# WISCONSIN SUPREME COURT
# CALENDAR AND CASE SYNOPSES
# APRIL 2021

**NOTICE:** Due to the COVID-19 pandemic, oral arguments 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 on www.wicourts.gov.

The cases listed below originated in the following counties:

Brown
Dane
Dodge
Walworth

**THURSDAY, APRIL 8, 2021**

| | | |
|---|---|---|
| 9:45 a.m. | 20AP616-CR | State v. Anthony M. Schmidt |
| 10:45 a.m. | 19AP882 | City of Mayville v. Wis. Department of Administration |

**MONDAY, APRIL 12, 2021**

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|---|---|---|
| 9:45 a.m. | 16AP1688 | Clean Wisconsin, Inc. v. Wis. Department of Natural Resources |
| 10:45 a.m. | 18AP59 | Clean Wisconsin, Inc. v. Wis. Department of Natural Resources |
| 1:30 p.m. | 19AP1404-CR | State v. George Steven Burch |

***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 8, 2021**
**9:45 a.m.**

2020AP616-CR State v. Anthony M. Schmidt

*This case was taken on a petition to bypass the Court of Appeals, District II, filed by Anthony M. Schmidt. The petition challenges an order of the Walworth County Circuit Court, Judge Philip A. Koss, presiding, that applied Wisconsin's child pornography surcharge statutes, Wis. Stat. § 973.042.*

Anthony M. Schmidt was charged with numerous counts of possessing child pornography and a charge of failing to comply with sex offender registration requirements. He subsequently pled guilty to six counts of possessing child pornography. The other charges were dismissed and read in. The circuit court sentenced Schmidt to five years of initial confinement and five years of extended supervision, consecutive to a sentence imposed in a 2014 possession of child pornography case. Important to the issues raised on bypass, the circuit court also imposed fourteen child pornography surcharges, or one $500 surcharge for each child pornography offense contained in the information, including the eight charges that had been dismissed and read in.

Schmidt filed a post-conviction motion arguing that the child pornography surcharge is a punishment and needed to be adequately explained in the plea colloquy. He asserted that since the circuit court did not adequately explain how the surcharges could be applied to his case, the resulting plea was invalid and he was entitled to withdraw it. Second, Schmidt argued that the plain language of Wis. Stat. § 973.042 did not permit the circuit court to impose a child pornography surcharge for a dismissed and read-in offense.

The circuit court denied the motion, finding that the surcharge was not punitive in effect. The court concluded that the surcharge was not a punishment; that Schmidt had a sufficient understanding of how the surcharge codified in Wis. Stat. § 973.042 would be applied to his case; and that it was proper to apply the child pornography surcharge to dismissed and read in offenses. The circuit court stated that it was within its authority to "determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury." Wis. Stat. § 973.042(2)

Schmidt appealed and, following briefing in the Court of Appeals, petitioned the Supreme Court to bypass Court of Appeals' review. Schmidt asks the Supreme Court to decide whether the child pornography surcharge statute permits a circuit court to impose a surcharge for an offense that is dismissed and read in. Schmidt argues that a read in offense is not "associated with the crime" but rather occupies its own legal category, has not resulted in a sentence or disposition, and is not otherwise "associated with an offense resulting in conviction." Schmidt further asks the Supreme Court to decide if a child pornography surcharge constitutes a punishment for purposes of a plea colloquy.

The following issues have been presented for review:

1. Does Wis. Stat. § 973.042(1) (the child pornography surcharge statute) permit the circuit court to impose a child pornography surcharge for an offense that is "read in" for sentencing purposes?

2. Is the child pornography surcharge a punishment that must be explained during a plea colloquy? If so, was Mr. Schmidt entitled to a hearing on his claim that the plea colloquy was deficient in this case?

**WISCONSIN SUPREME COURT**
**April 8, 2021**
**10:45 a.m.**

2019AP882 City of Mayville v. Wisconsin Department of Administration

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed an order of the Dodge County Circuit Court, Judge Joseph G. Sciascia, presiding, that reversed the Department of Administration's decision approving a cooperative plan prepared pursuant to Wis. Stat. § 66.0307 by the Village of Kekoskee and the Town of Williamstown.*

Wisconsin Stat. § 66.0307 concerns "Boundary change pursuant to approved cooperative plan." The statute provides any combination of municipalities the authority to determine lines between themselves via a cooperative plan that is approved by the Department of Administration (DOA). The statute states that no boundary may be changed unless the municipality is a party to the cooperative agreement. In this case, two Dodge County municipalities, the Town of Williamstown and the Village of Kekoskee, ultimately proposed a plan that would impact the boundaries of a nearby municipality, the City of Mayville, without its involvement in the plan.

