WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
DECEMBER 2022

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:

Brown
Langlade
Milwaukee
Trempeauleau

THURSDAY, DECEMBER 1, 2022
9:45 a.m. 21AP267-CR - State v. Mitchell D. Green
10:45 a.m. 20AP1775 - Nancy Kindschy v. Brian Aish

MONDAY, DECEMBER 12, 2022
9:45 a.m. 21AP462-CR - State v. Michael K. Fermanich
10:45 a.m. 21AP102 - Green Bay Professional Police Association v. City of Green Bay

TUESDAY, DECEMBER 13, 2022
9:45 a.m. 20AP1876-CR - State v. Tomas Jaymitchell Hoyle

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 1, 2022
9:45 a.m.

No. 2021AP267-CR State v. Mitchell D. Green

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed the Milwaukee County Circuit Court order, Judge David Borowski, presiding, denying Green's motion to dismiss on double jeopardy grounds.

This case relates to Mitchell D. Green's alleged involvement in a child sex trafficking ring with a 17-year-old minor, who was allegedly victimized by Green and his uncle, Kimeo Conley. On one occasion between October 31, 2018, and December 4, 2018, Green allegedly drove the victim to meet a prostitute at a downtown Milwaukee hotel. Conley was arrested on December 4, 2018. During Conley's trial in February 2019, the victim identified Green when he entered the courtroom as an observer during the victim's testimony. On March 3, 2019, the State charged Green with one count each of trafficking of a child contrary to Wis. Stat. §948.051(1); physical abuse of a child contrary to Wis. Stat. § 948.03(2)(b); and disorderly conduct contrary to Wis. Stat. §§ 947.01 and 939.63(a)(a).

On August 21, 2019, Green filed a witness list which included Green's cousin, Jonathan Cousin. The State filed a motion in limine the next day requesting an order that certain categories of evidence not be admitted without prior notice and a prior determination of admissibility, including an order prohibiting the defense from introducing any "other-acts evidence" involving a third-party perpetrator, unless and until Green satisfied his burden and such evidence was ruled admissible by the court.

At a hearing later that day, the court acknowledged receipt of the State's motion in limine as well as both parties' witness lists and jury instructions. Green did not object to any of the State's requests. The judge who normally presided over the case was out sick that day, so the judge who took over the hearing did not rule on the State's motion in limine. The State never submitted any discovery requests for any such evidence and Green did not provide any reports of his witness's anticipated testimony and did not file any other motions prior to trial.

Prior to the start of Green's jury trial, the assigned judge requested another judge hear the case due to a scheduling conflict. The case then proceeded to trial before the Honorable David Borowski on January 27-28, 2020. The State called two witnesses: the victim and a police officer. The victim testified about her experiences with both Green and Conley, stating that Green drove her to the downtown hotel. The defense called its only witness, Green's cousin, Jonathan Cousin, who testified that it was he—not Green—who transported the victim on the night in question.

Upon hearing the testimony of Cousin, the State asserted that the only information it had about Cousin prior to him taking the stand was that his name was on a witness list, although "[a]pparently there was an affidavit that he gave to defense back in April of 2019 that the State never received." Further, the State asserted, and the court agreed, that Cousin's testimony

amounted to an admission, at least to the level of probable cause, of child trafficking and that such an admission was made without counsel or the opportunity to assert the privilege against self-incrimination. Green responded that Cousin did not admit to any crime and therefore defense counsel saw no need to give Cousin any warning or recommendation that he seek counsel. Defense counsel then provided the court with Cousin's April 2019 affidavit, which, after summarizing its contents, concluded that Cousin was saying he, not Green, committed the crime.

Because Cousin's testimony was given without prior notice and Cousin was without representation by counsel, the circuit court sua sponte ordered a mistrial and called for a new trial date.

On February 18, 2020, Green filed a motion to dismiss the case arguing that a new trial would violate his constitutional right against double jeopardy. The court denied Green's motion stating that Cousin's testimony had "blindsided" the State, and "there were no legitimate alternatives at that point in time other than a mistrial." Following the court's denial of the motion to dismiss, Green, represented by new counsel, filed a motion for reconsideration of the motion to dismiss on double jeopardy grounds. On February 3, 2021, the circuit court denied the motion, reaffirmed its decision to declare a mistrial, and declined to reconsider its prior decision denying dismissal. Green filed an appeal with the Court of Appeals.

On March 22, 2022, the Court of Appeals reversed the circuit court, concluding that retrial would violate Green's constitutional right against double jeopardy because there was no "manifest necessity" for the mistrial during Green's first trial. The Court of Appeals remanded the case with instructions for the circuit court to dismiss the charges against Green with prejudice. The State petitioned this Court for review.

