

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES APRIL 2020

NOTICE: Due to the COVID-19 pandemic, oral arguments before the court during April will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on WisconsinEye or via a link to be provided on www.wicourts.gov.

The cases listed below originated in the following counties:

Dane
Milwaukee
Rock
Waukesha
Washington

MONDAY, APRIL 20, 2020

9:45 a.m.	19AP1376-OA	Nancy Bartlett v. Tony Evers
10:45 a.m.	19AP2054-OA	Wisconsin Small Business United, Inc. v. Joel Brennan
1:30 p.m.	19AP1974-BA	David E. Hammer v. Board of Bar Examiners

WEDNESDAY, APRIL 22, 2020

9:45 a.m.	19AP567-W	Milton Eugene Warren v. Michael Meisner
10:45 a.m.	16AP2082/17AP634	Kathleen Papa v. Wisconsin Dept. of Health Services
1:30 p.m.	18AP319-CR	State v. Timothy E. Dobbs

MONDAY, APRIL 27, 2020

9:45 a.m.	18AP1774-CR	State v. Alfonso Lorenzo Brooks
10:45 a.m.	18AP947	Quick Charge Kiosk LLC v. Josh Kaul

THURSDAY, APRIL 30, 2020

9:45 a.m.	18AP875-CR	State v. Ryan M. Muth
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In addition to the cases listed above, the following cases are assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

16AP2522-D	Office of Lawyer Regulation v. Peter J. Kovac
17AP2525	Town of Delafield v. Central Transport Kriewaldt
18AP659-D	Office of Lawyer Regulation v. Robert C. Menard

Note: The Supreme Court calendar may change between the time you receive these synopses and when a case is 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. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT

April 20, 2020

9:45 a.m.

No. 2019AP1376-OA

Nancy Bartlett v. Tony Evers

The Supreme Court accepted jurisdiction over the original action petition filed by the Wisconsin Institute of Law & Liberty, raising the question whether “in partially approving an appropriations bill pursuant to Article V, § 10 of the Wisconsin Constitution, the governor may disapprove parts of the bill which are ‘essential, integral, and interdependent parts of those which were approved.’”

Wisconsin Constitution Article V, § 10(1), ratified by voters in 1930, grants the governor the authority to exercise a partial veto when approving an appropriations bill presented by the Legislature. After two subsequent amendments, it presently states:

Governor to approve or veto bills; proceedings on veto.

Section 10. (1) (a) Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.

(b) If the governor approves and signs the bill, the bill shall become law. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law.

(c) In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill, and may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill.

On June 25 and 26, 2019, the Wisconsin State Assembly and Senate, respectively, passed the legislation constituting the 2019-21 biennial budget. See 2019 Assembly Bill 56. The budget was then presented to Governor Tony Evers, who signed the bill with partial vetoes on July 3, 2019. See 2019 Wis. Act 9. The bill was published as law the next day, July 4, 2019.

On July 31, 2019, the Wisconsin Institute for Law & Liberty (WILL) filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 and a supporting legal memorandum on behalf of three citizens who, as taxpayers, claim an interest in certain legislation approved as part of 2019 Wisconsin Act 9. Upon order of the Supreme Court, an amended petition was filed on August 19, 2019. The amended petition raises two issues stated as follows:

1. Whether, in partially approving an appropriation bill pursuant to Article V, § 10 of the Wisconsin Constitution, the governor may strike parts of the bill which are “essential, integral, and interdependent parts of those which were approved.” *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 493 (1935).
2. Does Art. V, § 10’s direction that appropriations bills may be approved in whole or in part permit the Governor to strike words in a way that transforms the meaning and purpose of the law, changing it into a different law?

