WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2019

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
Milwaukee
Oconto
Rock

WEDNESDAY, APRIL 10, 2019

9:45 a.m.	16AP1276-CR	State v. Nelson Garcia, Jr.
10:45 a.m.	17AP741-CR	State v. Javien Cajujuan Pegeese
1:30 p.m.	17AP2278-OA	Kristi Koschkee v. Carolyn Stanford Taylor

MONDAY, APRIL 15, 2019

9:45 a.m.	16AP375-CR	State v. Tyrus Lee Cooper
10:45 a.m.	16AP2058-CR	State v. Peter J. Hanson

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any camera coverage of Supreme Court oral argument, contact media coordinator Hannah McClung at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
April 10, 2019
9:45 a.m.

2016AP1276-CR State v. Nelson Garcia, Jr.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court judgement of conviction for bank robbery, Judge William S. Pocan presiding.

On December 27, 2011, a man robbed a Milwaukee bank. There were two witnesses: the bank teller that the man interacted with, D.L, and another teller that witnessed the interaction. The robbery was also caught on surveillance video. Following release of the video to the media, police received several calls identifying the man in the video as Nelson Garcia, Jr. Police arrested him on January 2, 2012.

Within forty-eight hours of his arrest, on January 4, 2012, a Milwaukee County court commissioner reviewed a form titled, "Probable Cause Statement and Judicial Determination." The form, prepared by police, contained a statement alleging that officers had received several calls identifying Garcia in the surveillance video; that the name led officers to find a booking photo of Garcia, which an officer also matched to the surveillance video; that the two people who lived in the house where Garcia was arrested told police they had known Garcia for years and identified Garcia as the man in the surveillance video; and that Garcia's girlfriend also told police that Garcia was the man in the surveillance video. A Milwaukee County court commissioner signed the form and checked boxes indicating that he found the following statement true: "I have reviewed the probable cause statement from the arresting officer. Based on this statement[] I find probable cause to believe that the arrested person committed the offense(s) as listed above[.]" The commissioner set bail at $50,000. The commissioner placed the date and time on the form: January 4, 2012, at 1:27 p.m.

A few hours after Garcia's bail was set, police conducted an in-person lineup with the two tellers involved in the robbery. The two tellers were given standard lineup forms and instructed as to the procedures. Each viewed the lineup. Before collecting their forms, the detective administering the process asked if either had any questions or wished to see the lineup again. One witness said she wanted to see the lineup again, so the detective ran the lineup a second time. D.L. positively identified Garcia as the robber; the other teller said she was not positive. The detective instructed her that if she was not positive, she should indicate "no" on the form, and she did.

The State charged Garcia with the bank robbery. Over the next three years, Garcia was represented by six different attorneys. The first five attorneys exited the case, largely because of conflicts with Garcia. The sixth attorney moved the court for suppression of the lineup identification on the grounds that Garcia had been deprived of his right to counsel during the lineup and that the lineup had been unduly suggestive. Garcia was unhappy with the sixth attorney and moved to represent himself, but the circuit court denied this motion, holding that Garcia's courtroom demeanor was not suitable to allow Garcia to represent himself. The case went to a jury trial and Garcia was ultimately convicted.

Garcia appealed. Garcia argued on appeal that he had a Sixth Amendment right to counsel during the lineup when a witness made a positive identification of him, and the violation

of that right requires a new trial with the identification evidence suppressed; that the lineup violated his due process rights; and that the trial court erred when it denied his motion to represent himself. The Court of Appeals disagreed on all points.

In his petition for review of the Court of Appeals' decision, Garcia continues to argue that he had a right to counsel at the lineup; that the lineup was impermissibly suggestive; and that the trial court erred in denying him the opportunity to represent himself. In support of his first argument, Garcia points to Eastern District of Wisconsin cases that hold that the Sixth Amendment right to counsel attaches at a court commissioner's probable cause and bail determination, even when the arrestee does not personally appear before the commissioner.

Garcia's petition offers the following issues for Supreme Court review:

1. Does the 6th Amendment Right to Counsel attach upon the finding of probable cause and the setting of bail by a court commissioner?
2. Is a line-up that violates the DOJ's model policy and procedure for eye-witness identification, compounded by a failure of viewing witnesses to follow standard instructions given to them, impermissibly suggestive?
3. Can a trial court, at a pre-trial hearing, deem that a criminal defendant has waived his right to self-representation because the court believes the defendant will engage in disruptive behavior in front of the jury? If so, does the defendant have the right to redeem himself?

