WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
DECEMBER 2021

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

Brown
Dane
Marathon
Sauk
Shawano
Sheboygan
Vernon
Waupaca

WEDNESDAY, DECEMBER 8, 2021

9:45 a.m.	19AP1832-CR/ 19AP1833-CR	State v. Christopher W. Yakich
10:45 a.m.	21AP6	Sheboygan County v. M.W.

THURSDAY, DECEMBER 9, 2021

9:45 a.m.	20AP29-CR	State v. Westley D. Whitaker
10:45 a.m.	20AP704	Daniel Doubek v. Joshua Kaul

FRIDAY, DECEMBER 10, 2021

9:45 a.m.	19AP221-CR	State v. Nhia Lee
~~10:45 a.m.~~	~~18AP2205~~	~~State v. C.G.~~ (TO BE RESCHEDULED)

MONDAY, DECEMBER 13, 2021

9:45 a.m.	20AP298-CR	State v. Joseph G. Green
~~10:45 a.m.~~	~~19AP1033~~	~~Sauk County v. S.A.M.~~ (TO BE RESCHEDULED)

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
December 8, 2021
9:45 a.m.

2019AP1832-CR & 2019AP1833-CR — State v. Christopher W. Yakich

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed two Waupaca County Circuit Court orders, Judge Vicki L. Clussman, presiding, that sentenced Christopher Yakich to two terms of commitment, to be served consecutively, for a total of five years.

Christopher Yakich was found not guilty by reason of insanity (NGI) on four offenses in two different cases: one count of felony bail jumping and one count of phone harassment in one, and two counts of felony bail jumping in another. The circuit court signed two NGI commitment orders (one for each case), using a standard form entitled "Order of Commitment (Not Guilty by Reason of Mental Disease or Defect)." On one case, the court committed Yakich for three years. On the second case, the court committed him for two years. On both form orders, the circuit court checked a box indicating that the commitments would run "consecutive" to each other, for a total commitment of five years.

Yakich appealed those orders, arguing that the trial court had no authority under Wis. Stat. § 971.17, the commitment statute, to order consecutive commitments. And, Yakich argued, because commitments aren't criminal sentences,[1] the consecutive sentence rule in § 973.15(2)(a) doesn't authorize consecutive commitments. Based on his argument that the trial court lacked authority to order consecutive commitments, Yakich asked the Court of Appeals to remand to the circuit court with instructions to amend the orders to reflect that his commitments are "concurrent."

After initial briefing and another round of supplemental briefing, the Court of Appeals held that the circuit court had statutory authority to order one commitment period, with its maximum length calculated by adding up the maximum terms on each offence——here, a total of five years. Thus, the Court of Appeals affirmed the circuit court's orders.

Yakich petitioned this court for review, presenting the following issue:

> When a defendant has been found not guilty by reason of mental disease or defect in two separate cases and is subject to two separate commitment orders, does the circuit court have the authority to run the terms of commitment consecutive to one another?

[1] See State v. Harr, 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997).

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

2021AP6 Sheboygan County v. M.W.

M.W. asks this court to review of a decision of the Court of Appeals, District II (headquartered in Waukesha), that reversed recommitment and involuntary medication and treatment orders and remanded the matter back to the Sheboygan County Circuit Court, Judge Kent R. Hoffman, presiding, for further fact-finding regarding the applicable statutory standard of dangerousness.

The circuit court entered orders extending M.W.'s involuntary mental health commitment and authorizing involuntary medication and treatment. M.W. challenged these orders on appeal, citing, among other things, this court's decision in Langlade County v. D.J.W., 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. In D.J.W., this court stated a new requirement that, going forward, circuit courts in recommitment proceedings are to make specific factual findings with reference to the statutory standard of dangerousness on which the recommitment is based. Here, M.W. argued, and the Court of Appeals agreed, that the circuit court failed to comply with this requirement in D.J.W.

This case asks what the appropriate remedy is for a circuit court's failure to comply with a D.J.W. violation. The Court of Appeals held here that the appropriate remedy is to reverse and remand to the circuit court for further fact-finding consistent with D.J.W. In a different case, however, the Court of Appeals held that the appropriate remedy is an outright reversal of the underlying orders. M.W. argues that the latter is the appropriate remedy.

Specifically, M.W. offers the following issue for this court's review:

> Whether the Court of Appeals erred when it fashioned a remedy that was contrary to M.W.'s uncontested position, and which thwarted the express purpose of the underlying rule from D.J.W. under which the circuit court erred?

WISCONSIN SUPREME COURT
December 9, 2021
9:45 a.m.

2020AP29-CR State v. Westley D. Whitaker

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Vernon County Circuit Court judgment of conviction and sentence, Judge Darcy Jo Rood presiding.

