WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2020

NOTICE: Due to the COVID-19 pandemic, oral arguments during November 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:

Green
Milwaukee
Kenosha
Rock
Washington

MONDAY, NOVEMBER 9, 2020

9:45 a.m.	19AP90-CR	State v. George E. Savage
10:45 a.m.	18AP1239	Applegate-Bader Farm, LLC v. Wis. Department of Revenue

TUESDAY, NOVEMBER 10, 2020

9:45 a.m.	18AP2066-CR	State v. Alfonso C. Loayza
10:45 a.m.	17AP2244	Village of Slinger v. Polk Properties, LLC

MONDAY, NOVEMBER 16, 2020

9:45 a.m.	20AP1718-OA	Fabick v. Evers

TUESDAY, NOVEMBER 17, 2020

9:45 a.m.	18AP1952-CR	State v. Mark D. Jensen
10:45 a.m.	18AP1887	Waupaca County v. K.E.K.

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
November 9, 2020
9:45 a.m.

2019AP90-CR State v. George E. Savage

This is a review of a decision of the Wisconsin Court of Appeals, District I, which reversed the Milwaukee County Circuit Court, Judge Mark A. Sanders, presiding, judgment of conviction and order denying Savage's postconviction motion to withdraw his guilty plea.

This case concerns the reporting requirements for sex offender registrants. In State v. Dinkons, 2012 WI 24, 339 Wis. 2d 78, ¶52 810 N.W.2d 787, this court held that "a registrant cannot be convicted of violating Wis. Stat. § 301.45(6) for failing to report the address at which he will be residing when he was unable to provide this information."

In March 2016, George Savage was released from extended supervision. He was required to register as a sex offender until 2024. In August 2016, a warrant was issued for Savage's arrest after he cut off his GPS monitoring device and absconded. The complaint alleged that Savage had failed to comply with reporting requirements by not reporting updated information (regarding where he was residing) to the Department of Corrections within 10 days after a change to the information. Savage was ultimately arrested, reached a plea agreement with the State, and found guilty at a combined guilty plea and sentencing hearing.

Savage, represented by postconviction counsel, filed a motion for postconviction relief. He alleged he should be allowed to withdraw his guilty plea based on manifest injustice because his trial counsel was prejudicially ineffective in communicating with and advising him during the plea process. Savage averred that counsel had never informed him that good faith efforts to comply with the sex offender supervision requirements would bar his conviction. The trial court held an evidentiary hearing at which Savage and defense counsel testified. The court found that counsel did not tell Savage he had a defense "because [Savage] did not have a defense." As a result, the court found there was no prejudice and denied his motion for postconviction relief.

On appeal, Savage argued that his trial counsel's performance was deficient because, although she knew that Savage was homeless, she failed to inform him that, under State v. Dinkins, good faith efforts to comply with the registration requirements could be a defense. The State argued that Savage could not demonstrate that trial counsel was ineffective for failing to raise a Dinkins good faith defense because in his request for oral argument and publication on appeal, he conceded that the appeal involved issues of law which are not settled. The Court of Appeals said based on the language and reasoning in Dinkins, the trial court in this case erred as a matter of law when it held that Dinkins did not apply to Savage's situation, and it rejected the State's claim that the law was unsettled after Dinkins.

The State now raises the following issues for Supreme Court review:

1. Did Savage prove that he was entitled to withdraw his plea without showing a reasonable probability that his defense would have succeeded at trial?
2. Did State v. Sholar, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, prevent the Court of Appeals from affirming the circuit

court's determination that counsel was not ineffective based on the evidence at the Machner[1] hearing?

[1] State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

WISCONSIN SUPREME COURT
November 9, 2020
10:45 a.m.

2018AP1239 Applegate-Bader Farm, LLC v. Wisconsin Dept. of Revenue

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Green County circuit court ruling, Judge Thomas J. Vale, presiding, that rejected Applegate-Bader Farm's claim that the Wisconsin Department of Revenue violated the Wisconsin Environmental Protection Act (WEPA) by failing to sufficiently investigate the potential environmental effects of amending a tax rule before deciding not to prepare an environmental impact statement.

