WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2023

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

Dane
Milwaukee
Trempealeau
Wood

MONDAY, APRIL 17, 2023

9:45 a.m.	20AP819-CR	State v. Wilson P. Anderson
11 a.m.	21AP1732-CR	State v. Eric J. Debrow
1:30 p.m.	20AP2012-CR	State v. James P. Killian

WEDNESDAY, APRIL 19, 2023

9:45 a.m.	21AP938-CR	State v. Quaheem O. Moore
11 a.m.	21AP373	Derrick A. Sanders v. State of Wisconsin Claims Board

Note: The Supreme Court calendar may change between the time you receive it 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. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
April 17, 2023
9:45 a.m.

2020AP819-CR State v. Wilson P. Anderson

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that affirmed the Milwaukee County Circuit Court order, Judge David A. Feiss, presiding, committing Wilson P. Anderson to a mental health institution due to his incompetency, and ordering involuntary administration of medication.

In March of 2020, Wilson P. Anderson was charged and detained for misdemeanors after he allegedly hit a stranger on the head and screamed at her without provocation. In a court-ordered evaluation, a psychologist deemed Anderson incompetent to stand trial due to mental illness. The psychologist noted that medication was likely necessary to restore competency. The circuit court conducted a competency hearing in April 2020. Anderson refused to appear. The psychologist testified in favor of involuntary medication for Anderson but did not specify a treatment plan. The circuit court agreed with the psychologist's assessment that Anderson was not competent to proceed and further agreed that the involuntary administration of medication to Anderson while he was committed was "substantially likely to render [Anderson] competent to stand trial."

Anderson appealed. The Court of Appeals affirmed the order, determining that the State proved the factors established by the United State Supreme Court in Sell v. United States, 539 U.S. 166 (2003),[1] by showing that involuntary medication is necessary, would restore Anderson's competency, and that it is in Anderson's medical best interest. The Court of Appeals also determined the circuit court properly exercised its discretion in allowing the psychologist to testify on the issue of involuntary medication. The Court of Appeals rejected Anderson's argument that the State needed to submit an individualized treatment plan to satisfy Sell.

Anderson filed a petition for review with the Wisconsin Supreme Court. The issues for this court to decide are:

1. Did the State present sufficient evidence to meet its burden to prove the second, third, and fourth Sell factors by clear and convincing evidence?
2. Was the psychologist sufficiently qualified to offer expert testimony on the Sell factors?

[1] In Sell, the United States Supreme Court established a four-factor test to determine whether the involuntary administration of medication is "constitutionally permissible." Before ordering involuntary medication to achieve competency, a trial court must find that (1) important government interests are at stake; (2) involuntary medication will significantly further those interests; (3) involuntary medication is necessary to further those interests; and (4) the administration of the medication is medically appropriate, that is, that it is in the patient's best medical interest in light of his medical condition. 539 U.S. at 180-81.

WISCONSIN SUPREME COURT
April 17, 2023
11:00 a.m.

2021AP1732-CR State v. Eric J. Debrow

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that reversed the Dane County Circuit Court judgment, Judge John D. Hyland, presiding, convicting Eric J. Debrow of second-degree sexual assault of a 13-year-old girl.

Eric J. Debrow was charged with second-degree sexual assault of a13-year-old girl. Because Debrow had been convicted of first-degree sexual assault of a child in 2004, he was charged as a persistent repeater. This case was joined with a charge of first-degree sexual assault of another girl. Both victims individually claimed that Debrow entered their shared room and had sexual contact with them, but on different dates. The issue in this case concerns the charge for second-degree sexual assault charge as a persistent repeater.

Before trial, Debrow made a motion to exclude evidence of his 2004 conviction for sexual assault. The circuit court granted this motion and all parties agreed evidence of this conviction would be highly prejudicial. At trial, one victim and her brother testified regarding the second-degree sexual assault charge. The brother testified he saw Debrow enter the victim's room and leave after she screamed. When asked why he was on alert on the night in question, the brother testified that he was on alert because he had "looked on CCAP," but this comment was obscured by overlapping interjections and objections from counsel.