In 2015, Kekoskee notified Williamstown that it was having difficulty seating a full village board, and, as a result, it was considering dissolving under Wis. Stat. § 61.187. In February of 2017, Kekoskee and Williamstown each resolved to participate in the preparation of a cooperative plan under § 66.0307.

In February of 2018, Kekoskee and Williamstown submitted their proposed cooperative plan to DOA for review and approval. Mayville wrote to DOA and requested a public hearing on the plan. DOA conducted a public hearing. Kekoskee and Williamstown made a presentation in support of the proposed plan. Mayville provided written comments and exhibits, along with testimony, opposing the plan.

In May of 2018, DOA issued a letter to Kekoskee and Williamstown stating that their proposed plan did not meet any of the required statutory criteria, but that it could if it were revised and resubmitted. Among the revisions, DOA suggested that the plan better articulate and provide for "adequate provision for delivery of necessary services to the Cooperative Plan territory," including that Kekoskee and Williamstown "revise the Cooperative Plan to provide territory adjacent and proximate to the City [of Mayville] the opportunity to receive higher level services should landowners desire that." The DOA provided several options for how Kekoskee and Williamstown could implement this recommendation. The DOA suggested that Kekoskee and Williamstown consider "designat[ing] a sufficiently-sized area adjacent to the City of Mayville where detachment to the City will occur should landowners desire higher density development and services."

In July 2018, Kekoskee and Williamstown submitted a revised proposed cooperative plan to DOA. Mayville opposed the plan in writing. The revised plan had some new provisions, including a new Section 24 detailing a "City Growth Area," created "[i]n order to provide for future growth for the City of Mayville, and to ensure that owners of territory adjacent and proximate to the City of Mayville have the opportunity to receive higher level services through the city of Mayville." The proposed City of Mayville Growth Area would roughly double the

existing area of Mayville. The revised plan, like the first one, did not include Mayville as a party.

In August 2018, DOA informed Kekoskee and Williamstown that their revised plan met two of the five statutory criteria for approval, and it recommended resubmission of the plan after more revisions.

In September 2018, Kekoskee and Williamstown submitted a second revised proposed cooperative plan to DOA. Mayville again was not included as a party. Mayville again filed a letter with DOA objecting to approval of the plan.

On October 4, 2018, DOA approved the second revised cooperative plan. Under the plan, Kekoskee will change its name to the Village of Williamstown. Under Section 24 of the Plan, Kekoskee and Williamstown agreed to create a "Village of Williamstown Detachment Area," which provides that "[i]n order to ensure that owners of territory adjacent and proximate to the City of Mayville will have the opportunity to receive higher level services through the City of Mayville," the Village of Williamstown "will not object to, and will take action necessary to effectuate[] the detachment of territory from within the Village of Williamstown Detachment Area" provided that "the petition for detachment meets the requirements of Wis. Stat. § 66.0207 as they exist on the effective date of this Plan." The plan provided that this provision "will remain in effect until December 31, 2118 unless the Village of Williamstown and the City of Mayville . . . agree otherwise."

In Section 25 of the Plan, Kekoskee and Williamstown's agreed boundary change "will have the effect of eliminating the Town-Village boundary entirely." Section 25 provided, "The current boundaries with the City of Mayville . . . will be unaffected." Section 25 further states that "under the Village of Williamstown Detachment Area provisions of Section 24, the size of the village of Williamstown will be reduced over time." "Provided that detachments meet the criteria set forth in that Section, residents in the Village of Williamstown Detachment Area could detach the entire 2030 Future Land Use Map area, which consists of approximately three square miles and is nearly the size of the existing city of Mayville." "As a result of these attachments, the Village of Williamstown will continually become smaller and more compact, and the City of Mayville will grow in an orderly and compact manner." The Plan states that it is consistent with current state and federal law … [and] will be interpreted with applicable law.

