WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2021

NOTICE: Due to the COVID-19 pandemic, oral arguments during March will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on WisconsinEye or on www.wicourts.gov.

The cases listed below originated in the following counties:

Dane
Fond du Lac
Green
Milwaukee

WEDNESDAY, MARCH 3, 2021

9:45 a.m.	19AP435-CR	State v. James Timothy Genous
10:45 a.m.	19AP1918	Cheyne Monroe v. Chad Chase

MONDAY, MARCH 15, 2021

9:45 a.m.	19AP1983-CR	State v. Jacob Richard Beyer
10:45 a.m.	19AP1200	Kathy Schwab v. Paul Schwab

THURSDAY, MARCH 18, 2021

9:45 a.m.	16AP308-CR	State v. Dawn M. Prado
10:45 a.m.	19AP1272-CR	State v. Jordan Alexander Lickes

TUESDAY, MARCH 23, 2021

9:45 a.m.	19AP2073	Fond du Lac County v. S.N.W.

Note: The Supreme Court calendar may change between the time you receive these synopses and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT
March 3, 2021
9:45 a.m.

2019AP435-CR State v. James Timothy Genous

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that reversed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl, presiding, that found James Timothy Genous guilty of being a felon in possession of a firearm.

In 2016, the State of Wisconsin charged Genous with one count of being a felon in possession of a firearm. According to the criminal complaint, a West Allis police officer initiated a traffic stop in the early hours of August 28, 2016, after noticing a vehicle parked outside of a house known to be occupied by a heroin user. The complaint stated that the driver of the vehicle, subsequently identified as Genous, "appeared to make a transaction[.]" Another responding policeman saw a black handgun under the driver's seat. Genous was subsequently arrested and charged.

Genous filed a motion to suppress the evidence from the traffic stop, arguing that the evidence was obtained as a result of an illegal seizure. Specifically, Genous argued that there was no reasonable suspicion to stop his car, because all that the police observed was his brief, nondescript interaction with a woman suspected to be a drug user.

At a hearing on the motion, the arresting police officer testified that at about 3:30 a.m. on the day in question, he was on patrol in an unmarked squad car when he noticed a black sedan, legally parked in front of a residence. The sedan was running and had its headlights on. The officer did not know how long the sedan had been parked in that location. The officer turned his squad car headlights off and drove about a half a block closer to the parked vehicle. The driver of the sedan – Genous – turned off his headlights. A few seconds later, the officer saw a female come out of a house, enter the front passenger side of the sedan, and remain in the vehicle for about fifteen to twenty seconds. The officer testified that he could not see what was going on inside the vehicle. The woman then exited the sedan and returned to the home. The officer testified that he did not observe her to be carrying anything.

The officer testified that he believed the woman to be a known drug user, K.S., who had had previous interactions with the police. The officer had received a police department email with K.S.'s address, her physical description, and a statement that the drug unit was "keeping an eye" on her. The officer said that the physical description of K.S. provided in the email matched his observation of the woman, and the house address provided in the email matched the address of the house he was observing.

The officer testified that he believed the parties were engaged in a possible drug transaction. He radioed for back up and notified other officers that he was going to conduct a traffic stop. The officer testified that after K.S. went back into the house, Genous turned his headlights on and began to drive away. The officer followed him for three blocks, without observing any traffic violations. Prior to stopping the sedan, the officer ran the vehicle's license plate and found no information about a vehicle with this plate number being used for drug sales, or, more generally, about a black sedan being used by a known drug dealer or user in that area.

The officer further testified that when he initiated the traffic stop, Genous pulled over right away, and the officer made contact with him. Genous produced a valid driver's license.

The officer admitted he had no information from the police department that Genous was a known drug dealer.

Genous told the officer that he had gone to meet his mistress, who failed to show up. When the officer told Genous that he had seen a female enter his car, Genous acknowledged that a woman had, in fact, entered his vehicle and asked for money, but left when Genous did not give any money to her. The officer stated that when he was speaking with Genous, he observed multiple cell phones, hand sanitizer, and cigar wrappers in the vehicle.