This Court must decide a single issue:

> Whether the circuit court erroneously exercised its discretion when it concluded that there was a manifest necessity for a mistrial after Green introduced unnoticed third-party perpetrator evidence at trial via the testimony of a witness who claimed to have committed the crime but was unrepresented by counsel.

WISCONSIN SUPREME COURT
December 1, 2022
10:45 a.m.

2020AP1775 Nancy Kindschy v. Brian Aish

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's, Judge Rian Radtke presiding, decision to issue an injunction against Brian Aish, forbidding him from coming near Nancy Kindschy, her place of employment, and her home, for a period of four years.

Nancy Kindschy is a nurse practitioner who has worked at several family planning clinics. Since 2014, Aish has protested at several family planning clinics at which Kindschy worked. In 2019, Kindschy worked at the Blair Clinic, and Planned Parenthood began providing family planning services there. Between 2019 and 2020, Aish regularly protested at the Blair Clinic.[1] It is undisputed that early interactions between Aish and Kindschy were not confrontational.

On March 10, 2020, Kindschy petitioned the Trempealeau County Circuit Court for a harassment injunction against Aish, claiming that Aish had engaged in threatening behavior toward her over a period of time that caused her to fear for her safety.

The circuit court conducted a two-day injunction hearing at which it heard testimony from Kindschy, two of Kindschy's co-workers, Aish, and Aish's wife. Aish, a retired law enforcement officer, testified he protests at Planned Parenthood and other family planning clinics to "stand for children." His priority is to share the gospel, to warn women they will be accountable to God on the day of judgment if they proceed, and to try to persuade them to repent. Aish acknowledged that he stays on site until the clinic employees check out after work. He said that he did not talk to the employees with an intent to harass or intimidate them; he talked to them because he loves them and was trying to persuade them to repent. Aish denied any desire to harm or intimidate Kindschy.

However, Kindschy testified that in the fall of 2019, Aish became more aggressive and confrontational toward her, and seemed to single her out while he was protesting. For instance, Kindschy testified that on October 8, 2019, as she was leaving the Blair Clinic after work, Aish stood close to her car and said directly to her, "You have time to repent. You will be lucky if you don't get killed by a drunk driver on your way home. Bad things are going to start happening to you and your family." There were several other instances of Aish similarly approaching Kindschy, and her co-workers' testimony confirmed she was afraid when leaving work. The Clinic arranged for additional security based on her concerns.

After hearing all the testimony, the circuit court issued an injunction, enjoining Aish from harassing Kindschy, requiring him to avoid Kindschy's home or any premises temporarily occupied by her, including the Blair Clinic, for four years. The court found that Aish's actions

[1] Abortions are not performed at the Blair Clinic.

did not serve any legitimate purpose. The court acknowledged the First Amendment concerns and agreed the First Amendment rights are "guarded" and protected, but also said that Kindschy having to endure intimidation from Aish's statements that made her think she may be killed on her way home, "crosse[d] the line" in this particular case.

Aish filed an appeal with the Court of Appeals arguing, among other things, that the injunction was insufficiently tailored in scope, thereby violating his First Amendment rights by effectively banning him from ever protesting against Planned Parenthood at the Blair Clinic. The Court of Appeals affirmed the circuit court's decision, emphasizing that the circuit court specifically found that Aish engaged in harassment "with intent to harass or intimidate" Kindschy. The Court of Appeals concluded that while Aish may indeed have intended to share his beliefs and persuade Kindschy to leave her employment, Aish also intended to frighten Kindschy. The Court of Appeals stated that harassing behavior cannot be transformed into non-harassing, legitimate conduct simply by labeling it as a political protest.

Aish filed a petition with the Wisconsin Supreme Court to review the Court of Appeals' decision.

The issues this Court must decide are:

1. Whether Wis. Stat. § 813.125, as construed by the Court of Appeals to prohibit speech from a public sidewalk intended to persuade listeners to cease their sinful conduct (participation in abortion) and repent immediately before something bad happens and they no longer have time to repent, violates the First Amendment of the U.S. Constitution and Art. I, §3 of the Wisconsin Constitution?
2. Whether speech from a public sidewalk intended to persuade listeners, even if directed to a specific listener, to cease sinful conduct (participation in abortion) and repent immediately before something bad happens and there is no longer time to repent serves "no legitimate purpose" within the meaning of Wis. Stat. §813.125?
3 Whether enjoining, for a period of four years, a longtime prolife, anti- Planned Parenthood protestor from protesting on a public sidewalk in front of a Planned Parenthood during its business hours because he made comments urging a Planned Parenthood worker to repent before something bad happens and there was no more time to repent, constitutes an unconstitutional restraint on First Amendment protected expression?