Under certain circumstances, Wisconsin property owners can "enroll" their lands in a variety of state and federal easement programs. Wisconsin property tax law contains a set of incentives concerning easement programs. One incentive is that the owner who enrolls farmland in an easement program may continue to classify the land as having an "agricultural use" for purposes of property taxes, even though the farming activities on the land are limited by the easement program. An agricultural use classification generally results in a lower tax rate than is applied to land not classified as being put to agricultural use.

Prior to June 2015, Wis. Admin. Code § Tax 18.05(1)(d)-(e) listed specific state and federal easement programs under which enrolled lands in Wisconsin met the definition of "agricultural use" for property tax purposes. After amendment, the rule, § 18.05(1)(d), no longer lists specific state and federal easement programs. Instead, it uses criteria that are not tied to any identified program and that are applied to all easement land to determine if the land meets the definition of agricultural purpose.

Consistent with Wis. Stat. § 227.135, which governs agency rulemaking procedures, the Wisconsin Department of Revenue (the Department) prepared a "statement of scope" regarding its proposal to amend Wis. Admin. Code § Tax 18.05(1). The governor approved the scope statement in July 2013. The Department published an initial draft of the rule along with a notice of hearing for public comment. Also included in the publication was a "fiscal estimate and economic impact analysis" of the rule. The Department held a hearing to receive public comments on the initial draft of the proposed amendment in January 2014. It accepted written comments before and after the hearing.

Following the hearing, the Department made substantive changes to the initial draft. It submitted the changed draft rule to the Legislature and the Governor for final approval. The submission to the Legislature included a report summarizing the public comments the Department had received and described the changes made from the initial draft rule. The Department submitted the changed draft rule to the Legislature and the Governor without preparing a revised scope statement, holding a second hearing for public comment on the changed draft rule, or preparing a revised economic impact analysis addressing the changed draft rule. The Governor approved the changed draft rule in January 2015, and the Legislature took no action to prevent its promulgation. The Department filed the changed draft rule with the Legislative Reference Bureau.

The Department did not prepare an environmental impact statement (EIS) for either version of the draft rule, as called for in certain circumstances under the Wisconsin Environmental Protection Act (WEPA).

Applegate-Bader Farm, LLC, (Applegate) operates a corn, soybean, and cattle farm on approximately 11,000 acres in Green and Rock Counties. It also owns land in the Town of Avon, Rock County, that is enrolled in a Wetlands Reserve Easement through the Agricultural Conservation Easement Program. In exchange for assistance in restoring the Avon property from marginal farmland to wetlands, Applegate encumbered the property with perpetual agricultural easements restricting its ability to develop, destroy, or otherwise alter the nature of the land.

In April 2016, Applegate sought to have § Tax 18.05(1)(d), as amended, be declared invalid on multiple grounds. As germane to this appeal, Applegate argued that the Department of Revenue failed to follow Wis. Stat. ch. 227 procedures because it did not undertake the additional rulemaking steps of revising the scope statement, holding a second public comment hearing, or revising the economic impact analysis after making changes to the initial draft rule. Applegate also argued that the Department violated WEPA because it did not sufficiently investigate potential environmental effects of the rule before deciding not to prepare an EIS.

The parties filed cross motions for summary judgment in the circuit court. The circuit court granted Applegate's motion, concluding that the Department failed to follow proper rulemaking procedures under ch. 227. The circuit court invalidated § Tax 18.05(1)(d). However, the court went on to conclude that the Department's failure to produce an EIS had not violated WEPA. The circuit court then granted the Department's motion for a stay of its invalidation of the rule pending appeal.

The Department appealed, arguing that Applegate failed to rebut the statutory presumption that the Department's promulgation of the rule amendments complied with ch. 227 rulemaking procedures. The Court of Appeals agreed and reversed that part of the circuit court's order.