Following the entry of a guilty plea, Westley D. Whitaker was sentenced to two years of initial confinement and two years of extended supervision for one count of first-degree sexual assault of a child under the age of 13. The circuit court exempted Whitaker from having to register as a sex offender given Whitaker's age at the time of the offense and the court's conclusion that he did not pose a risk of committing similar offenses in the future. The offense of conviction was among six counts for which Whitaker was charged for acts allegedly committed from 2005 through 2007, when he had been between the ages of 12 and 14. The other counts were dismissed and read in for sentencing purposes. The assaults were discovered by authorities after receiving a report from one of the victims in 2017, when Whitaker was 25 years old.

The primary subject of this appeal stems from the circuit court's sentencing comments that a part of its rationale for imposing the four-year sentence was to "send a message" to the elders of the Amish community/congregation of which Whitaker had been a part at the time of the offenses. Adults in the community/congregation had been aware of Whitaker's actions at the time they were occurring, but they had chosen to address them internally rather than report them to law enforcement or social services. Whitaker had left the Amish community when he reached adulthood and had moved out of state.

At one point the circuit court expressed the hope that the sentence would deter "the community from permitting their sons . . . to engage in this [behavior]." At another point the circuit court stated that "a prison sentence is the only way to send the message to Mr. Whitaker and to the community that this is totally unacceptable behavior" and that it "hope[d] that the elders in the community pay attention to this."

Whitaker filed a post-conviction motion that argued, in relevant part, that the circuit court's objective of deterring the Amish community/congregation of which he had been a member had improperly considered his faith and religious association. The circuit court denied the motion. It acknowledged that it had wanted to send a "message" to the particular Amish community/congregation, but it concluded that it had not violated Whitaker's constitutional rights because it had focused on the Amish community in which Whitaker had been a member, rather than on that community's religious beliefs.

Whitaker appealed and the Court of Appeals affirmed, rejecting Whitaker's constitutional challenges to the circuit court's sentencing comments and rationale. Whitaker petitioned the Supreme Court for review, which the court granted in part.

The Supreme Court will review the following issues:

1. Does the sentencing factor/objective of "protection of the public" include permitting the sentencing court to increase the sentence imposed on the defendant to send a message to an identified set of third parties that they should alter their behavior in the future, apart from generally being deterred from committing offenses like those committed by the defendant?
2. Does it violate the First and Fourteenth Amendments and Article I, Section 18 of the Wisconsin Constitution to consider a defendant's religious identity and impose a sentence intended to deter crime solely within his religious community?
3. If a sentencing court may consider a defendant's religious association to deter other members of a religious community, does the "reliable nexus" test in State v. Fuerst, 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994), and State v. J.E.B., 161 Wis. 2d 655, 469 N.W.2d 192 (Ct. App. 1991), require congruity between the offense and the activity protected by the First Amendment?

WISCONSIN SUPREME COURT
December 9, 2021
10:45 a.m.

2020AP704 Daniel Doubek v. Joshua Kaul

This appeal was certified to the Supreme Court by the Wisconsin Court of Appeals, District II (headquartered in Waukesha). In the appeal, Daniel Doubek is seeking review of the order of the Brown County Circuit Court, J. Kendall Kelley, presiding, that rejected Doubek's challenge to the state Department of Justice's revocation of Doubek's license to carry a concealed firearm.

In November 1993, Daniel Doubek was convicted in the Door County Circuit Court of one count of misdemeanor disorderly conduct, in violation of Wis. Stat. § 947.01. The complaint in that case charged Doubek with having "engage[d] in violent, abusive and otherwise disorderly conduct . . . contrary to Wis. Stat. § 947.01." There are no existing transcripts of a plea hearing in that 1993 case. The judgment of conviction simply indicates that Doubek pled to and was convicted of "Disorderly Conduct," in violation of the statute.

The Department of Justice (DOJ) subsequently issued Doubek a license to carry a concealed weapon (CCW). Doubek retained his CCW license until September 2019, when the DOJ revoked it. The DOJ concluded at that time that Doubek was prohibited from holding a CCW license because he had a "Federal Disqualifier for Domestic Violence." In particular, relying on two prior Court of Appeals' decisions (Evans v. Wisconsin Dept. of Justice, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, and Leonard v. State, 2015 WI App 57, 364 Wis. 2d 491, 868 N.W.2d 186) the DOJ concluded that Doubek's disorderly conduct conviction in the 1993 case was a "misdemeanor crime of domestic violence," which disqualifies a person under Federal law from holding a CCW license issued by a state.

In October 2019, Doubek challenged the DOJ's revocation in the Brown County Circuit Court pursuant to Wis. Stat. § 175.60(14m). The Brown County Circuit Court affirmed the DOJ's revocation of Doubek's CCW license.