WISCONSIN SUPREME COURT
December 12, 2022
9:45 a.m.

2021AP462-CR State v. Michael Fermanich

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that reversed the Langlade County Circuit Court order, Judge John B. Rhode presiding, granting Fermanich 433 days of pre-sentence credit.

On September 30, 2017, Fermanich stole three unoccupied trucks in Langlade County. After taking the third truck, Fermanich drove into Oneida County. He led police on a chase through Oneida County before crashing the truck. Fermanich was subsequently arrested.

The State filed charges in both counties. The Oneida County Circuit Court imposed a $10,000 cash bail, and the Langlade County Circuit Court imposed a signature bond. Fermanich posted bond in Langlade County but was unable to pay the $10,000 bail in Oneida County. Fermanich remained in custody in Oneida County jail for 433 days. The cases were later consolidated for the purpose of resolution by plea agreement.

Pursuant to the plea agreement, Fermanich entered no contest pleas to three counts: one count relating to the first truck taken in Langlade County and two counts relating to the third truck he stole in Langlade County, which he drove into Oneida County and attempted to evade police in Oneida County. Initially, the circuit court withheld sentence and imposed five years of probation on each count to run concurrently.

Two years later, Fermanich violated his probation. The circuit court held a sentencing after revocation hearing and imposed a sentence of 18 months of initial confinement plus 24 months of extended supervision on each count, to be served concurrently. The circuit court granted Fermanich 433 days of sentence credit. The State appealed the sentence credit awarded on the count related to the first truck taken in Langlade County. It was the State's position that credit is unavailable on the Langlade County count because Fermanich's Oneida County pretrial custody was not in connection with the "course of conduct" for which Fermanich was sentenced on the Langlade County charge. Fermanich's position was that the phrase "course of conduct" refers to the "factual connection" between the sentences, and "he was ultimately sentenced in his Langlade case for the same specific acts that led to his custody in the Oneida County Jail."

The Court of Appeals reversed, concluding that the circuit court erred in granting the pretrial sentence credit on the Langlade County charge because it was not connected with the "course of conduct"—the specific acts or offense—for which the sentence was imposed on the Oneida County charges. Fermanich petitioned this court for review, which this court granted.

The Wisconsin Supreme Court must decide the following issues:

1. Whether, in order to prove that his custody was "in connection with the course of conduct for which sentence was imposed" on count one, under Wis. Stat. § 973.155(1)(a), Mr. Fermanich was required to prove that

count one (Langlade County) was based on the same "specific act" as counts four and five (Oneida County).

2. Whether State v. Tuescher, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999), should be reexamined to determine whether its definition of "course of conduct" as meaning "specific act" was erroneous, or alternatively, whether the definition should be limited to the specific circumstances present in Tuescher.
3. Whether Mr. Fermanich is entitled to the 433 days of pretrial credit on count one (Langlade County).

WISCONSIN SUPREME COURT
December 13, 2022
9:45 a.m.

2020AP1876-CR State v. Tomas Jaymitchell Hoyle

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that reversed the Chippewa County Circuit Court judgment, Judge James M. Isaacson presiding, convicting Hoyle of second-degree sexual assault and second-degree sexual assault of a child less than 16 years of age, and order denying his motion for postconviction relief.

In 2017, when she was 15 years old, the victim in this case disclosed to a school liaison officer that she was sexually assaulted in February of 2017. The liaison officer interviewed the victim and then turned the investigation over to a police investigator. The investigator interviewed the victim about the details of the assault, but she would not identify her assailant. In May of 2017, the victim told the school liaison officer that the assailant was Hoyle. Hoyle was charged with four sexual assault offenses: two counts of second-degree sexual assault and two counts of second-degree sexual assault of a child less than sixteen years of age in violation.

At trial, the State's main witness was the victim. She testified that she had taken some Vicodin and drank some alcohol throughout the day of the assault. She further testified that on her way to her friend's house, Hoyle drove by and asked her if she wanted to hang out. She accepted a ride from Hoyle, and after driving for some time, Hoyle turned down a dead-end road. The victim then got out of the car, and when Hoyle instructed her to get back into the car, she climbed into the back passenger seat. According to the victim, Hoyle then joined her in the back seat and began to sexually assault her. She said after the assault Hoyle took her home and said, "if anyone finds out about this someone is going to end up dead."

The only other witness for the State was the police investigator who testified that the road where the alleged assault occurred was in Chippewa County, and admitted she did not speak about the incident with the victim's family members or with the friend with whom she was supposed to meet on the day of the assault. The investigator also testified that when she interviewed the victim, the victim made no mention of having anything to drink or being under the influence of any drugs at the time of the assault.