Applegate cross-appealed the separate circuit court ruling that the Department did not violate WEPA by failing to sufficiently investigate the potential environmental effects of amending the rule before deciding not to prepare an EIS. The Court of Appeals affirmed the circuit court's finding that the Department did not violate WEPA. The Court of Appeals rejected Applegate's challenge to the amendments to § Tax 18.05(1)(d) based on WEPA, noting that Applegate alleged only "indirect" environmental effects, which under existing case law "are not alone sufficient to trigger the Department's duty to justify a decision not to prepare an environmental impact statement." It is this decision from the Court of Appeals that is on review with the Supreme Court.

Applegate Farms asks the Supreme Court to consider whether Wisconsin state agencies need to consider indirect environmental effects when determining whether to issue an environmental impact statement ("EIS") under Wis. Stat. § 1.11(2).

WISCONSIN SUPREME COURT
November 10, 2020
9:45 a.m.

2018AP2066-CR State v. Alfonso C. Loayza

This is a review of a decision of the Wisconsin Court of Appeals, District IV reversing a judgment of conviction by the Rock County Circuit Court, Judge Richard T. Werner and Judge John M. Wood, presiding, for eighth offense drunk driving and remanding with directions that Alfonso Loayza be sentenced as a seventh offense drunk driver.

In May of 2012, Alfonso C. Loayza was stopped for speeding. A preliminary breath test registered an alcohol concentration of .14. The officer ran Loayza's driving record, which showed eight prior alcohol related convictions. Given the prior convictions, Loayza was prohibited from driving with an alcohol concentration above .012. A blood test revealed a blood alcohol concentration of .165.

Loayza was charged with one count of operating while intoxicated, as a ninth offense, and one count of operating with a prohibited alcohol concentration, also as a ninth offense. The complaint identified three California drunk driving convictions that were committed in 1989, 1990, and 1991 and five Wisconsin convictions committed between 1992 and 2009. Loayza pled guilty to one count of operating while intoxicated, as a ninth offense. The parties made the plea contingent on the State being able to prove the number of prior convictions at sentencing.

At sentencing, the State submitted three exhibits as proof of the prior convictions. First, it submitted a certified copy of Loayza's driving record from Wisconsin Department of Transportation (DOT). Second, it submitted a series of documents from the Superior Court of California, County of San Mateo, sent in response to a request for records related to the 1990 California offense. The documents included the complaint, plea questionnaire and waiver of rights form, and the criminal docket for the 1990 California offense. Third, the State submitted a series of documents from the Superior Court of California, County of Santa Clara, regarding the 1991 offense. Those documents included the complaint, a bench warrant, and a minute sheet.

Loayza conceded that the State offered sufficient proof for the 1991 offense but argued the State had failed to offer sufficient proof for either the 1989 or the 1990 offenses. Loayza argued that the State's submission of the "certified Wisconsin Department of Transportation record" qualified as "competent proof" of the Wisconsin violations but that it did not qualify as "confident proof with respect to the California violations." The State argued that the certified DOT record alone was sufficient proof of the prior convictions. The circuit court concluded that the State offered sufficient proof for both the 1989 and 1990 offenses, so it imposed sentence for ninth offense OWI and sentenced Loayza to five years of initial confinement and five years of extended supervision. The circuit court granted Loayza's motion for re-sentencing and amended the judgment of conviction to eighth offense OWI.

Loayza appealed and argued that, regardless of what Wisconsin's DOT record showed about a 1990 California conviction, the California documents themselves failed to show that an OWI conviction actually occurred as shown in the DOT report. The State argued that since a DOT record is "competent proof" of a prior conviction, the DOT record alone was sufficient to prove the 1990 California conviction, even if the California documents themselves did not do so.

The appellate court said the California material does not include a judgment of conviction, nor does the docket printout expressly show that a conviction occurred. It said even if a conviction did occur, the materials raise doubt about whether it was for OWI. The Court of Appeals reversed and remanded with directions that the circuit court sentence Loayza for seventh offense OWI.