The petition further asked the court to issue a declaration that the Governor’s partial vetoes of four particular provisions in Act 9 are unconstitutional and invalid, and requests the Court enjoin the Department of Administration’s expenditure of funds allocated by the Governor for those four specific provisions. Petitioners identify the four particular provisions as follows: the “Volkswagen Settlement” veto¹; the Road Improvements veto²; the Vehicle Weights veto³; and the Vapor Products veto.⁴

The Governor, as respondent, filed an answer to the amended petition and opposed the request for leave to commence an original action. On October 16, 2019, the court granted the petition for leave to file an original action.

On January 14, 2020, the court also accepted a petition for leave to commence an original action in another case challenging the scope of the Governor’s partial veto authority, Wisconsin Small Businesses United, Inc. v. Joel Brennan, case no. 2019AP2054-OA. Oral argument in that matter will be heard on the same date.

¹ See 2019 Wis. Act 9, § 55c, (creating Wis. Stat. § 16.047(4s) and 9101(2i)).

² See 2019 Wis. Act 9, § 126 (creating § 20.395(2)(fc)).

³ See 2019 Wis. Act 9, § 1988b (amending Wis. Stat. § 341.25(2)).

⁴ See 2019 Act 9 §§ 1754, 1755f, 1757b (creating Wis. Stat. § 139.75(14)).

WISCONSIN SUPREME COURT

April 20, 2020

10:45 a.m.

No. 2019AP2054-OA

Wis. Small Businesses United, Inc. v. Joel Brennan

The Supreme Court accepted jurisdiction over the original action petition filed by the Wisconsin Small Businesses United, Inc. and five Wisconsin citizens, raising the question of whether the governor, pursuant to his constitutional authority under Article V, § 10 of the Wisconsin Constitution, may reject individual parts of a date contained in an enrolled bill so as to create a new date that was never approved by the Legislature.

This matter echoes the challenges raised in case no. 2019AP1376-OA, Bartlett v. Evers. Here, as there, the Supreme Court is asked to examine the scope of the governor’s partial veto authority.

On September 15, 2017, the Wisconsin State Assembly and Senate passed a biennial budget bill for the 2017–2019 biennium. It was presented to then-Governor Scott Walker pursuant to article V, section 10(1)(a), for his signature, and on September 21, 2017, Governor Walker signed the budget bill with partial vetoes. The bill was published as 2017 Wis. Act 59 (“Act 59”) on September 22, 2017. The partial vetoes to Act 59 were calendared and sustained by the Legislature’s inaction on May 8, 2018.

With this original action, Wisconsin Small Businesses United, Inc. and five Wisconsin citizens challenge two of Governor Walker’s partial vetoes from 2017. The petitioners, as taxpayers, claim an interest in certain legislation approved as part of Act 59. The petition alleges that Governor Walker’s partial vetoes in Act 59 are unconstitutional. The petitioners question whether the governor may, pursuant to his constitutional authority under art. V, sec. 10 of the Wisconsin Constitution, as amended in 1990, reject individual parts of a date contained in an enrolled bill so as to create a new date that was never approved by the Legislature.

The specific vetoes the petitioners are contesting are in Section 1641m, the Energy Efficiency Revenue Limit Adjustment (changing a legislative deadline of “December 31, 2018” into “December 3018”) and in Section 2265, the Private Label Credit Card Bad Debt Deduction (changing the implementation date of the Private Label Credit Card Bad Debt Deduction from “July 1, 2018” to “July 1, 2078.”).

The respondents to this petition for original action are, named in their official capacities, Joel Brennan, Secretary, Department of Administration (DOA); Peter Barca, Secretary, Department of Revenue (DOR); and Carolyn Stanford Taylor, Acting Superintendent of the Department of Public Instruction.

The court will hear oral argument on this matter on the same date as it hears argument in Nancy Bartlett v. Tony Evers, case no. 2019AP1376-OA.

WISCONSIN SUPREME COURT

April 20, 2020

1:30 p.m.

No. 2019AP1974-BA

David E. Hammer v. Board of Bar Examiners

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and ensuring that attorneys admitted to the bar meet the high standards of conduct held by the Court.