The jury was excused, and both parties agreed with the court that the brother had said something to the effect of he had "looked on CCAP." Debrow then moved for a mistrial, arguing that a jury instruction was not enough to cure the prejudice from the CCAP comment. The circuit court denied this motion because the brother did not disclose what he saw on CCAP, the court interrupted the testimony for hearsay reasons, and there were less drastic remedies than a mistrial to deal with possible prejudice to Debrow. The court gave a curative instruction to the jury regarding stricken testimony. The jury found Debrow guilty of second-degree sexual assault, but acquitted him of the charge of first-degree sexual assault of the other girl. Pursuant to the persistent repeater statute, the circuit court sentenced Debrow to life imprisonment without the possibility of release on extended supervision.

Debrow appealed, and the Court of Appeals reversed Debrow's conviction and remanded for a new trial. The Court of Appeals held that the CCAP comment signaled to jurors that Debrow had a prior criminal conviction related to sexual misconduct involving a child, which unfairly prejudiced Debrow enough to warrant a new trial. In reaching this conclusion, the Court of Appeals stated that the brother's testimony was unfairly prejudicial to Debrow and violated the circuit court's order that evidence of the prior conviction be excluded; the circuit court's attempts to cure the prejudicial effect of this testimony were insufficient; and, therefore, the circuit court erroneously exercised its discretion in denying Debrow's motion for a mistrial.

The State filed a petition to review with this court to address the interplay between curative instructions and the necessity for a mistrial. The State suggests that when confronted

with a situation as is present here, a court should first determine whether an objected-to error is capable of being overcome by a curative instruction and if so, the court properly exercised its discretion in denying the request for a mistrial. The State says that the Court of Appeals suggested a different curative instruction could have obviated the need for a mistrial, and therefore erred by "folding" the curative instruction analysis into mistrial analysis.

The issue before the Supreme Court is:

> Did the Court of Appeals apply the proper legal standard to its review of the circuit court's decision to deny Debrow's motion for a mistrial when it considered the adequacy of the curative instruction given by the circuit court and, if not, did the circuit court properly exercise its discretion in denying the motion for a mistrial?

WISCONSIN SUPREME COURT
April 17, 2023
1:30 p.m.

2020AP2012-CR State v. James P. Killian

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that affirmed the Trempealeau County Circuit Court order, Judge Rian Radtke, presiding, dismissing all child sexual assault charges against James Killian.

In March 2015, James Killian was charged with one count of first-degree sexual assault of a child under 12 years of age (hereinafter "B."). The complaint the State filed lists the time period for which charges applied as "on or about August 18, 2014," for grabbing B.'s buttocks while sleeping in the same bed. During a forensic interview, B. stated that Killian had squeezed her buttocks on five different occasions, beginning around age 8 and had touched her breasts once in 2014.

In 2016, the State separately charged Killian with one count of repeated sexual assault of a child under age 16 for allegedly sexually abusing "A." from April 1994 through Nov. 30, 1998. During A.'s forensic interview, she stated that the assaults began around January, 1988, when she was 6, and ended around December 1999, when she was 17. The State moved to introduce evidence from A.'s sexual assault case to show the absence of mistake or accident. The circuit court granted the State's request and ruled that evidence of Killian's alleged sexual assaults against A. between January 1988 and December 1999 would be admissible at trial.

At that same hearing, Killian made a motion to exclude "evidence pertaining to other crimes, wrongs, or acts," which would prevent the State from introducing evidence that Killian had assaulted B. in ways other than grabbing her buttocks on Aug. 18, 2014. The prosecutor did not object to the motion and stated that the only allegation being made at that time was the Aug. 18, 2014 incident.