WISCONSIN SUPREME COURT
April 10, 2019
10:45 a.m.

2017AP741-CR State v. Javien Cajujuan Pegeese

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Rock County Circuit Court judgment that convicted Javien Pegeese of robbery with a threat of force as a party to the crime, based on his guilty plea, and its order denying his postconviction motion for plea withdrawal. Judges Richard T. Werner and John M. Wood presided.

Javien Cajujuan Pegeese was charged with one count of armed robbery. He subsequently agreed to plead guilty to one count of robbery with threat of force, as a party to the crime.

The circuit court conducted a plea hearing on August 13, 2015. At the plea hearing, the circuit court asked Pegeese whether he had read and understood the plea questionnaire and waiver of rights form and whether he understood the constitutional rights he was giving up by entering a guilty plea. Pegeese responded in the affirmative to those two questions. The court then asked Pegeese whether he had any questions about his constitutional rights, to which Pegeese responded in the negative. The circuit court also asked defense counsel whether he had reviewed the questionnaire/waiver form with Pegeese and whether he believed Pegeese had understood it. Counsel responded affirmatively to both questions. The circuit court did not mention any of the specific constitutional rights being waived during the plea colloquy or ask Pegeese any questions about his understanding of any specific rights.

Based on the colloquy as just described, the circuit court accepted Pegeese's plea, withheld sentence, and placed him on probation for a period of three years.

Pegeese subsequently filed a postconviction motion to withdraw his plea on the grounds that the circuit court had failed to explain, and he had failed to understand, the constitutional rights he was waiving by entering his plea. His motion noted that he had been only 16 years old at the time of his plea and had completed only the 10th grade.

The circuit court denied Pegeese's plea withdrawal motion without holding an evidentiary hearing. It concluded that it had not been obligated to review each constitutional right individually because Pegeese and defense counsel had read through the plea questionnaire. In addition, the circuit court stated that Pegeese's claim that he had not understood the constitutional rights he was waiving was insufficient because Pegeese had not made that statement in a sworn affidavit.

Pegeese appealed, and the Court of Appeals affirmed. The Court of Appeals said it was clear from the record that the circuit court had connected Pegeese's review of the plea questionnaire with his understanding of the rights he was waiving. It also concluded that the circuit court's reference to Pegeese's review and understanding of the questionnaire/waiver form and its question to Pegeese as to whether he understood the constitutional rights he was waiving was a sufficient basis on which to ascertain that Pegeese understood the constitutional rights he was waiving and that his plea was therefore knowing, intelligent, and voluntary.

The Supreme Court granted Pegeese's petition to review the extent to which a plea-taking judge may rely on a plea questionnaire/waiver of rights form to ascertain the defendant's understanding of his/her waiver of rights.

Pegeese's petition asks the Supreme Court to review the following issue: Whether the circuit court's failure to personally insure that Pegeese understood each constitutional right waived by his guilty plea entitled Pegeese to a [State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)] evidentiary hearing to determine whether his plea was knowing, intelligent, and voluntary.

WISCONSIN SUPREME COURT
April 10, 2019
1:30 p.m.

2017AP2278-OA Kristi Koschkee v. Carolyn Stanford Taylor

The Supreme Court accepted jurisdiction over the original action petition filed by the Wisconsin Institute of Law & Liberty raising the question of whether the Department of Public Instruction and its Superintendent are required to comply with the Wisconsin Regulations from the Executive In Need of Scrutiny (REINS) Act.

The Wisconsin Institute for Law & Liberty (WILL) filed a petition to commence an original action on behalf of licensed school teachers, Kristi Koschkee and Amy Rosno; New London School Board member, Christopher Martinson; and Mary Carney, parent of a child attending a parochial school in Wisconsin as well as a member of the Marshfield School Board. The respondents named in the petition were Tony Evers, in his former capacity as Wisconsin Superintendent of Public Instruction (SPI), and the Department of Public Instruction (DPI). The case caption has since been amended to reflect the new SPI, Carolyn Stanford Taylor.

The petition raises one issue: Must DPI comply with the Regulations from the Executive In Need of Scrutiny (REINS) Act?

The REINS Act amended state statutes to require that any agency that proposes to promulgate a rule must first submit a statement of scope for the proposed rule to the Department of Administration (DOA), which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope. After DOA makes a determination of the agency's authority to promulgate the proposed rule, it reports on the determination to the governor, who may approve or reject the rule.