David E. Hammer applied for admission to the Wisconsin bar in January 2019. After Hammer passed the Wisconsin bar examination in February 2019, the Board of Bar Examiners (BBE) undertook the required character and fitness review, considered Hammer's file, and issued a letter stating Hammer's bar application was at risk of being denied on character and fitness grounds.

The BBE based their analysis on Hammer's record as a practicing attorney in Florida. Hammer was a Florida lawyer from 2006-2010 until he was disbarred for trust account violations and misappropriation of client funds. The BBE specifically cited Hammer's extensive disciplinary history with the Florida bar, financial issues, law school discipline, and traffic citation history.

Hammer requested and received a hearing before the BBE in August 2019. On September 19, 2019, the BBE issued its decision and order, declining to certify Hammer's admission to the Wisconsin bar. The BBE concluded that Hammer failed to demonstrate to the BBE's satisfaction that he has the necessary character and fitness to practice law in Wisconsin. The BBE cites the Florida disbarment as the primary reason for its decision. The BBE notes that it was also troubled by: (1) Hammer's decision to file the civil suits against 32 defendants, which the BBE describes as "alleging fantastical claims and paints Mr. Hammer as a vulnerable victim"; (2) Hammer's alleged statement that he used his 2013 Chapter 13 bankruptcy proceeding to forestall his family's eviction from their home, which the BBE characterized as "abuse of process" – a charge Hammer disputes; (3) Hammer's extensive traffic record; and (4) Hammer's failure to demonstrate significant rehabilitation. The BBE states it is "perplexed by his desire to be admitted in Wisconsin."

Hammer appeals the BBE's decision to the Supreme Court. He argues that his misconduct was remote in time; his Florida discipline would have been less severe if it had occurred in Wisconsin; and says the BBE discriminated against him because he is a Florida resident. He also contends the BBE failed to consider various mitigating factors and contends that he has demonstrated rehabilitation.

The BBE disagrees, arguing that Hammer downplays the importance of his past misconduct. The BBE takes the position that by engaging in repeated acts of misconduct, including misappropriating client funds, being held in contempt of court, misuse of the legal process, and also amassing a significant number of traffic citations, Hammer has not met his burden of establishing his character and fitness.

The Supreme Court is expected to decide whether to affirm BBE's decision to decline Hammer's admission to the Wisconsin Bar.

The following issues are presented for review:

1. Whether Hammer satisfies the character and fitness requirements of SCR 40.06, as interpreted by this court's prior decisions, or Hammer should be forever banned from practicing law in the State of Wisconsin.
2. Whether the conclusions of the Board of Bar Examiners of the Supreme Court of Wisconsin that Hammer does not satisfy the requirements of SCR 40.06 are mere pretext for unconstitutional discrimination against a resident of Florida.
3. Whether the Board of Bar Examiners of the Supreme Court of Wisconsin committed clear error in reaching certain Findings of Fact, based on the record evidence.

WISCONSIN SUPREME COURT

April 22, 2020

9:45 a.m.

No. 2019AP567-W State ex rel. Milton Eugene Warren v. Michael Meisner

This is a review of a decision of the Wisconsin Court of Appeals, District IV that denied Mr. Warren's petition for writ of habeas corpus. Warren was convicted in 2014 of possession of heroin with intent to deliver more than 50 grams as a party to a crime, intentionally contributing to the delinquency of a child by act or omission, and possession of THC, second and subsequent offense. He filed a petition for writ of habeas corpus alleging ineffective assistance of postconviction counsel in this case.

This case asks this court to clarify the procedure for raising collateral, postconviction claims of ineffective assistance of postconviction counsel. Specifically, Warren requests that this court resolve questions regarding the proper forum to address issues related to postconviction counsel's alleged failure to raise claims of ineffective assistance of trial counsel.