The officer testified that two other officers arrived on the scene. The testifying officer stated that one of the arriving officers notified him that Genous made "furtive movements" by "using his hands to go underneath the seat," prompting one of the officers to ask Genous to exit his vehicle. The testifying officer told Genous to sit on a curb and ordered Genous to remove his shoes and socks. Another officer then told the testifying officer that he noticed a gun in plain view inside the vehicle.

The officer testified that no drugs were found either in the vehicle or on Genous's person, and that Genous was cooperative. The officer admitted that he did not know how many people actually resided at the residence at issue, nor had he seen a picture of K.S. The officer stated that he relied primarily on the address and the physical description contained in the police department email.

The trial court denied Genous's suppression motion, finding that under the totality of the circumstances, the officers had reasonable suspicion to stop Genous. Specifically, the trial court noted that: (1) Genous was in a high drug trafficking area; (2) there was short-term contact between Genous and a known drug user; (3) the time was 3:30 a.m.; and (4) Genous's vehicle was "suspiciously running with its lights on and then turns its lights off and turns the car off," when K.S. ran out of the house, into the vehicle, and then back into the house.

Genous subsequently pled guilty to being a felon in possession of a firearm. The trial court sentenced him to one year of initial confinement and one year of extended supervision.

Genous appealed. On appeal, Genous argued that the police lacked reasonable suspicion to believe that he was engaged in a drug transaction or any other criminal activity. Genous argued that none of the facts relied upon by the police officers, either individually or cumulatively, were sufficient to constitute a reasonable suspicion that criminal activity was afoot.

The Court of Appeals agreed. The Court of Appeals remarked that the police placed heavy emphasis on Genous's brief interaction with K.S., as well as the location of the interaction, as the basis for the investigatory stop. The court noted that it had addressed a similar factual situation in State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729. The Young court held that a person's presence in a high drug trafficking area, together with information conveyed from one police officer to another that the defendant had had a "short-term contact" with another individual, were not sufficient to constitute reasonable suspicion of criminal activity justifying an investigative stop, despite the officer's experience that drug transactions in that neighborhood often took place on the street during brief meetings. The Court of Appeals held that here, as in Young, it was unable to discern the required reasonable suspicion necessary to justify the investigative stop at issue.

The State has petitioned for the Supreme Court for review, claiming that the Court of Appeals failed to properly account for various factors in its reasonable suspicion analysis.

The State raises the following question:

Do the following facts contribute to reasonable suspicion of illegal drug activity: a brief encounter in a car between two or more people, an officer's belief that one or more people is a known drug user, the time of day or night, and the car's headlights turning off right before the encounter and turning back on right afterward?

WISCONSIN SUPREME COURT
March 3, 2021
10:45 a.m.

2019AP1918 Cheyne Monroe v. Chad Chase

The Wisconsin Court of Appeals, District IV (headquartered in Madison) has certified Cheyne Monroe's appeal of a judgment that dismissed her claim of malicious prosecution against her ex-husband for filing a termination of parental rights action. The case arises out of the Dane County Circuit Court, Judge Valerie Bailey-Rihn, presiding.

Cheyne Monroe and Chad Chase were divorced in Minnesota in 2013. Under the stipulated terms of the divorce judgment, Chad was granted primary placement of their daughter, and Cheyne received periods of non-primary placement to be determined by agreement of the parties. After the divorce, Chad moved to Wisconsin. When Cheyne contacted Chad to establish a regular placement schedule, Chad would not agree to any terms. Cheyne filed a motion asking the family court to set a placement schedule.