WILL asserts that in September and October of 2017, after the effective date of the REINS Act, DPI forwarded statements of scope for proposed rules to the Legislative Reference Bureau but did not first submit the statements of scope to DOA as required by the REINS Act. WILL says the DPI's position is that it is not required to comply with the portion of the REINS Act requiring it to submit statements of scope to DOA or receive approval from the governor based on this court's decision in Coyne v. Walker, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520.

WILL notes that Coyne held that certain portions of Act 21, which predates the REINS Act, could not be applied to DPI, and concedes the petition seeks to revisit the Coyne decision.

The DPI argues that WILL asks the Supreme Court to take a simple, but unprecedented, action: reverse this Court's holding in Coyne v. Walker, a decision from just three years ago, and upend the Court's longstanding interpretation of Article X, § 2 of the Wisconsin Constitution.

The DPI asserts the REINS Act did nothing to modify the provisions at issue in Coyne and merely added an additional procedural step by requiring agencies to first submit scope statements to DOA for a determination if there is "legal authority" to draft the rule. Under the REINS Act, DPI says the DOA then forwards the rule to the governor who, as was provided by Act 21 (which was at issue in Coyne), may approve or reject the scope statement.

The DPI says that in Coyne, a majority of this court already ruled that the governor cannot "veto" administrative rules promulgated by the SPI to supervise public instruction. The

DPI says the issues raised by petitioners are identical to the issues already litigated in Coyne and do not need to be reconsidered.

WISCONSIN SUPREME COURT
April 15, 2019
9:45 a.m.

2016AP375-CR State v. Tyrus Lee Cooper

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court judgment of conviction entered upon Tyrus Lee Cooper's guilty plea to one count of armed robbery, Judge M. Joseph Donald presiding.

In 2013, Tyrus Lee Cooper was represented by Attorney Michael Hicks for an armed robbery charge. Just before his October 2013 trial date, Cooper filed a letter with the circuit court complaining about Attorney Hicks's performance and stating that Attorney Hicks had not given him a copy of the discovery material despite his requests; that Attorney Hicks had not subpoenaed witnesses; and that Attorney Hicks had not met with him to prepare for trial nor spoken with him on the phone.

On his scheduled trial date, Cooper appeared with Attorney Hicks and Cooper entered a guilty plea. During the plea hearing, the circuit court addressed Cooper's letter. Cooper said that he did not want any action taken on the letter and Attorney Hicks said, in reference to the letter, that it was a "misunderstanding." The circuit court accepted Cooper's guilty plea and adjourned the matter for sentencing.

In January 2014, prior to sentencing, Cooper filed a letter indicating that he wanted to withdraw his guilty plea, and he requested the appointment of new counsel. Cooper complained that Attorney Hicks was ineffective, and in support, Cooper asserted that Attorney Hicks's law license had been suspended during a portion of the time that Attorney Hicks represented Cooper. This allegation was true: Attorney Hicks's law license was temporarily suspended from February 12, 2013, through March 11, 2013, for reasons unrelated to his representation of Cooper. Cooper claimed that he mistrusted Attorney Hicks, and stated that Attorney Hicks was under investigation by the Office of Lawyer Regulation.

The circuit court permitted Attorney Hicks to withdraw. The State Public Defender appointed another attorney for Cooper. With this new representation, Cooper filed a motion for plea withdrawal in April 2014. The circuit court conducted a hearing on Cooper's motion in June 2014. At that hearing, Cooper's counsel stated that had Cooper known that Attorney Hicks's license had been suspended at the time of his trial, he would have asked the court for another lawyer. Cooper's counsel also stated that Cooper had entered his plea in haste because Attorney Hicks had failed to provide Cooper with information and seemed unprepared for trial.

The circuit court denied Cooper's plea withdrawal motion. The matter proceeded to sentencing in July 2014. The circuit court sentenced Cooper to an evenly bifurcated, concurrent, ten-year term of imprisonment.

Meanwhile, in a separate disciplinary case, Attorney Hicks pled no contest to 19 counts of professional misconduct. See In re Disciplinary Proceedings Against Hicks (Hicks II), 2016 WI 31, ¶1, 368 Wis. 2d 108, 877 N.W.2d 848. Some of those counts involved Attorney Hicks's representation of Cooper in this case. In its decision in this disciplinary matter, this court accepted the referee's factual finding that Attorney Hicks's failure to properly communicate with

Cooper before his plea prevented Cooper from adequately understanding and participating in his own defense.