In *State ex rel. Rothering v. McCaughtry*⁵, the Court of Appeals established a procedure for addressing ineffective assistance of postconviction counsel claims. Rothering, in the portion relevant to this case, determined that the circuit court should handle claims of ineffective assistance of counsel related to the attorney's alleged deficient performance at the postconviction stage. In 2013, however, this court decided *State v. Starks*⁶ and language in that decision suggested that claims of ineffective assistance of counsel due to counsel's alleged failure to file for postconviction relief in the circuit court should be raised in the Court of Appeals. *Starks* did not overrule Rothering, so questions have been raised about the correct forum in which to bring such an action.

In this case, Warren sought to bring ineffective assistance of counsel claims under a situation potentially covered by language in both *Starks* and Rothering. For background, Warren pursued a direct appeal of his 2014 conviction in Rock County Circuit Court, arguing that the evidence at trial was insufficient to support his convictions, and that he was entitled to a new trial because the circuit court erroneously denied his motion to admit evidence about the facts of an informant's conviction for robbery. The Court of Appeals affirmed his conviction. This court denied his petition for review.

Then, in October 2018, Warren filed a pro se motion for postconviction relief with the circuit court. Warren then retained Attorney Meyeroff, who filed an amended motion on Warren's behalf in January 2019. Warren alleged that his postconviction counsel was deficient for failing to raise ineffective assistance of trial counsel. The circuit court denied Warren's motion, ruling that this situation was covered by *Starks*. Consequently, the circuit court decided that Warren's claims should be brought before the Court of Appeals via a Knight⁷ petition.

Accordingly, in March 2019, Attorney Meyeroff filed a Knight petition with the Court of Appeals. However, the petition was denied because the Court of Appeals determined that

⁵ *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

⁶ *State v. Starks*, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146.

⁷ A Knight petition is a petition for writ of habeas corpus, filed in the Court of Appeals, alleging ineffective assistance of appellate counsel. *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

Warren should have appealed the circuit court decision. Warren filed a motion for reconsideration, which was denied.

As a result, Warren now asks this court to address the following issue:

Whether Warren's postconviction claims should be heard in the circuit court or the Court of Appeals and further, how is the decision in this matter to be explained under the ruling of State v. Starks.

WISCONSIN SUPREME COURT

April 22, 2020

10:45 a.m.

Nos. 2016AP2082 Kathleen Papa v. Wisconsin Dept. of Health Services
& 2017AP634

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that reversed a Waukesha County Circuit Court order, Judge Kathryn W. Foster presiding, that granted declaratory and injunctive relief in favor of Kathleen Papa and Professional Homecare Providers, Inc. The Court of Appeals remanded the matter with directions to enter the judgement in favor of the Wisconsin Department of Health Services.

Kathleen Papa is a Medicaid-certified nurse, and is a member of Professional Homecare Providers, Inc. (PHP), a nonprofit organization of professional nursing services providers. Papa and other PHP members provide in-home care to Medicaid-program participants and bill their services directly to the Wisconsin Medicaid Program, which is housed in the Department of Health Services (DHS). Medicaid billing and reimbursements have previously been the subject of DHS audits.

In the DHS-published Medicaid Provider Handbook, there is section called Topic #66, which states the following:

Program Requirements

For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

PHP asserted DHS was recouping payments from providers whenever an audit revealed that covered and reimbursed services failed to meet “all applicable program requirements.” PHP said that DHS’s use of this policy was problematic because Topic #66 was not promulgated as an administrative rule (the policy exceeded DHS’s statutory recoupment authority), and DHS’s use of Topic #66 to recoup payments amounted to an unconstitutional taking without just compensation.

Wisconsin Stat. § 227.40(1) allows parties to challenge “the validity of a rule or guidance document” via a declaratory judgment action filed in circuit court. In December 2015, PHP filed an action under this statute in Waukesha County Circuit Court, alleging that DHS’s Topic #66 was an unpromulgated and illegal administrative rule.