The State raises the following issues for Supreme Court review: Do the lack of a judgment of conviction for a prior offense and other documents that "support the inference" that the conviction does not exist render a Wisconsin DOT driving record that lists the conviction so unreliable that it does not prove the conviction by even a preponderance of the evidence?

WISCONSIN SUPREME COURT
November 10, 2020
10:45 a.m.

2017AP2244 Village of Slinger v. Polk Properties, LLC

This is a review of a decision of the Wisconsin Court of Appeals, District II, affirming the judgment and orders of the Washington County Circuit Court, Judge Sandy A. Williams presiding, requiring Polk Properties, LLC (1) to pay the Village of Slinger (the Village) $60,970.36 in damages for lost tax revenues, (2) to pay the Village $57,520 in forfeitures for violating its zoning code, and (3) to pay the attorney fees incurred by the Village for prosecuting a contempt motion against Polk.

In 2004, Polk Properties, LLC (Polk), owned by Donald J. Thoma, purchased vacant land in the Town of Polk. Thoma planned to develop the land into a residential subdivision to be known as Pleasant Farm Estates. By 2007, Polk had executed development agreements and restrictive covenants with the Village. Based on those agreements, the Village annexed the property and rezoned it as residential. One of the restrictive covenants granted by Polk, Article 5.1[2], prohibited the property at issue from being used for agricultural purposes. Although the land was zoned as residential, Thoma continued to maintain alfalfa and grass on most of the property, which he arranged to be cut regularly. In a small area of the property, Thoma also allowed a third-party farmer to plant row crops. For a number of years after the execution of the development agreements, the property continued to be classified as agricultural property for tax purposes.

In 2011, the Village filed the civil action underlying this appeal against Polk and Thoma, individually, seeking an injunction against any agricultural use of the property based on the restrictive covenant. In December 2012 the circuit court granted summary judgment to the Village and entered an injunction against Polk and Thoma enjoining them from causing or permitting the property "to be used for agricultural purposes and [commanded Polk] to bring said real property into compliance with" the Declaration's requirement that the lots be used only for single-family residential purposes. Polk filed a motion to vacate the injunction on the ground that it had the unilateral authority to amend the Declaration to permit agricultural uses until the lots were sold. The circuit court denied the motion, concluding that Polk could not amend the use restriction without the Village's written release, pursuant to Wis. Stat. § 236.293 (2017-18).

In October 2015, the Village was allowed to amend its complaint to add, inter alia, a claim for damages consisting of the allegedly lost tax revenue because of the agricultural classification for the 2010-2013 tax years. The Village also added a claim for the imposition of daily forfeitures due to the alleged ongoing violations of the Village's zoning ordinance.

In March 2015, the Village again moved for summary judgment, this time on its claims for lost tax revenue and daily forfeitures. The circuit court granted summary judgment in favor of the Village. It awarded $60,970.36 in damages for the lost tax revenue for the tax years 2010 through 2013. The circuit court also ruled that daily zoning code forfeitures should be imposed beginning on October 7, 2009 until all agricultural use of the property ceased. At a September 2017 hearing, the circuit court ruled that $10 daily forfeitures should be imposed for the period

[2] That article stated that each lot "shall be occupied and used only for single family residential purposes and for no other purpose."

from the date of the injunction in December 2012 until August 21, 2017, resulting in a total forfeiture of $57,520. In that hearing the circuit court also granted the Village's motion for contempt against Polk and Thoma due to their noncompliance with the injunction. Ultimately, the circuit court also found Polk and Thoma in contempt and ordered Polk to pay the Village's attorney fees incurred in bringing the contempt motion.