After that hearing, the cases were consolidated for trial. On June 15, 2017, four days before the trial, the prosecutor filed a motion to amend the information in each case: (1) to charge Killian with one count of incest in A.'s case that occurred "on or about April, 1994 through December, 1999"; and (2) to expand the charging period for B.'s allegation from on or about Aug. 18, 2014, to on or between January 2014 and Aug. 18, 2014. The circuit court denied the State's request to charge Killian with one count of incest in A.'s case, but granted an expansion of the charging period for B.'s allegation in order to give a window for the alleged grabbing. However, the court reiterated that the State was not allowed to use that window to introduce evidence of other sexual assaults.

In his opening statement at the trial, the prosecutor stated other alleged occasions of sexual assault and stated that B. would testify to a course of conduct including other instances of sexual assault. Killian's counsel objected and stated that if B. testified as the prosecutor described, he would move for a mistrial. The circuit court admonished the prosecutor, repeating that evidence of grooming behavior was allowed, but not evidence of other sexual assaults.

B. testified about grooming behavior, but then, at the prosecutor's request, she testified about another instance of sexual assault. Defense counsel immediately moved for a mistrial for violating the other-acts ruling. The circuit court granted the mistrial due to prejudice to Killian and violation of the other-acts ruling. Killian then moved to dismiss with prejudice, and the court granted that motion because it found that the prosecutor intentionally provoked a mistrial. The State did not appeal this ruling.

Then, in October 2019, the State charged Killian with ten crimes relating to the same victims. Nine counts were related to A.: three sexual-assault charges and six incest charges. The three sexual-assault charges and two of the incest charges had charging periods that predated the charges from the first prosecution. The four other incest charges had periods that overlapped with the initial charging period of April 1994 through Nov. 30, 1998. The tenth count related to B. and alleged repeated sexual assault of the same child "in or around June 2012, and no later than Aug. 17, 2014." Killian moved to dismiss the complaint for violating double jeopardy because the dismissal with prejudice prohibited refiling "even under a different charging scheme." The circuit court granted the motion, stating that although the charges would not be the same offenses, the scope of the dismissal "is meant to encompass future prosecutions involving the same facts alleged" in the first prosecution.

The State filed an appeal with the Court of Appeals, and the Court of Appeals affirmed the circuit court's order, stating that Killian had risked being convicted for the current charges in the first prosecution.

The State filed a petition for review with this court. The issue presented to this court for review is:

Has the State exposed Killian to multiple prosecutions for the same offense in violation of double-jeopardy principles? Stated another way, do any or all of the ten counts in the second prosecution violate double jeopardy?

WISCONSIN SUPREME COURT
April 19, 2023
9:45 a.m.

2021AP938-CR State v. Quaheem O. Moore

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that affirmed the Wood County Circuit Court order, Nicholas J. Brazeau, Jr., presiding, suppressing evidence obtained during a traffic stop.

On Nov. 17, 2019, Officer Abel initiated a traffic stop of Moore's vehicle for speeding. The officer witnessed liquid fly out of the driver-side window and Moore turn onto a side street and hit the curb while stopping. On approaching the vehicle, the officer noted a strong smell of marijuana. Officer Abel requested backup indicating she "might have smelled the odor of marijuana coming from the car." Officer Scheppler arrived to assist and his body camera footage showed Officer Abel performing an initial pat-down of Moore during which she located a vape pen. Moore stated the vape pen was used for CBD and not marijuana and that the vehicle he was driving belonged to his brother.

The officers informed Moore they were going to search him again based on the odor of marijuana coming from the vehicle. Officer Scheppler conducted a thorough search of Moore and nothing was uncovered. Officer Abel began to search the vehicle and Officer Scheppler said he wanted to search Moore again, because he "forgot to look one place." Scheppler later testified that he did so because when he was talking to Moore he noticed his belt buckle was a little higher on his pants and when he looked behind the belt buckle he noticed a bulge in Moore's pants. No contraband had been discovered in the vehicle at this point. Moore was again ordered to place his hands on his head and Scheppler focused on the area around Moore's belt buckle.