Once Doubek's appeal of the denial of his challenge arrived at the Court of Appeals, that court questioned whether its decisions in Evans and Leonard remain good law or whether they conflict with a 2014 decision by the United States Supreme Court, United States v. Castleman, 572 U.S. 157 (2014). Because the Court of Appeals is bound by its prior decisions and may not overrule, modify, or withdraw them, that court certified the following question to the Supreme Court:

> Are Evans v. DOJ, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, and Leonard v. State, 2015 WI App 57, 364 Wis. 2d 491, 868 N.W.2d 186, "good law" in light of the United States Supreme Court's decision in United States v. Castleman, 572 U.S. 157 (2014)?

WISCONSIN SUPREME COURT
December 10, 2021
9:45 a.m.

2019AP221-CR State v. Nhia Lee

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), holding that the criminal complaint against Nhia Lee should be dismissed without prejudice because the circuit court (Marathon County Circuit Court, Judge Lamont K. Jacobson, presiding), extended the statutory deadline for holding a preliminary hearing without properly finding good cause to do so.

On September 10, 2018, Lee was charged in Marathon County Circuit Court with two felony drug offenses and a single count of identity theft. He made an initial appearance that same day, which was continued the following day. Lee was represented by State Public Defender (SPD)-appointed counsel for purposes of those hearings only. The circuit court found probable cause for the charged offenses and imposed cash bail in excess of $500, triggering the statutory obligation to hold a preliminary hearing within ten days of the initial appearance per Wis. Stat. § 970.03(2).

Lee's preliminary hearing was set for September 19, 2018, and because of his indigence Lee was deemed eligible for SPD representation. However, the preliminary hearing did not occur until months later, on January 2, 2019. During the months between his initial appearance and his preliminary hearing, the SPD had repeatedly tried to appoint a lawyer to represent Lee, and the circuit court repeatedly extended the 10-day deadline for holding a preliminary hearing, each time finding good cause to extend the time limit for the preliminary hearing based solely on the SPD's inability to locate an attorney for Lee.

In December 2018, the SPD appointed Attorney Julianne Lennon as counsel for Lee. Attorney Lennon moved to dismiss the criminal complaint, alleging: (1) that the delays in appointing counsel for Lee had violated his constitutional and statutory rights; (2) that given the SPD's delay in appointing counsel for Lee, the circuit court was required to have appointed an attorney at county expense, and it had the inherent authority to do so; and (3) that the circuit court's failure to appoint an attorney for Lee at county expense and to hold a preliminary hearing within the statutory time limits deprived the court of personal jurisdiction over him.

The circuit court ultimately denied Lee's motion to dismiss.

The Court of Appeals reversed, holding that the circuit court lost personal jurisdiction over Lee by postponing the preliminary hearing without a proper finding of good cause. The Court of Appeals therefore directed the circuit court to dismiss the criminal complaint without prejudice.

Lee asks this court to review the following issues:

1. Should circuit courts be required to appoint attorneys when there are delays in securing State Public Defender-appointed counsel for the defendant?
2. Was Lee's right to counsel denied?
3. Was Lee denied due process?
4. Was Lee's right to a speedy trial denied?
5. If the circuit court lost jurisdiction to determine probable cause at a preliminary hearing because the ten-day time limit under Wis. Stat. § 970.03(2) had expired by 104 days, what is the appropriate remedy?

WISCONSIN SUPREME COURT
~~December 10, 2021~~
~~10:45 a.m.~~ (TO BE RESCHEDULED)

2018AP2205 State v. C.G.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), affirming the holding of the Shawano County Circuit Court, Judge William F. Kusssel, presiding, denying a motion to stay a juvenile sex offender registration.

The petitioner, Ella (a pseudonym), is a transgender female who, as a juvenile, was ordered to register as a sex offender following a plea of no contest to a sexual assault charge.

The sex offender registry statute prohibits an offender from legally changing his or her name. Accordingly, Ella may not formally change her legal, male-sounding name. In the lower courts, Ella argued, unsuccessfully, that this name-change ban unconstitutionally restrains her freedom of expression, and additionally violates her constitutional right to be free from cruel and unusual punishment.

Ella's petition for review presents the following two issues:

1. Does Wis. Stat. § 301.45, the statute governing juvenile sex offender registration, unconstitutionally infringe on Ella's First Amendment right to freedom of speech by preventing her from legally changing her name to reflect her gender identity?
2. Does requiring Ella to register under Wis. Stat. § 301.45 amount to cruel and unusual punishment in violation of the Eighth Amendment?

WISCONSIN SUPREME COURT
December 13, 2021
9:45 a.m.

2020AP298-CR State v. Joseph G. Green

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed a Dane County Circuit Court order, Judge Valerie Bailey-Rihn presiding, for the commitment and involuntary medication of Joseph G. Green.