Around the same time, Chad commenced an action seeking to terminate Cheyne's parental rights (TPR) on the grounds that Cheyne had abandoned their daughter and had never had a substantial parental relationship with her. Chad alleged in the TPR action that Cheyne had had no contact with their daughter for approximately three years. Cheyne argued that Chad took contradictory positions in the two cases, since in the family court case he acknowledged there had been recent contact between Cheyne and their daughter. After the TPR action was filed, the family court stayed all proceedings on Cheyne's motion for placement pending resolution of the TPR case.

Nine months later, just prior to a hearing in the TPR case, Chad unilaterally withdrew his complaint and the TPR action was dismissed. As a result of the TPR action and its dismissal, Cheyne incurred damages including the loss of months of time with her daughter, significant litigation costs defending against the TPR case, and emotional distress.

Cheyne filed a malicious prosecution action alleging that Chad had initiated the TPR case with malice and on false grounds. Chad moved to dismiss the complaint for failure to state a claim for relief. Among other things, he argued that Cheyne had to show that the TPR proceeding terminated in her favor and that, as a matter of law, his voluntary dismissal of the TPR case cannot satisfy that requirement.

The circuit court granted Chad's motion, concluding that under Pronger v. O'Dell, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985), and Tower Special Facilities, Inc. v. Investment Club, Inc., 104 Wis. 2d 221, 211 N.W.2d 225 (Ct. App. 1981), a voluntary dismissal of the TPR case that did not adjudicate the merits does not constitute a favorable judicial determination of the action. Cheyne appealed, arguing that Chad's voluntary dismissal of the TPR case did constitute a judicial determination favorable to her.

The Court of Appeals, District IV, has certified the appeal to the Supreme Court. The Court of Appeals points out that there may be a conflict on this question between a Wisconsin Supreme Court decision, Lechner v. Ebenreiter, 235 Wis. 244, 292 N.W.2d 913 (1940), and a Court of Appeals decision, Pronger v. O'Dell, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985).

The certification raises this issue for Supreme Court review:
Does a unilateral decision to request dismissal of a prior termination of parental rights action satisfy the third element of the tort of malicious prosecution, which requires a showing that the prior action terminated in favor of the tort plaintiff?

WISCONSIN SUPREME COURT
March 15, 2021
9:45 a.m.

2019AP1983-CR State v. Jacob Richard Beyer

The Wisconsin Court of Appeals, District IV (headquartered in Madison) has certified Jacob Richard Beyer's appeal of a judgment that accepted Beyer's guilty plea to one count of possession of child pornography. The case arises out of the Dane County Circuit Court, Judge William E. Hanrahan, presiding.

This case asks: Does a stipulated court trial, where the defendant stipulates to facts supporting his conviction and agrees to have the trial court find him guilty based on those facts, allow the defendant to preserve for appeal an issue that would otherwise be barred by the guilty-plea-waiver-rule?

Wisconsin's guilty-plea-waiver rule provides that a guilty plea waives all non-jurisdictional defects, including constitutional claims. There is, however, a statutory exception to the guilty-plea-waiver rule. Wisconsin Stat. § 971.31(1) provides that a defendant who pleads guilty does not waive the right to appeal an order denying a motion to suppress evidence.[1] This statutory exception prevents trials where the only contested issue is whether the denial of a motion to suppress was proper.

This certification request questions whether the parties' agreed-upon procedure to avoid the guilty-plea-waiver rule is an appropriate procedure under Wisconsin law.

The State charged Richard Beyer with ten counts of possession of child pornography. Before trial, Beyer moved to suppress certain evidence, claiming the search warrant was improperly executed. Beyer also filed a discovery motion, seeking permission for his forensic expert to analyze the State's computer that purportedly detected the child pornography evidence that led to the search warrant. The trial court denied both motions.

Beyer wanted to preserve the discovery issue for appeal, but didn't want to proceed to a traditional trial. So the parties agreed to a procedure intended to resolve the trial court proceedings and avoid the guilty-plea-waiver rule. They entered a written stipulation in which: (1) they stipulated to the facts underlying one of the charges of possession of child pornography, including that Beyer knowingly possessed the image of child pornography at issue; and (2) Beyer "waive[d] his right to a jury trial and agree[d] to have the Court find him guilty based upon the above stipulated set of facts."