During this search, Officer Scheppler felt what he believed to be a plastic bag and located two plastic baggies from Moore's zipper area, which were later confirmed to be cocaine and fentanyl. Moore was then placed under arrest. Eventually, the officers located a tenth of a gram of marijuana in the vehicle (a "shake," referring to loose leaves, seeds and stems at the bottom of a bag of marijuana).

The State charged Moore with two counts of possession of narcotics (cocaine and fentanyl) with intent to deliver, as a second and subsequent offense. Moore was not charged with anything relating to the marijuana shake found in the vehicle. Moore moved to suppress the drugs evidence, arguing that the "officers did not have probable cause to arrest when Officer Scheppler conducted a body search" based solely on the odor of marijuana in the vehicle. At the evidentiary hearing on the motion, the investigating officers testified and body camera footage was presented. Officer Scheppler admitted that he conducted the body search of Moore based "solely on the smell in the car" and not any odor observed on Moore. He also admitted that during the previous protective pat-down search, the vape pen was "all that we had located on him at that time." Neither officer provided any testimony about their training and experience observing the odor of marijuana.

The circuit court granted the motion to suppress, concluding that the second and third searches of Moore were a single continuous search and the sole basis for the body search was the smell of marijuana. The circuit court concluded that there was reasonable suspicion for Officer Abel to conduct a pat down of the defendant for weapons, but the second search was not a search for weapons, but a search for contraband and was justified only by the officers' belief they had smelled marijuana in the vehicle.

The State appealed to the Court of Appeals. The Court of Appeals affirmed, but on different grounds. First, the State failed to show the odor was "unmistakably that of marijuana" because the officers did not testify to their experience in identifying the odor and the State asserted the odor of CBD is indistinguishable—an assertion the court took as a concession of fact. Second, the State did not show the odor was linked to Moore because Moore had an innocent explanation—the odor was CBD; Moore did not own the vehicle; and the officers did not smell marijuana on Moore's person. Third, the odor of marijuana, Moore's CBD vape pen, and Moore hitting a curb did not provide probable cause to arrest under the circumstances. The Court of Appeals ignored Officer Abel's observation that Moore disposed of liquid because the State did not develop the argument at the circuit court level.

The State petitioned this Court for review, which this court granted. The issues for this court to decide are:

1. Whether State v. Secrist, 224 Wis.2d 201, 589 N.W.2d 387 (1999), established a heightened evidentiary standard for search and seizure based on the detection of the odor of marijuana?
2. Did the Court of Appeals correctly construe the requirement that the odor of marijuana be "unmistakable" to the officer to be a question of law rather than a question of fact?
3. Did the officers have probable cause to arrest Moore under the totality of the circumstances, which included a "strong" odor of raw marijuana coming from the vehicle of which Moore was the sole occupant?

WISCONSIN SUPREME COURT
April 19, 2023
11:00 a.m.

2021AP373 Derrick A. Sanders v. State of Wisconsin Claims Board

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) that reversed the Dane County Circuit Court order, Judge Stephen E. Ehlke, presiding, affirming the determination of the Wisconsin Claims Board awarding statutory maximum compensation to Sanders who spent 26 years in prison for a crime he did not commit.

In October 1993, Sanders assaulted a man. Later that evening, Sanders' associates took the victim to another location where he was shot and killed. Sanders did not participate in the shooting. Nonetheless, Sanders was charged with first-degree intentional homicide as party to a crime. Based on advice of counsel, Sanders pleaded no-contest and spent 26 years in prison. In 2017, Sanders filed a motion for post-conviction relief claiming ineffective assistance of counsel. In 2018, the circuit court granted Sanders' motion, concluding that the State failed to establish any facts supporting Sanders' no-contest plea. The State informed the court, on the record, that it "could not prove that Mr. Sanders was party to the crime of the homicide." The circuit court vacated the judgment of conviction and dismissed the case.