Both parties moved for summary judgment. The circuit court agreed with PHP’s position. The circuit court said Topic #66 was part of DHS’s broader recoupment policy and the policy amounted to an unpromulgated administrative rule, so the court enjoined enforcement. The circuit court declared that DHS’s recoupment authority was limited under Wis. Stats. §§ 49.45(3)(f) and 49.45(2)(a)10. to situations where DHS is unable to verify from a provider’s records that a service was actually provided or that an amount claimed was inaccurate or inappropriate for a service that was provided.

DHS appealed. The Court of Appeals reversed and remanded. The Court of Appeals concluded that Topic #66 is not an administrative rule, and it said that PHP's claims failed since there was no rule to declare invalid. Thus, the Court said, summary judgment should have been granted in favor of DHS. The Court of Appeals reversed in full the circuit court's summary judgment order and remanded with directions that judgment be entered in favor of DHS. In addition, the Court of Appeals vacated the circuit court's orders for supplemental relief.

In a short dissent, Court of Appeals Judge Paul F. Reilly agreed that Topic #66 is not an administrative rule, but went on to conclude that 2011 Wis. Act 21⁸ prohibits DHS from utilizing Topic #66 to take Papa's property. Judge Reilly agreed with the circuit court that "DHS was enforcing standards, thresholds and requirements found in Topic #66 as a mechanism to take Papa's property without the legal right to do so," and he said he would affirm.

The Supreme Court is expected to resolve these issues:

1. Is judicial review under Wis. Stat. § 227.40 applicable to the Department's policy, based on its interpretation of statute and administrative rules, that it may recoup Medicaid payments from a provider based solely on a provider's alleged imperfect compliance with the Medicaid Provider Handbook or other program requirements?
2. Do the 2017 Act 369 revisions to Wis. Stats. §§ 227.40(1) and (4)(a), which expanded the scope of declaratory judgment actions to guidance documents, permit the Court to rule on the validity of the Department's recoupment policy regardless of whether the challenged policy is a rule?
3. Does the Department's policy of recouping payments for Medicaid services based on a provider's alleged failure to strictly comply with program requirements exceed the scope of the Department's statutory recoupment authority under Wis. Stat. § 49.45(3)(f)2., thus conflicting with Wis. Stat. § 227.10(2)?
4. Is the Department's recoupment policy a "rule" which was not promulgated, in violation of Wis. Stat. § 227.10(1)?

⁸ Act 21, as codified in Wis. Stat. § 227.10(2m), prohibits agencies from "implement[ing] or enforce[ing] *any standard, requirement, or threshold* . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule." (Emphasis added.)

WISCONSIN SUPREME COURT

April 22, 2020

1:30 p.m.

No. 2018AP319-CR

State v. Timothy Dobbs

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a judgment convicting Mr. Dobbs of homicide by intoxicated use of a vehicle, entered in Dane County Circuit Court, Judge Clayton Patrick Kawski, presiding.

This case arises out of a hit-and-run accident that resulted in the death of a pedestrian. At about 7:30 a.m., about ten minutes after the accident occurred, a police officer found Timothy Dobbs's truck at an intersection several blocks away from the crash scene. Dobbs's truck generally met the description of the wanted vehicle, and the truck had a completely deflated front driver's side tire.

The officer handcuffed Dobbs, frisked him, and placed him in the locked back of the squad car, where he remained for almost an hour while the officer talked with him, communicated with other officers, and examined his truck. The officer removed the handcuffs when Dobbs agreed to perform field sobriety tests, which he performed without signs of intoxication. The officer then returned Dobbs to the locked rear seat of the squad car while the investigation continued.

Dobbs agreed to submit to a blood draw, so he was transported in the locked rear of the squad car to the hospital, arriving at around 9:20 a.m. It was after the blood draw, and before being questioned by a drug recognition expert, that Dobbs was first Mirandized,⁹ at about 10:20 a.m.

Dobbs eventually admitted to taking a puff from an air duster can while driving, passing out, swerving, and leaving the scene.