At the subsequent court proceeding, the prosecutor explained the parties' plan as follows:

> [W]hat we're going to do today is we're going to hold a stipulated court trial. The purpose of this is to-- The defense wishes to maintain an appellate issue on some of the points that have been litigated thus far in the case. So, rather than plead, the parties have attempted to get a stipulation to you, which you have in front of you

[1] The statute provides that "[a]n order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest ...."

> right now. Everyone has signed that. The defendant is essentially, if you follow through with this, going to be found guilty of Count 1 of that stipulation.
>
> . . . .
>
> So, all being said, this is a very strange procedure we're going to do today. . . . But the goal of today is to stipulate a court trial with that written stipulation and the concession of the defense and find him guilty of Count 1.

The prosecutor then moved to dismiss Counts 2 through 10, which the trial court allowed.

The trial court then asked the parties the following question:

> Now, fill me in on this, because this is an exceedingly rare occurrence. What, if any, legal or strategic advantage is there in the Court of Appeals for proceeding in this fashion as opposed to a plea?

Defense counsel answered:

> Okay. When someone pleads guilty to a charge, you preserve the right for your suppression motion, but if you recall, there was also a discovery motion in this case, and I'm convinced that if I plead guilty or Mr. Beyer pleads guilty, he waives that right to the discovery issue.

The trial court then conducted a colloquy with Beyer to ensure that he was knowingly, intelligently, and voluntarily waiving his right to a jury trial.

The trial court then stated:

> I've reviewed the Criminal Complaint, and I've reviewed the stipulated set of facts for trial to the court. All right. And is it the defense stipulation further that the evidence that you've stipulated to in terms of the stipulated set of facts and in terms of what's contained in the Criminal Complaint as they relate to Count 1 is proof of each element of this crime beyond a reasonable doubt?
> [DEFENSE COUNSEL]: I would agree to that--with that, yes, sir.
> THE COURT: All right. And I do so find. I've reviewed both documents. I do so find. Based upon that evidence, I do find the defendant guilty.

The trial court sentenced Beyer to three years of initial confinement and two years of extended supervision. The trial court also granted Beyer's request to stay imposition of his sentence pending appeal.

Beyer appealed, challenging the trial court's denial of both his suppression motion and his discovery motion. The Court of Appeals has certified the following question to the Supreme Court:

> [W]hether the guilty-plea-waiver rule applies when a defendant pleads not guilty to an offense, but stipulates to the inculpatory facts

supporting each element of the offense, and explicitly agrees to a finding of guilt at a hearing before the circuit court at which no witness testifies.

WISCONSIN SUPREME COURT
March 15, 2021
10:45 a.m.

2019AP1200 Kathy Schwab v. Paul Schwab

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that reversed orders of the Milwaukee County Circuit Court, Judge Michael J. Dwyer presiding, that allowed Kathy Siech's (f/k/a Kathy Schwab) motion for contempt to proceed and that enforced a pension division provision of the Schwabs' marital settlement agreement.

In February 1992, the Milwaukee County Circuit Court entered a judgment of divorce, terminating the marriage of Kathy Schwab and Paul Schwab. The judgment incorporated a "marital settlement agreement" (MSA).

The MSA addressed the division of the Schwabs' marital property. The MSA allocated to Kathy 50% of the 1992 pretax value of Paul's Air National Guard pension, which was not then vested, when and if it became available to Paul.

The MSA (and therefore the judgment of divorce) provided that the circuit court would retain continuing jurisdiction over the property division and the parties' responsibility to cooperate in signing necessary documents:

> *F. The parties agree that the court has continuing jurisdiction to enforce but not to modify the property division: specifically, in the event of a disagreement between the parties as to a sale price for the home or the terms of payment of money due under this division or occupancy of the home, the court has the power to make orders enforcing the provisions of the judgment.*

Finally, the judgment of divorce also contained a provision that a party could enforce the judgment via a motion for contempt: "Likewise, violations of other orders for the payment of money, such as the property settlement or attorney fees is punishable by contempt."

