WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2020

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

Milwaukee
Waukesha

WEDNESDAY, MARCH 18, 2020

9:45 a.m.	19AP567-W	Milton Eugene Warren v. Michael Meisne
10:45 a.m.	16AP2082/17AP634	Kathleen Papa v. Wisconsin Dept. of Health Services

MONDAY, MARCH 30, 2020

9:45 a.m.	18AP1774-CR	State v. Alfonso Lorenzo Brooks
10:45 a.m.	18AP947	Quick Charge Kiosk LLC v. Josh Kaul
1:30 p.m.	18AP659-D	Office of Lawyer Regulation v. Robert C. Menard

Note: The Supreme Court calendar may change between the time you receive these synopses and when a cases 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 Stephanie Fryer at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
March 18, 2020
9:45 a.m.

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

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

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

In State ex rel. Rothering v. McCaughtry[1], the Court of Appeals established a procedure for addressing ineffective assistance of postconviction counsel claims. Rothering, in the portion relevant to this case, determined that the circuit court should handle claims of ineffective assistance of counsel related to the attorney's alleged deficient performance at the postconviction stage. In 2013, however, this court decided State v. Starks[2] and language in that decision suggested that claims of ineffective assistance of counsel due to counsel's alleged failure to file for postconviction relief in the circuit court should be raised in the Court of Appeals. Starks did not overrule Rothering, so questions have been raised about the correct forum in which to bring such an action.

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

Then, in October 2018, Warren filed a pro se motion for postconviction relief with the circuit court. Warren then retained Attorney Meyeroff, who filed an amended motion on Warren's behalf in January 2019. Warren alleged that his postconviction counsel was deficient for failing to raise ineffective assistance of trial counsel. The circuit court denied Warren's motion, ruling that this situation was covered by Starks. Consequently, the circuit court decided that Warren's claims should be brought before the Court of Appeals via a Knight[3] petition.

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

[1] State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).
[2] State v. Starks, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146.
[3] A Knight petition is a petition for writ of habeas corpus, filed in the Court of Appeals, alleging ineffective assistance of appellate counsel. State v. Knight, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

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

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

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

WISCONSIN SUPREME COURT
March 18, 2020
10:45 a.m.

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

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

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

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

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

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

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

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

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

In a short dissent, Court of Appeals Judge Paul F. Reilly agreed that Topic #66 is not an administrative rule, but went on to conclude that 2011 Wis. Act 21[4] prohibits DHS from utilizing Topic #66 to take Papa's property. Judge Reilly agreed with the circuit court that "DHS was enforcing standards, thresholds and requirements found in Topic #66 as a mechanism to take Papa's property without the legal right to do so," and he said he would affirm.

The Supreme Court is expected to resolve these issues:

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

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

WISCONSIN SUPREME COURT
March 30, 2020
9:45 a.m.

No. 2018AP1774-CR State v. Alfonso Lorenzo Brooks

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

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

Brooks moved to suppress the evidence found in the search, arguing that the search was an improper exercise of the deputies' community caretaker function. The community caretaker function is an exception to the Fourth Amendment that states "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures."[5] Brooks testified that after being told the car would be towed, he told the deputies he did not understand the purpose for the tow because the vehicle was not a road hazard and was not violating any parking ordinances. The circuit court denied the suppression motion, finding that Brooks was properly stopped for speeding and that the deputies had followed their established protocol with respect to the search. Brooks pled guilty to being a felon in possession of a firearm. He was sentenced to 37 months of initial confinement and 30 months of extended supervision.

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

Brooks appealed his case to the Court of Appeals. The Court of Appeals noted that this court's decision in State v. Asboth[6] set forth a three-part test to be used in evaluating a claimed community caretaker justification for a warrantless search or seizure:

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised[.] [7]

[5] State v. Pinkard, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592.
[6] State v. Asboth, 2017 WI 76, 376 Wis. 2d 644, 898 N.W.2d 541
[7] State v. Asboth, 2017 WI 76, ¶13, 376 Wis. 2d 644, 898 N.W.2d 541.

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

The Supreme Court is expected to address this issue:

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

WISCONSIN SUPREME COURT
March 30, 2020
10:45 a.m.

No. 2018AP947 Quick Charge Kiosk, LLC v. Josh Kaul

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

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

Quick Charge Kiosk LLC operates "cell phone charging machines" ("Machines") and places them in retail establishments throughout Wisconsin. The Machines resemble video gambling machines commonly found in casinos or taverns——like mechanical slot machines——and they function much the same way. When a customer puts one dollar into the Machine, that customer receives 100 credits to play the video chance game, and one minute of electronic device charging time. A customer who charges an electronic device cannot continue to play the game after the expiration of the charging time, but the customer may cash out any remaining credits by printing out a paper receipt using the Machine's printer and redeem the receipt for cash at the Machine's site. The credits are redeemable at the ratio of one dollar per 100 credits, the same rate at which the credits are acquired. So, a customer need not use any game credits while charging a phone and may redeem all the credits for cash when the charging time expires.[8]

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

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

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

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

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

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

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

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

WISCONSIN SUPREME COURT
March 30, 2020
1:30 p.m.

No. 2018AP659-D Office of Lawyer Regulation v. Robert C. Menard

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Milwaukee.

In this case, Attorney Robert C. Menard has appealed the referee's recommendation that his license to practice law in Wisconsin be revoked.

Menard was licensed to practice law in Wisconsin in 1991. He has no prior disciplinary history. The OLR filed an amended complaint alleging thirty-one counts of misconduct arising out of twelve client matters. Attorney Menard has admitted the factual basis for thirty of the counts, and the OLR agreed to dismiss the remaining count.

Attorney Menard admitted to multiple counts of failing to hold client funds in trust, converting over $1,000,000 in client funds, using client funds to pay personal expenses, and failing to preserve transaction registers and client ledgers as required by Supreme Court rules.

In recommending revocation of Attorney Menard's license, the referee said the scope of Menard's conduct "in playing fast and loose with client money is simply breathtaking." In addition, the referee said, "this is far-reaching, deplorable and disreputable conduct. It reflects poorly on the practice of law in general and has jaded those clients that [Menard] was to have served. This is clearly not the way lawyers should conduct themselves."

Menard argues that revocation is not warranted and that appropriate discipline for his admitted misconduct would be a suspension of his law license for a period of between 18 and 24 months.

The Supreme Court is expected to decide the appropriate level of discipline for Menard's misconduct.