Before trial, the trial court granted a motion by the State to exclude proposed testimony by Dobbs's expert on the subject of false confessions. The trial court concluded that the expert's testimony would not assist the trier of fact to determine a fact at issue because the expert had not applied the principles and methods to the facts of the case.

The trial court also denied Dobbs's motion to suppress certain statements that he made to police both before and after he received the Miranda warning.

At trial, a jury found Dobbs guilty of homicide by intoxicated use of a vehicle. The Court of Appeals affirmed.

Dobbs petitioned for review. The case presents the following issues for this court's consideration:

1. Whether the Court of Appeals' decision is consistent with State v. Morgan, 2002 WI App 124, 254 Wis. 2d 602, 648 N.W.2d 23, and if not, whether Morgan should be overruled
2. Did the trial court err in precluding defense expert witness Dr. Lawrence T. White from testifying where, consistent with State v. Smith, 2016 WI

⁹ Miranda v. Arizona, 384 U.S. 436, 444 (1966) requires that "Prior to any questioning [of a person in custody], the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

App 8, 366 Wis. 2d 613, 874 N.W.2d 610, his opinions were relevant to a material issue, but he would not be offering an opinion on the specific facts of the case?

3. Did the trial court err in allowing Mr. Dobbs'[s] statements to law enforcement into evidence despite the delay in reading him his Miranda rights and because his statements were involuntary due to his mental and physical conditions?

WISCONSIN SUPREME COURT

April 27, 2020

9:45 a.m.

No. 2018AP1774-CR

State v. Alfonso Lorenzo Brooks

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a judgment of the Milwaukee Circuit Court, Judge Jeffrey A. Wagner, presiding, that convicted Alfonso Lorenzo Brooks of one count of being a felon in possession of a firearm.

Alfonso Lorenzo Brooks was pulled over after officers observed his vehicle travelling at 65 to 70 miles an hour in a 50-mile-per-hour zone. Deputies discovered that Brooks was operating with a suspended driver's license. They told him that the vehicle would have to be towed since there were no other drivers present and they would conduct an inventory search of the vehicle which would allow valuable items to be removed prior to the vehicle being towed. During the inventory search, deputies retrieved a firearm from the trunk of the vehicle. The deputies ran a criminal history on Brooks and, after learning he had a felony record, arrested him for being a felon in possession of a firearm.

Brooks moved to suppress the evidence found in the search, arguing that the search was an improper exercise of the deputies' community caretaker function. The community caretaker function is an exception to the Fourth Amendment that states "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures."¹⁰ Brooks testified that after being told the car would be towed, he told the deputies he did not understand the purpose for the tow because the vehicle was not a road hazard and was not violating any parking ordinances. The circuit court denied the suppression motion, finding that Brooks was properly stopped for speeding and that the deputies had followed their established protocol with respect to the search. Brooks pled guilty to being a felon in possession of a firearm. He was sentenced to 37 months of initial confinement and 30 months of extended supervision.

Brooks filed a postconviction motion, arguing that the search and tow of the vehicle was an improper exercise of the community caretaker function because the vehicle was lawfully parked and was not obstructing traffic. The motion also alleged that trial counsel was ineffective in not submitting additional evidence showing that sheriff's department written policies did not authorize the search and tow of the vehicle. The motion was denied without a hearing.

Brooks appealed his case to the Court of Appeals. The Court of Appeals noted that this court's decision in State v. Asboth¹¹ set forth a three-part test to be used in evaluating a claimed community caretaker justification for a warrantless search or seizure:

(1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised[.]¹²

¹⁰ State v. Pinkard, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592.

¹¹ State v. Asboth, 2017 WI 76, 376 Wis. 2d 644, 898 N.W.2d 541

¹² State v. Asboth, 2017 WI 76, ¶13, 376 Wis. 2d 644, 898 N.W.2d 541.