Paul's National Guard pension was not vested at the time of the judgment of divorce. Paul retired from the Air National Guard in November 2008, after 35 years of service. He applied for and began receiving his pension in 2013, when he reached 60 years of age. He did not pay Kathy any portion of his Air National Guard pension or assign any portion of that pension to Kathy.

In December 2017, Kathy filed a motion to hold Paul in contempt for failure to comply with the property division requirements of the MSA (and the judgment of divorce) regarding Kathy's half of his pension for the years of their marriage.

Paul's response argued that the motion was barred by the statute of repose, Wis. Stat. § 893.40. That statute provides that an "action upon a judgment or decree of a court of record . . . shall be commenced within 20 years after the judgment or decree is entered or be barred."

The circuit court held an evidentiary motion on Kathy's contempt motion in December 2018. Citing the Wisconsin Supreme Court's decision in Johnson v. Masters, 2018 WI 43, 347 Wis. 2d 238, 830 N.W.2d 647, the circuit court concluded that based on the "unique" nature of family law judgments, the circuit court had "equitable jurisdiction" that provided it with "the authority to carry out [its] orders and judgments into execution." It therefore determined that

Kathy's contempt motion, which sought to enforce an otherwise valid order of the court, was not barred by Wis. Stat. § 893.40. It ultimately directed Paul to divide his Air National Guard pension pursuant to the MSA.

Paul appealed, and the Court of Appeals reversed. It focused primarily on the Supreme Court's decision in Johnson. It noted that the Johnson decision acknowledged that it is a common occurrence in family law cases for continuing obligations arising out of family law judgments to extend beyond 20 years and that the Supreme Court had made certain accommodations to allow enforcement of some of those continuing obligations. The Court of Appeals pointed out, however, that the Supreme Court also observed that the Legislature had not intended for there to be a categorical exemption from the Wis. Stat. § 893.40 statute of repose for actions based on family law judgments. The Court of Appeals therefore concluded that Wis. Stat. § 893.40 does apply to family law judgments.

The Court of Appeals noted that the trigger date for beginning the 20-year period of repose in divorce proceedings is the entry of judgment. It rejected Kathy's argument that the repose period should have been deemed to begin when Paul had retired or when he had begun to collect his pension, concluding that she had not provided legal authority for interpreting the statute in that manner. It therefore ruled that the circuit court had erred in refusing to apply the statute of repose due to the unique nature of family law proceedings and in allowing Kathy's contempt motion to proceed. It concluded that the circuit court had been obligated to apply the statute of repose as written, which precluded any attempt to enforce provisions of the judgment of divorce more than 20 years after it had been entered.

Kathy petitioned the Supreme Court for review and asked it to decide the following issue:

> Does Wis. Stat. § 893.40 deprive the circuit court of its inherent and statutory contempt power under Wis. Stat. ch. 785 when one party brings a contempt action to enforce a vested property right, which was not obtainable until after 20 years from the entry of the judgment?

WISCONSIN SUPREME COURT
March 18, 2021
9:45 a.m.

2016AP308-CR State v. Dawn M. Prado

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed an order of the Dane County Circuit Court, Judge David T. Flanagan III, presiding, that suppressed the results of a blood draw.

Wisconsin's implied consent statute, Wis. Stat. § 343.305(2), provides that any person who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent" to breath, blood, or urine tests when requested or required to do so by a law enforcement officer, as long as certain probable cause requirements are met. When a suspect is capable of responding, the law enforcement officer is required to read the statutory "Informing the Accused" form to the suspect. See Wis. Stat. § 343.305(4). This form provides information about the legal consequences of consenting to testing and the legal consequences of refusing. After reading the form, the officer asks the suspect to submit to a breath, blood, or urine test. Suspects capable of responding must either submit to testing——which means the results of the test can be used against them in an OWI prosecution——or refuse and face civil penalties, including license revocation. See Wis. Stat. § 343.305(9).