Cooper appealed his judgment of conviction, arguing that the circuit court erred by denying his motion for plea withdrawal, and that he received ineffective assistance from Attorney Hicks. The Court of Appeals rejected both arguments and affirmed the circuit court's decision.

Cooper petitioned the Supreme Court for review, arguing that he satisfied his burden to show a fair and just reason for withdrawal of his plea prior to sentencing by virtue of the fact that the Supreme Court ultimately suspended Attorney Hicks in part for his handling of Cooper's case. The Supreme Court accepted his petition and has instructed the parties to address an additional issue, set forth below.

Cooper's petition offers the following issues for Supreme Court review:

> 1. When a defendant's counsel has engaged in serious professional misconduct leading up to the trial date affecting defendant's meaningful participation in his own defense, does that provide a sufficient reason to withdraw a guilty plea prior to sentencing?
>
> 2. Did the circuit court erroneously exercise its discretion when it denied defendant's motion to withdraw his plea prior to sentencing without an evidentiary record to support substantial prejudice to the State?

The Supreme Court has asked the parties to address the following issue:

> 3. In deciding whether Mr. Cooper may withdraw his guilty plea, is the circuit court bound by the Supreme Court's findings and/or conclusions in In re Disciplinary Proceedings Against Hicks, 2016 WI 31, 368 Wis. 2d 108, 877 N.W.2d 848, including, but not limited to, language stating that the failure of Mr. Cooper's trial counsel to properly communicate with him prevented him from adequately understanding and participating in his own defense, see id., ¶¶23-28, 39?

WISCONSIN SUPREME COURT
April 15, 2019
10:45 a.m.

2016AP2058-CR State v. Peter J. Hanson

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a conviction, entered following a jury verdict, for first-degree intentional homicide as a party to the crime, from the Oconto County Circuit Court, Judge Michael T. Judge presiding.

In 1998, 19-year-old Chad McLean went missing in Oconto County. A month later McLean's body was found in the Pensaukee River, wearing the same clothes he was wearing on the day he disappeared. He had been shot repeatedly in the head. The case went "cold" until 2009, when Peter Hanson's estranged wife, Kathy, told investigators that she believed Hanson had killed McLean. McLean's body was found near Hanson's property, which bordered the river.

In 2012, the Oconto County Circuit Court commenced a John Doe proceeding involving the cold case. Hanson was called to testify. The circuit court gave Hanson a Miranda[1] warning, the completeness of which is now at issue. Hanson's testimony included an acknowledgement that Kathy, who was by then deceased, had told police she believed Hanson killed McLean.

Hanson was ultimately charged with first-degree intentional homicide as a party to the crime. At trial, the State stated its intent to read Hanson's John Doe hearing testimony into evidence. Hanson objected on confrontation and hearsay grounds, but did not challenge the Miranda warning. The circuit court overruled Hanson's objections and Hanson's John Doe testimony was read to the jury. The jury ultimately found Hanson guilty of first-degree intentional homicide as a party to the crime. He was sentenced to life imprisonment without the possibility of parole.

Hanson filed a postconviction motion seeking a new trial alleging that his trial counsel rendered ineffective assistance of counsel for failing to call certain witnesses he says would have exonerated him, and for failing to challenge the Miranda warning given at the John Doe hearing. A Machner[2] hearing was conducted. Trial counsel explained his reasons for not calling certain witnesses and explained that he did not object to the admission of Hanson's John Doe testimony on Miranda grounds because he did not believe Miranda warnings were required at a John Doe hearing. The circuit court denied the postconviction motion.

Hanson appealed, again arguing that the circuit court improperly admitted portions of his John Doe hearing testimony at trial on several grounds, including hearsay and confrontation, and that his lawyer was ineffective for failing to object to the flawed Miranda warning, and for failing to call certain witnesses. The Court of Appeals affirmed the circuit court's ruling and Hanson filed a petition for review with the Supreme Court.

In his petition for review, Hanson maintains that his John Doe testimony was inadmissible hearsay and that its admission violated his rights under the Confrontation Clause of

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

the Sixth Amendment of the U.S. Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Hanson's petition presents these issues:

1. Whether the admission of hearsay statements of a defendant's deceased wife inculpating the defendant in murder violates a defendant's right to confrontation?
2. Whether trial counsel is ineffective in failing to move to suppress inculpatory statements made by a defendant at a John Doe hearing where the defendant was in custody and not properly Mirandized?