The appellate court said Brooks was stopped for speeding; did not have a valid driver's license; was not the registered owner of the vehicle; and there were no other drivers present to drive the vehicle away from the scene. The Court of Appeals said whether the car was legally parked did not change the totality of the circumstances, and it said the deputies were in fact exercising a bona fide community caretaker role when they impounded the vehicle. The Court of Appeals also found that the deputies reasonably exercised their community caretaker function when they towed Brooks's car and that his privacy interests were not violated. As a result, the Court of Appeals affirmed.

The Supreme Court is expected to address this issue:

Whether the community caretaker exception permits law enforcement to inventory and tow a vehicle after discovering that the driver does not have a valid license, when the vehicle is lawfully parked and not obstructing traffic.

WISCONSIN SUPREME COURT

April 27, 2020

10:45 a.m.

No. 2018AP947

Quick Charge Kiosk, LLC v. Josh Kaul

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a summary judgment in favor of the State, entered in Milwaukee County Circuit Court, Judge John J. DiMotto, presiding.

This case involves a dispute of first impression over the statutory interpretation and application of three statutes pertaining to gambling: Wis. Stat. §§ 945.01(3), 945.01(5), and 100.16(2). These statutes relate, in turn, to gambling machines, lotteries, and in-pack change promotions (a marketing tool like a sweepstakes, contest or sales promotion).

Quick Charge Kiosk LLC operates “cell phone charging machines” (“Machines”) and places them in retail establishments throughout Wisconsin. The Machines resemble video gambling machines commonly found in casinos or taverns – like mechanical slot machines – and they function much the same way.

When a customer puts one dollar into the Machine, that customer receives 100 credits to play the video chance game, and one minute of electronic device charging time. A customer who charges an electronic device cannot continue to play the game after the expiration of the charging time, but the customer may cash out any remaining credits by printing out a paper receipt using the Machine’s printer and redeem the receipt for cash at the Machine’s site. The credits are redeemable at the ratio of one dollar per 100 credits, the same rate at which the credits are acquired. So, a customer need not use any game credits while charging a phone and may redeem all the credits for cash when the charging time expires.¹³

This lawsuit commenced after some municipalities became concerned. The City of Greenfield ordered Quick Charge to remove three Machines from a retail location, citing an Attorney General Opinion that opined that the machines are illegal gambling devices. In Brown County, state officials obtained a search warrant for removal of the Machines based on a probable cause finding that the Machines are illegal gambling machines.

In August 2016, Quick Charge filed an action in Milwaukee County Circuit Court seeking a declaratory judgment that its Machines comply with the “in-pack chance promotion” statute, Wis. Stat. § 100.16, and do not violate Wisconsin’s gambling statutes. The State moved for summary judgment, seeking an order declaring that the Machines are unlawful gambling machines under Wis. Stat. § 945.01(3). Quick Charge filed a cross motion for summary judgment seeking an order declaring that they do not violate Wisconsin’s gambling statutes.

Milwaukee County Circuit Court agreed with the State. It was not persuaded that the Machines qualify for the “in-pack chance promotion exception” in Wis. Stat. § 100.16(2), or that the exception would apply to Wis. Stat. § 945.01(3), the gambling machine subsection. The

¹³ For instance, a customer may deposit one dollar in exchange for one minute of charging time and 100 game play credits. When the one minute of charging time expires, the customer may redeem all 100 game play credits for one dollar, effectively receiving one free minute of cell phone charging. A customer may also play the video chance game without connecting an electronic device for charging. The Machines also have a random number generator that determines if a player wins and, if so, the amount the player wins.

court ruled the Machines are “gambling machines” under § 945.01(3) and unlawful under ch. 945.

Quick Charge appealed and the Court of Appeals affirmed the circuit court’s decision. The Court of Appeals agreed that the in-pack chance promotion exception found in Wis. Stat. § 100.16(2) does not apply to gambling machines under § 945.01(3). The Court ruled further that the definition of “consideration” in Wis. Stat. § 945.01(3) for a gambling machine is different than the definition of “consideration” in § 945.01(5) for a lottery. The Court concluded that the Machines are gambling machines, not a lottery.