When a driver is incapacitated, the implied consent statute does not require the officer to ask for the suspect's consent to chemical testing. See Wis. Stat. § 343.305(4). Instead, the incapacitated suspect is presumed not to have withdrawn consent and one or more samples of breath, blood, or urine may be obtained.

This case involves the collision of two vehicles in Fitchburg, Wisconsin, in December 2014. Police had probable cause to believe that Prado had been the driver of one of the vehicles. Prado was severely injured in the crash, and the driver of the other vehicle was killed.

Prado was taken to a nearby hospital. While intubated and unconscious, a police officer read the "Informing the Accused" script from Wisconsin's implied consent statute and asked Prado to consent to a blood draw. When Prado did not respond, the officer directed a nurse to draw a sample of her blood. The officer did not apply for a warrant. He later testified he did not believe a warrant was needed based on the incapacitated driver provision. An analysis of the blood sample revealed the presence of a controlled substance and a prohibited concentration of alcohol in Prado's blood. Prado was charged with nine counts, including homicide by intoxicated use of a vehicle, homicide by use of a vehicle with a detectable amount of a restricted controlled substance in the blood, and homicide by use of a vehicle with a prohibited alcohol concentration.

Prado moved to suppress the results of the blood draw on the grounds that the incapacitated driver provision is unconstitutional. The State argued that Prado had given consent to a blood draw by virtue of the plain language of the implied consent law. In the alternative, the State argued that even if the incapacitated driver provision were unconstitutional, the test result should not be suppressed because the officer had relied on the statute in good faith.

Following an evidentiary hearing, the circuit court concluded that the officer directed the blood draw without authority to do so and in the absence of Prado's consent. The circuit court suppressed the blood draw test result. The State appealed.

The Court of Appeals stayed the appeal for more than two years pending resolution of other appeals raising the same question about the constitutionality of the incapacitated driver provision, but none of those cases resolved the issue, nor did the U.S. Supreme Court's decision in Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

When it took up the appeal, the Court of Appeals noted that the case turned on whether Wisconsin's incapacitated driver provision is consistent with the U.S. Constitution's Fourth Amendment guarantee that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." The Court of Appeals also noted that a warrantless search is unreasonable——and unconstitutional——unless it falls within one of the specifically established and well-delineated exceptions to the Fourth Amendment's warrant requirement.

The Court of Appeals' decision discussed the exceptions to the Fourth Amendment warrant requirement and the case law behind it. The Court of Appeals ultimately found that the consent incapacitated drivers are deemed to have given by virtue of Wisconsin's implied consent statute is unconstitutional because it does not satisfy any exception to the Fourth Amendment warrant requirement. However, the Court of Appeals also found that the officer in this case acted in objective good faith reliance on the incapacitated driver provision so the circuit court should not have suppressed the test result.

Both the State and Prado petitioned the Supreme Court for review. The State's petition for review raises these issues:

1. Was the blood draw justified under Mitchell v. Wisconsin, which established that for the category of cases involving suspected drunk drivers who are unconscious and taken to the hospital before a breath test can be administered, a warrantless blood draw is almost always justified by exigent circumstances?
2. Was the blood draw from Prado justified by her consent under the implied consent law?
3. Was suppression of the blood test results improper because the police officer who ordered the blood draw relied in good faith on the unconscious driver provision in Wisconsin's implied consent law?

Prado's petition for review raises these issues:

1. Whether the "good faith" exception to the warrant requirement should be extended to an officer's reliance on law which is not "well established."
2. Whether the "good faith" exception to the warrant requirement should be extended to officers who are not "well trained" in the matter they supposed exercised "good faith" in.
3. Whether a circuit court's determination that an officer did not act in good faith is a question of fact, law, or both, and what standard of review ought to apply to such determinations, is an issue of first impression requiring a decision from this court.