In December 2019, Jospeh G. Green was charged with first-degree intentional homicide. At the request of defense counsel, the circuit court ordered a competency evaluation. A court-appointed psychiatrist conducted an evaluation and drafted a report opining that Green suffered from "Other Specified Schizophrenia and other Psychotic Disorder;" that Green was incompetent to understand court proceedings and aid in his own defense; and that Green could be rendered competent through treatment with antipsychotic medication. At Green's competency hearing, the psychiatrist testified that if treated with antipsychotic medication, Green would be substantially likely to become competent within the twelve months provided by statute.

The circuit court found Green incompetent and ordered Green committed to the Department of Health Services for "an indeterminate term not to exceed 12 months." It also issued an order for involuntary medication.

Green appealed the involuntary medication order and moved for an automatic stay of the order. At a hearing on the motion, the parties agreed that Green was entitled to an automatic stay, pursuant to State v. Scott, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141. The court stayed the involuntary medication order until further order of the court.

The State filed motions to lift the automatic stay and to toll the 12-month time period to bring Green to competency during the time the stay was in place. The circuit court granted the State's motion to lift the automatic stay of the involuntary medication order based on its determination that the State was likely to succeed on appeal and that lifting the stay would not cause irreparable harm to Green, substantial harm to any other interested parties, or harm to the public. The circuit court also granted the State's motion to toll the twelve month statutory period to bring Green to competency.

Green moved the Court of Appeals for relief pending appeal. The Court of Appeals granted a temporary stay of the involuntary medication order. After additional briefing, it denied Green's motion for relief pending appeal and lifted the temporary stay. The Court of Appeals, however, ultimately concluded that the State did not meet its evidentiary burden on the order for involuntary medication, and it also concluded that the circuit court lacked the authority to toll the statutory period to commit Green in order to bring him to competency while the stay was in place.

The State petitioned the Supreme Court for review of the following issue:

Did the circuit court have authority to order tolling of the 12-month statutory time limit for bringing an incompetent criminal defendant to trial competency?

WISCONSIN SUPREME COURT
~~December 13, 2021~~
~~10:45 a.m.~~ (TO BE RESCHEDULED)

2019AP1033 Sauk County v. S.A.M.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that dismissed as moot a Sauk County Circuit Court order, Judge Patrick J. Taggart presiding, that extended S.A.M.'s involuntary commitment.

In February 2018, S.A.M., who has bipolar disorder, was committed to mental health treatment pursuant to Wis. Stat. ch. 51 for a period of six months. In June 2018, Sauk County filed a petition to extend S.A.M.'s involuntary commitment for twelve months. S.A.M. contested the petition, and the circuit court held a recommitment hearing.

Following the hearing, the circuit court issued an order extending S.A.M.'s commitment for six months, rather than the twelve months requested by the County. The six-month recommitment order expired in February 2019.

In June 2019, approximately four months after the recommitment order had expired, appointed counsel for S.A.M. filed a notice of appeal from the recommitment order. (Counsel's delay in filing the notice of appeal was due in part to an extension granted by the Court of Appeals as a result of an unexpected death in counsel's immediate family.) The appeal raised sufficiency of the evidence and due process challenges to the recommitment order.

Because S.A.M.'s recommitment had ended, the Court of Appeals ordered the parties to brief mootness. S.A.M. argued that his appeal was not moot because his recommitment carried collateral consequences, including: (1) a firearm restriction; (2) the stigma associated with being committed; and (3) possible liability for the costs of his care.

The Court of Appeals was not persuaded. It held that firearm restriction did not eliminate mootness concerns because S.A.M. did not prove that the restriction was the result of his recommitment, rather than his initial commitment. The Court of Appeals also held that S.A.M. failed to prove that he suffered other collateral consequences from his recommitment, such as being stigmatized or required to pay the costs of his recommitment. The court therefore dismissed S.A.M.'s challenge to the recommitment order as moot.

S.A.M. petitioned the Supreme Court for review. The court is expected to address the following issues:

1. Whether S.A.M.'s appeal of his recommitment was moot because the commitment expired before S.A.M. filed his notice of appeal;
2. Whether Sauk County failed to meet its burden to prove by clear and convincing evidence that S.A.M. was dangerous;
3. Whether S.A.M. was denied procedural due process because he did not receive particularized notice of the basis for his recommitment, including which of the standards of dangerousness was being alleged.

4. Whether this court has the authority, through its "superintending and administrative authority over all courts" (Wis. Const. art. VII, § 3(1)) and/or its authority to "regulate pleading, practice, and procedure in judicial proceedings in all courts" (Wis. Stat. § 751.12(1)), to require the Court of Appeals to expedite the disposition of appeals under Wis. Stat. ch. 51, or in some other manner to ensure that appellants under Wis. Stat. ch. 51 receive an appeal that addresses the merits of the appellants' contentions?