Quick Charge Kiosk LLC and its owner, Jeremy Hahn, have petitioned the Supreme Court to review the following issues:

1. The Wisconsin Gambling Statute defines consideration, a required element of both lotteries and gambling machines, within the definition of lottery, but not within the definition of gambling machine. Should the specific definition of consideration in the statute apply to both gambling machines and lotteries?
2. Under Wis. Stat. § 945.01(3)(a), four elements are required to establish a gambling machine: contrivance, consideration, chance, and prize. Petitioners ran a promotion with the use of electronic charging kiosk that allowed customers to participate in the promotion without purchase or entry fee. Does the availability of free participation negate the element of consideration under Wisconsin’s Gambling Machine Definition?
3. Wis. Stat. § 100.16 governs marketing promotions that involve “selling with pretense of prize” and creates requirements needed to legally facilitate such a promotion. Petitioners used a mechanical/electronic device to conduct a marketing promotion. Does Wis. Stat. § 100.16 apply to electronic/mechanical devices used to facilitate a marketing promotion?

WISCONSIN SUPREME COURT

April 30, 2020

9:45 a.m.

No. 2018AP875-CR

State v. Ryan Muth

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a restitution order entered in Washington County Circuit Court, Judge Todd K. Martens, presiding.

This case comes to the court on cross petitions for review: one by the State, and one by the defendant, Ryan Muth. The petitions concern the Court of Appeals' decision regarding the trial court's restitution order, which the Court of Appeals affirmed in part and reversed in part.

Muth caused a woman's death by intoxicated use of a vehicle. The woman was survived by three adult children: a son and two daughters.

Muth's insurer, Progressive Insurance Company, paid the deceased's children \$100,000 in exchange for their execution of a document entitled "FULL RELEASE OF ALL CLAIMS WITH INDEMNITY." The pertinent language of the release states that the settlement recipients:

acquit and forever discharge Ryan Muth and Progressive Artisan & Truckers Casualty Insurance Company, of and from any and all claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship on account of or in any way growing out of . . . an automobile accident which occurred on or about March 6, 2016

Muth later pled to and was convicted of one count of homicide by intoxicated use of a vehicle while having a prior intoxicant-related conviction.

During later restitution proceedings, the deceased's children requested reimbursement for various expenses related to the decedent's death; e.g., funeral expenses, mileage, lost wages, etc. The deceased's daughters also sought restitution for their husbands' lost wages for time off related to the decedent's death. Defense counsel argued that the deceased's children had already collected through the civil settlement the expenses they now claimed as restitution, and that the deceased's sons-in-law were not entitled to restitution for their lost wages under the restitution statute, Wis. Stat. § 973.20. The trial court rejected these arguments.

Muth appealed, with partial success. The Court of Appeals disagreed with Muth's argument that the restitution award should be reduced by the civil settlement already paid to the deceased's children. But the Court of Appeals agreed with Muth's argument that the deceased's sons-in-law were not entitled to restitution for their lost wages under the restitution statute, Wis. Stat. § 973.20.

Both Muth and the State have petitioned for review. The case presents the following issues:

- Wisconsin's marital property statutes provide that income accrued during marriage belongs to both spouses. Wisconsin's restitution

statute permits crime victims to recover “income lost” from the “filing of charges or cooperating in the investigation and prosecution of the crime.” Where a crime involves death, a “victim” for restitution purposes includes the deceased’s family members. Is marital income lost by a deceased victim’s family member “income lost,” such that the family member may recover it as restitution?

- In a criminal restitution proceeding where the crime victims have accepted and received a prior settlement for damages including “lost wages, expenses . . .” and the defendant is asserting an accord and satisfaction of the subsequent restitution claim for lost wages and expenses, must the defendant produce extrinsic evidence of the nature of the unambiguous civil settlement agreement to show that the victims are seeking a double recovery?