WISCONSIN SUPREME COURT
March 18, 2021
10:45 a.m.

2019AP1272-CR State v. Jordan Alexander Lickes

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed an order of the Green County Circuit Court, Judge James R. Beer, presiding, that expunged Jordan Alexander Lickes' three convictions.

In 2012, Jordan Alexander Lickes, who was nineteen years old, had sexual intercourse with a sixteen-year-old girl. He was charged with four counts: (1) fourth degree sexual assault; (2) sexual intercourse with a child age 16 or older; (3) disorderly conduct; and (4) exposing genitals or pubic area. He pled guilty to count 2 and no contest to the other three counts.

Lickes was sentenced in January 2014. The circuit court withheld sentence on counts 1 and 3 and imposed concurrent 24-month terms of probation. On count 2, Lickes was sentenced to 90 days in jail, with Huber privileges. On count 4 the court imposed and stayed a three-year sentence, with one year of initial confinement and two years of extended supervision, and placed Lickes on probation for three years. The court set a number of terms and conditions of probation, one of which was that Lickes "enter into, participate [in] and successfully complete" sex offender treatment on all three counts for which he was placed on probation, i.e. counts 1, 3, and 4. The court ordered that if Lickes successfully completed probation, his convictions on those three counts would be expunged pursuant to Wis. Stat. § 973.015.

Lickes' probationary period for counts 1 and 3 ended on January 23, 2016. In July 2016, he filed a letter with the circuit court clerk asking for expungement on counts 1 and 3. In September 2016, Lickes' probation agent filed a form with the circuit court titled "Verification of Satisfaction of Probation Conditions For Expungement," related to counts 1 and 3. The probation agent indicated that Lickes had successfully completed his probation, had not been convicted of a subsequent offense, but had not met all court ordered conditions for expungement. At the time, Lickes was still participating in sex offender treatment.

Lickes' probationary period on count 4 ended on January 23, 2017. In July 2018, Lickes' probation agent filed a form related to count 4 titled "Certificate of Discharge and Satisfaction of Probation Conditions for Expungement." The agent indicated that Lickes had successfully completed probation and all court ordered conditions had been met.

In January 2019, the State filed a brief in circuit court opposing expungement on any of the three counts based on the ground Lickes had not successfully completed his sentence because he had not "satisfied the conditions of probation" as required by § 973.015(1m) and State v. Ozuna, 2017 WI 64, 376 Wis. 2d 1, 898 N.W.2d 20. The State noted that in October 2015, Lickes admitted violating "rules and conditions of probation," and the State argued that "conditions of probation" as used in § 973.015(1m) and Ozuna includes Department of Correction (DOC) rules of probation.

After a hearing, the circuit court granted expungement on counts 1 and 3. The court asked for additional briefing on count 4. After receiving the briefs and holding an additional hearing, the court also granted expungement on count 4, finding that Ozuna did not address Lickes' situation and declining to extend Ozuna's holding.

The State appealed and the Court of Appeals reversed. The Court of Appeals said the case required it to interpret and apply Wis. Stat. § 973.015(1m), the expungement statute. The Court of Appeals noted that the parties disputed whether the phrase "conditions of probation" includes DOC probation rules, but neither party disputes that "conditions of probation" includes, at a minimum, the conditions expressly ordered by the sentencing court. Here, the State argued that the circuit court erred in granting expungement as to counts 1 and 3 because Lickes violated a condition of probation expressly ordered by the court, i.e. the completion of sex offender treatment. The appellate court said it was undisputed that Lickes failed to complete sex offender treatment by the end of his two year probationary term for counts 1 and 3. Thus, the court said Lickes was not entitled to expungement on those counts.