Hoyle exercised his Fifth Amendment right not to testify and the defense did not introduce any other evidence. During closing arguments, the prosecutor repeatedly argued, over Hoyle's attorney's objection, that the victim's testimony was "uncontroverted." The prosecutor also said to the jury that there was absolutely no evidence disputing the victim's account of what occurred. The jury found Hoyle guilty on all counts.

Hoyle filed a postconviction motion arguing that the prosecutor improperly commented in his closing argument on Hoyle's right not to testify. The circuit court denied Hoyle's postconviction motion. Hoyle filed an appeal with the Court of Appeals.

The Court of Appeals reversed the circuit court, concluding that the State's repeated use of the term "uncontroverted" in a factual context where no one but Hoyle could contradict the

only evidence of guilt at trial, was improper and violated Hoyle's Fifth Amendment right not to testify at trial. The Court of Appeals remanded the case to the circuit court for a new trial.

The State petitioned the Wisconsin Supreme Court for review of the Court of Appeals' decision. The issue this court must decide is:

> Were the prosecutor's comments that the State's evidence was "uncontroverted," which were grounded in standard jury instructions and focused on the evidence in general, permissible under the Fifth Amendment?

WISCONSIN SUPREME COURT
December 12, 2022
10:45 a.m.

2021AP102 Green Bay Professional Police Ass'n v. City of Green Bay

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau) that affirmed the Brown County Circuit Court order, Judge Kendall M. Kelley, presiding, that granted summary judgment confirming an arbitration award for the City of Green Bay.

Andrew Weiss, a detective for the City of Green Bay Police Department (the "Department"), accessed sensitive information through a confidential electronic website regarding two sexual assault cases being investigated by the Department; Weiss was not working on the cases. He used his girlfriend's cell phone to provide the confidential information to a third party outside the Department. The Department's Professional Standards Division (the "Division") interviewed Weiss and provided him with a Formal complaint alleging violations of Department policies concerning media relations, media requests, unauthorized access/disclosure/use, and general conduct. Weiss was also provided with copies of each policy.

At a second interview, the Division gave Weiss an amended Formal complaint alleging two additional violations: the personal communication devices general policy, and the personally owned personal communications devices policy. The Division again provided copies of the policies; the Division also asked Weiss to provide records from the cell phone he used to send the information.

At a third interview, Weiss refused to provide the requested phone records. The Division informed Weiss that this constituted obstruction of an investigation and provided Weiss with a copy of the applicable policy.

Weiss received a Loudermill[2] notice stating the charges. The notice alleged only the violations in the original Formal complaint. At the disciplinary hearing, the Department discussed violations in the original Formal complaint as well as those in the amended Formal complaint. Notice was issued to Weiss imposing discipline and finding violations under two of the violations in the Formal complaint, as well as all of the violations in the amended Formal complaint. Weiss was removed from his detective assignment.

The Green Bay Professional Police Association (the "Association") filed a grievance on behalf of Weiss with the City of Green Bay Personnel Committee (the "Committee"), but waived

[2] A Loudermill notice is a letter sent to a public employee that outlines the issues a disciplinary investigation has revealed and asks whether the employee would like to share any additional information before a decision is made. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), after which the Loudermill notice is named, is a United States Supreme Court decision mandating that a tenured public employee is entitled to notice of the disciplinary charges against him, along with an explanation of the evidence the employer has against him, as well as an opportunity to present his side of the story.

a hearing. The Committee denied the grievance, and the Association sought arbitration. The Wisconsin Employment Relations Commission held an arbitration hearing.

The arbitrator found that Weiss received the due process required under Loudermill, and that cause existed for discipline. The Association filed a declaratory judgment action with the circuit court seeking vacatur of the arbitrator's award, and then filed a motion for summary judgment. The City filed a cross-motion for summary judgment. The circuit court granted summary judgment to the City. The Association filed an appeal with the Court of Appeals and the Court of Appeals affirmed the circuit court's order granting summary judgment to the City.

The Supreme Court granted the Association's petition to review the Court of Appeals' decision. The issues before this court are:

1. Does providing notice to law enforcement officers of "the nature of the investigation" prior to being interrogated, satisfy Loudermill's requirement that a public employee be provided with notice and an opportunity to be heard with respect to disciplinary "charges" after a personnel investigation has been completed?
2. Is due process satisfied when a law enforcement officer is disciplined for "charges" never identified in either a Loudermill notice or Loudermill hearing, simply because his employer identified the policies that eventually led to such discipline (along with a host of others) prior to interrogating the officer?
3. Does Loudermill limit the government's ability to discipline its employees to the "charges" that are actually identified in a Loudermill notice and/or at a Loudermill hearing?
4. Did the arbitrator "manifestly disregard the law" articulated in Loudermill?