist between the evidentiary hearings conducted in 1981 and the issuance of the permanent injunction in 1987 and the present 1995 challenge under § 806.07(1)(g), STATS. The trial judge who entered the permanent injunction in 1987 did not preside over this case when it was tried in 1981. In view of this unique situation, this court concludes that an adequate determination of the important legal issues raised by this litigation must be predicated on a new and full airing of the facts underlying the controversy. *See* § 752.35, STATS.,[7] and *see* ***United Pacific Ins. Co.***

---

[6] ***Wisconsin Professional Police Ass'n v. County of Dane,*** 106 Wis.2d 303, 316 N.W.2d 656 (1982), contains an exhaustive discussion of the powers and prerogatives of the office of sheriff, beginning with its common law origins in England prior to the writing of the Magna Carta.

[7] This court has authority to reverse a circuit court order and remand a cause for a new trial "if it

***v. Metropolitan Sewerage Comm'n,*** 114 Wis.2d 258, 262-63, 338 N.W.2d 298, 300 (Ct. App. 1983) (court of appeals, on its own motion, reversed judgment of circuit court dismissing case, and ordered cause consolidated and tried with companion case to obviate prospect of conflicting rulings in parallel cases). We conclude, therefore, that the trial court's order must be reversed and the cause remanded for a trial on the merits of whether it remains equitable for the injunction issued in 1987 to have continued prospective application to Sheriff Artison and Milwaukee County.

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

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

---

appears from the record that the real controversy has not been fully tried." Section 752.35, STATS.