As to count 4, the State argued that "conditions of probation" encompassed both court-imposed conditions and DOC-imposed conditions in the form of rules of probation. The State argued since Lickes violated DOC probation rules, he was not entitled to expungement on count 4. The Court of Appeals agreed.

Lickes petitioned the Supreme Court review. The petition raises these issues:

1. Does the expungement statute's requirement that a probation have "satisfied the conditions of probation" also mean that the probationer must perfectly comply at all times with each and every rule of probation set by the probation agent?
2. When a circuit court chooses to hold a hearing and exercise discretion to determine whether the probationer who violated a rule set by his agent has nevertheless "satisfied the conditions of probation" so as to qualify for expungement, should the appellate court review the circuit court's decision for an erroneous exercise of discretion?
3. When a circuit court makes factual findings concerning whether a probationer violated a condition of probation rendering him ineligible for expungement, must the appellate court uphold the finding in the absence of clear error?

WISCONSIN SUPREME COURT
March 23, 2021
9:45 a.m.

No. 2019AP2073 Fond du Lac County v. S.N.W.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed orders of the Fond du Lac County Circuit Court, Judge Dale L. English, presiding, for S.N.W.'s Chapter 51 mental commitment and involuntary medication and treatment.

In January 2019, S.N.W. was an inmate at the Dodge County Jail when he began behaving strangely: he was not bathing, he punched doors, talked to himself, and claimed jail staff were poisoning his food, among other things. Jail staff agreed he was "a harm to himself." The deputy sheriff filed a Chapter 51 statement of emergency detention and S.N.W. was transferred to Winnebago Mental Health Institute.

The Dodge County circuit court found probable cause to support S.N.W.'s continued detention and the administration of involuntary medication and treatment pending his final hearing. The next day, venue was changed to Fond du Lac County where S.N.W. lived before his incarceration. That same day, the new court set a February 7th trial date and appointed two psychiatrists to evaluate S.N.W. and submit their reports "at least 48 hours" before the final hearing. See Wis. Stat. § 51.20(10(b). One doctor filed a timely report; the other doctor's report was a day late.

At the final hearing, the County called Dr. Maria Raines, S.N.W.'s psychiatrist at Winnebago, and—over S.N.W.'s objection—Dr. Bales, the author of the tardy report. The circuit court held that the County had proven S.N.W. was mentally ill and a proper subject for treatment. As to dangerousness, the court deemed Dr. Raines's testimony insufficient on that point, so Dr. Bales's report was critical. In the end, the court held that the County had met its burden and entered a commitment order and order for S.N.W.'s involuntary medication and treatment.

S.N.W. appealed, arguing: (1) that the circuit court lacked competency to proceed with his final hearing due to Dr. Bales's violation of the 48-hour rule, which requires that psychiatric and other reports be provided to defense counsel 48 hours before the final hearing; (2) that if the circuit court retained competency, it erred in admitting Dr. Bales's report and testimony; and (3) that with or without Dr. Bales's report and testimony, the County failed to prove S.N.W. dangerous. S.N.W. also argued that, while his commitment would expire before the Court of Appeals could rule on its validity, his appeal would not be moot, as the collateral consequences of his commitment would persist.

The Court of Appeals affirmed. It rejected the competency claim on the merits; held that the circuit court did not err in admitting Dr. Bales's report and testimony; and declined to resolve S.N.W.'s sufficiency claim, citing mootness.

S.N.W. filed a petition for review[2], raising the following issues:

1. Did the circuit court lack competency to proceed with the final hearing due to the 48-hour rule violation?

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[2] Shortly after the petition for review was filed, counsel for S.N.W. informed the court that S.N.W. had passed away, but argued that the issues presented remain viable and that the matter is not moot.

2. If the circuit court retained competency, did it err in admitting the tardy report and its author's testimony?
3. Was the evidence presented at S.N.W.'s final hearing sufficient to prove him dangerous?
4. Is this appeal moot?