Mayville filed a petition for judicial review challenging DOA's approval of the plan in October 2018. DOA and Kekoskee filed a joint motion to dismiss the petition, arguing that Mayville lacked standing to challenge DOA's approval of the plan. The circuit court found that Mayville had standing, and it denied the motion. Following briefing and a hearing, the circuit court orally reversed DOA's October 2018 approval and remanded to DOA. The circuit court entered a written "Order Reversing and Remanding Decision of Department of Administration" on March 20, 2019. The court held that DOA's decision must be reversed because § 66.0307 does not allow a village to attach an entire township. The court said it was "unable to find any language in Sec. 66.0307 which in any way explicitly or implicitly authorizes such comprehensive and drastic changes in the status of Municipalities." DOA and Kekoskee appealed. The Court of Appeals affirmed.

The Court of Appeals found that Mayville had standing to seek judicial review, and it also concluded that DOA made an error of law in approving the plan. Two petitions were filed seeking Supreme Court review.

DOA filed a petition for review raising these issues:

1. Did DOA validly approve a Wis. Stat. § 66.0307 cooperative plan that changed the boundary between two municipalities by entirely eliminating it?
2. Did Mayville have standing under ch. 227, Stats., to challenge DOA's approval of the plan?

The Village of Kekoskee filed a petition for review raising essentially the same issues:

1. Whether DOA properly approved the cooperative plan boundary agreement between the Village of Kekoskee and the Town of Williamstown pursuant to Wis. Stat. § 66.0307.
2. Whether Mayville had standing to challenge DOA's decision to approve the cooperative plan even though Mayville was neither a party to the cooperative plan nor a third party beneficiary of it.

**WISCONSIN SUPREME COURT**
**April 12, 2021**
**9:45 a.m.** (2016AP1688)
**10:45 a.m.** (2018AP59)

2016AP1688 & 2018AP59 Clean Wisconsin v. Department of Natural Resources

*The Wisconsin Court of Appeals, District II (headquartered in Waukesha) has certified two appeals regarding the authority of the Department of Natural Resources to regulate wastewater permits and well permits. Both cases arise out of the Dane County Circuit Court, with Judges John W. Markson and Valerie Bailey-Rihn presiding.*

The Wisconsin Court of Appeals, District II, has certified two appeals to the Supreme Court that both involve the effect of 2011 Wis. Act 21 ("Act 21") on the regulatory agency permit approval process as applied to certain Department of Natural Resources ("DNR") permit applications. Specifically, the appeals bring into question the authority of the DNR to regulate wastewater permits and high-capacity well permits in the wake of Act 21. Act 21 made significant changes to statutes relating to the promulgation of administrative rules. Two sections of Act 21 altered Wisconsin administrative law relating to agency delegation. Wisconsin Stat. § 227.10(2m) states that "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule . . . ." Wisconsin Stat. §§ 227.11(2)(a)1. and 2. provide that statutory preambles (declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties) should not be relied upon by agencies that cannot otherwise find explicit statutory authority.

The DNR issues wastewater treatment permits under its Wisconsin Pollution Discharge Elimination System (WPDES) permit program, and also issues permits for high capacity wells, under its authority to manage the waters of the state, in accordance with the public trust doctrine. The public trust doctrine is part of the state's Constitution, art. IX, s. 1, that declares all navigable waters in the state are "common highways and forever free" and held in trust by the State of Wisconsin.

The first appeal, case no. 2016AP1688, involves a suit brought by Clean Wisconsin and various individual property owners after the DNR issued a WPDES permit to Kinnard Farms, a large dairy farm. Clean Wisconsin asserted the permit should have included off-site groundwater-monitoring requirements and animal-unit maximums. Following extensive proceedings, the circuit court held that the DNR had explicit authority to impose permit conditions necessary to "assure compliance" with various WPDES requirements. The DNR appealed, arguing these requirements would contravene Wis. Stat. § 227.10(2m).

The second appeal, no. 2018AP59, involves a suit brought by Clean Wisconsin and the Pleasant Lake Management District after the DNR issued eight high-capacity well permits. In so doing, DNR relied upon a May 2016 Attorney General opinion concluding that Act 21 "precluded" any type of environmental review for wells outside the limited types of wells

specified in chapter 281.[1] Clean Wisconsin argued that DNR retains the authority and general duty to preserve the waters of the state, citing Lake Beulah Mgmt. Dist. v. DNR, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, thereby authorizing additional environmental review. The circuit court agreed and vacated the permits. The DNR appealed, joined by intervening parties, including Wisconsin Manufacturers and Commerce.