In 2019, Sanders filed a claim under Wis. Stat. § 775.05 with the Claims Board seeking the maximum statutory compensation for wrongful conviction of $25,000, as well as over $5.5 million in additional damages for the 26 years he spent in prison wrongfully convicted. Sanders supported his claim with evidence of $30,000 for loss of property and over $500,000 for lost wages. In addition, Sanders calculated approximately $5.2 million in lost earning capacity and unspecified damages for physical, mental and emotional distress while wrongfully imprisoned.

The district attorney did not oppose the petition, and the Claims Board sent a follow-up email asking the district attorney to clarify whether it opposed payment of $5,754,965 to Sanders. The district attorney's office responded that their initial response expressed general support for Sanders' petition for compensation in the maximum amount of $25,000 but did not take a position on Sanders' request for additional compensation. Sanders was not copied on these communications.

At the hearing before the Claims Board, Sanders was asked only two questions: (1) how he came up with the $5 million in requested compensation; and (2) if Sanders sued his criminal attorney for malpractice. Sanders answered that he was not saying he would have earned $5 million, but referenced Wisconsin cases where individuals who were wrongfully incarcerated for less time than he was were awarded $7.5 million (for 24 years) and $13 million (for 13 years), and that he was trying to find someone to represent him in a malpractice suit against his former attorney.

The Claims Board issued a decision finding that "the evidence is clear and convincing that Sanders was innocent of the charge" and awarded $25,000 in compensation. It also concluded that Sanders' conduct did not contribute to the conviction; even though he entered a

no-contest plea, that was the result of a "legal error" due to ineffective assistance of counsel, and Sanders' plea was not knowing and voluntary. The decision did not discuss his request for additional damages and did not contain any explanation for its compensation award. The decision stated that the District Attorney did not oppose Sanders' claim for $25,000 but took no position on his claim for addition compensation.

Sanders submitted a petition for rehearing, asserting that the Claims Board erred by not addressing his claim for additional compensation, not following Wis. Stat. § 775.04(4), and by allegedly misstating the district attorney's position on his petition (as Sanders was never copied on the follow-up correspondence with the Claims Board). The Claims Board Chair rejected the petition for rehearing.

Sanders, pro se, filed a petition for judicial review of the Claims Board's decisions in Dane County Circuit Court. The circuit court affirmed the decisions and Sanders, still pro se, appealed to the Court of Appeals. In a split decision, the Court of Appeals reversed and remanded to the Claims Board with direction "to properly exercise its discretion as to whether the statutory maximum amount of $25,000 that it awarded is or is not adequate compensation where, as here, additional compensation was requested."

While acknowledging that it owed deference to the Claims Board's determination, the Court of Appeals concluded that both the initial decision and rehearing decision were lacking because neither contained factual findings or an explanation of its reasoning as to whether the maximum statutory amount it awarded was equitable or adequate.

Judge Fitzpatrick dissented. He concluded that the majority "grafted" onto Wis. Stat. § 775.05(4) a "process the legislature has not sanctioned and, as a result, those conclusions in the majority opinion are contrary to policy choices made by the legislature." Further, the dissent stated that there is no affirmative obligation for the Claims Board to provide an explanation concerning the adequacy of a compensation award unless it makes a finding that the statutory maximum is insufficient. The dissent focused on the fact that the statute's use of "if" imposes a condition precedent such that the Claims Board is required to submit a report to the legislature with an explanation of what it considers adequate compensation only if it determines that the statutory maximum is insufficient.

The Claims Board filed a petition for review with the Wisconsin Supreme Court. The issue this court will decide is:

> When a petitioner has requested compensation in excess of the $25,000 statutory maximum and the Claims Board awards that $25,000 statutory maximum, does Wis. Stat. § 775.05(4) require the Claims Board to offer an affirmative exercise of discretion as to why it did not submit a report to the Legislature regarding additional compensation?