The Supreme Court accepted the Court of Appeals' certification of both appeals. Not long after, the Joint Committee on Legislative Organization, on behalf of the Wisconsin Legislature, moved to intervene in both appeals. After extensive briefing, the Supreme Court granted the Legislature's motion to intervene. Meanwhile, the State, by the new Attorney General, advised the court that it was changing its position on the merits, such that the DNR and the Legislature are now at odds regarding the implications of Act 21 on an agency's authority.

[1] In 2016, Assembly Speaker Robin Vos requested the opinion from then-Attorney General Brad Schimel. Attorney General Schimel's Act 21 opinion has since been withdrawn.

**WISCONSIN SUPREME COURT**
**April 12, 2021**
**1:30 p.m.**

2019AP1404-CR State v. George Steven Burch

*The Wisconsin Court of Appeals, District III (headquartered in Wausau) has certified George Steven Burch's appeal of his conviction of first-degree intentional homicide, which he argues was based on illegally-obtained evidence. The case arises out of the Brown County Circuit Court, Judge John Zakowski presiding.*

The Wisconsin Court of Appeals, District III, has certified this criminal appeal, which raises issues regarding the extent to which law enforcement can download and later use information from an individual's cell phone. This case involves questions about privacy and search and seizure under the Fourth Amendment of the U.S. Constitution. Indeed, the United States Supreme Court has observed that modern cell phones carry vast amounts of data about their owners and implicate heightened privacy concerns that do not necessarily apply to physical objects. See Riley v. California, 573 U.S. 373, 393-98 (2014).

In June 2016, George Steven Burch was questioned by Green Bay Police about his possible involvement with a hit-and-run. Subsequent to questioning, the police officer asked to see some text messages on Burch's phone. Burch agreed. The officer then asked Burch if he would be willing to allow the officer to take the phone to a detective, download the information off the phone, and bring the phone back in about half an hour. The officer did not specifically limit what he meant by "the information." Burch signed a written consent form giving the officer and any assisting personnel "permission to search my . . . Samsung cell phone." Nothing on the form limited the scope of search and Burch did not orally express any concern as to limiting the search of the contents of his phone.

A police department forensic computer examiner performed a full forensic download of the contents of the phone. The examiner provided a report for the investigating officer containing only the information the officer requested, namely, all data from the phone "after June 7, 9:30 pm."

At the same time as the hit-and-run investigation, the Brown County Sheriff's Department was investigating the murder of Nicole VanderHeyden, whose body had been found in a Brown County field on May 21, 2016. In August 2016, based on DNA evidence, the sheriff's department began investigating Burch in connection with the murder. The sheriff's department learned that the Green Bay Police Department had downloaded data from Burch's cell phone and obtained it. Upon examining the downloaded data, the sheriff's department learned that Burch had viewed many news stories about VanderHeyden's death and was able to determine that during the early morning hours of May 21, 2016, Burch's cell phone was located near VanderHeyden's residence and then traveled to the field where her body was found.

Burch was arrested and charged with VanderHeyden's death. Burch moved to suppress all evidence from the sheriff's department's search of his cell phone data, arguing that the search of the phone data violated his Fourth Amendment rights. Burch's motion was denied, the cell phone evidence was introduced at jury trial, and he was found guilty of first-degree intentional homicide.

Burch appealed, arguing that the circuit court erred in denying his suppression motion. The Court of Appeals identified the issues presented as novel questions of law concerning unreasonable searches, consent, retention of contents from a search, and warrantless searches, and certified the appeal to the Supreme Court.

The issues raised by Burch on appeal that the Supreme Court will review are:

1. Whether police violated George Burch's Fourth Amendment rights by conducting a second warrantless search of his cell phone extraction; and
2. Whether critical evidence from Fitbit, Inc.'s business records was admissible without expert testimony and without a witness from Fitbit to establish that the evidence was accurate and reliable. Also, whether this issue implicated Burch's right to confrontation.[1]

[1] The brief background behind this issue is that the murder victim's boyfriend was initially arrested and held in custody for eighteen days. Police subsequently reviewed information on the boyfriend's phone, purportedly derived from his Fitbit device, showing that at the time of the murder he took only about a dozen steps. After reviewing this information, police released the boyfriend and the investigation continued, eventually leading to Burch's arrest. Burch filed a motion to exclude all Fitbit evidence after learning that the State would not be calling a witness from Fitbit, Inc. to present the evidence. The circuit court ruled that the Fitbit evidence was admissible without expert testimony and without any authenticating witness from Fitbit.