Polk appealed, and the Court of Appeals affirmed. Polk argued on appeal that the circuit court's finding that it had violated the zoning code was in error because the continued agricultural use was a legal, nonconforming use. The Court of Appeals concluded that Polk had abandoned the agricultural use. Thus, it determined that the circuit court (1) had properly rejected Polk's argument that it had not committed any violations of the Village's zoning ordinances and (2) had properly enforced the $10 daily forfeiture provided in Article 15.05 of those ordinances. Polk also challenged the circuit court's award of damages equal to the Village's "lost" property tax revenue for the difference between agricultural classification rates and residential classification rates. The Court of Appeals rejected Polk's argument that the Village's damage claim was an attempt to retroactively reassess the property or adjust its property taxes. It pointed to the Declaration executed and recorded by Polk, which stated that any owner who failed to comply with the Declaration "shall be liable for damages." Thus, the Village was entitled to enforce and to obtain damages for Polk's violation of the residential use restrictive covenant, and the circuit court had competency to adjudicate its damage claim.

Next, the Court of Appeals rejected Polk's claim that a different section of the Declaration, Article 10.1,[3] constituted an exception to restrictive covenant and permitted agricultural use of the property, concluding that Article 10.1 was not an exception to the restrictive covenant. The Court of Appeals also agreed with the circuit court that Polk's attempted amendment of the Declaration in May 2013 was ineffective because Wis. Stat. § 236.293 prohibited Polk from later amending the Declaration without a written release or waiver from the Village. Finally, the Court of Appeals rejected Polk's claim that it had not had proper notice that the contempt motion would be heard at the September 5, 2017 hearing, concluding that the circuit court had not erroneously exercised its discretion by hearing the contempt motion at that hearing.

Polk asks the Supreme Court to review the following issues:

1. Abandonment of the right to a non-conforming land use requires (1) cessation of the non-conforming use and (2) an intent to abandon the non-conforming use.[4] State ex rel. Schaetz v. Manders, 206 Wis. 121, 238 N.W. 835, 837 (1931). In that context, can the property owner's application for a zoning

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[3] 10.1 Reserved Rights. Pending the Sale of all Lots by Declarant, Declarant:

> A. May use the Outlots, and any unsold Lots in any manner as may facilitate the sale of Lots including, but not limited to, maintaining a sales and/or rental office or offices, models and signs and/or showing the Lots.

[4] The cessation of the use for a period of time specified by code or ordinance can, alone, result in abandonment. That circumstance has not been shown to exist in this case.

change, the owner's entry into a development agreement, or the owner's entry into restrictive covenants alone, constitute an abandonment?

2. Assessment and imposition of property taxes is controlled by a comprehensive administrative process, which is a prerequisite to the pursuit of judicial remedies. Hermann v. Town of Delavan, 215 Wis. 2d 370, ¶10, 24, 572 N.W.2d 855 (1998). In that context, did the trial court lack competence to retroactively reassess the subject property without prior involvement of the specified administrative process?

3. Thoma timely paid the property taxes assessed by the Village of Slinger (hereinafter Slinger) for the years 2009-2013. Wisconsin does not allow retroactive reassessments of property taxes unless expressly authorized by the legislature. Wisconsin Central Ltd. v. Wisconsin Department of Revenue, 2000 WI App 14, 232 Wis. 2d 323, 606 N.W.2d 226. In that context, was the trial court's assessment against Thoma of the difference between the amount of property taxes paid by Thoma and the amount the court believed Thoma should have paid in 2009-2013, an unlawful retroactive reassessment of taxes?

4. Do multiple additional errors require the reversal of the circuit and Court of Appeals' decisions; specifically:

    a. Is restrictive covenant 10.1, which expressly entitled Thoma to use unsold lots for non-residential purposes, an exception to restrictive covenant 5.1?

    b. Having issued a scheduling order that did not include a contempt hearing as a remaining proceeding in the case, and without any prior notice from the court of such a hearing, did the court conduct a contempt hearing without the required notice?

    c. Having supported the position in Thoma v. Village of Slinger, 2018 WI 45, 381 Wis. 2d 311, 912 N.W.2d 56, that the subject property was not being used for agriculture in 2014, did the doctrine of judicial estoppel preclude Slinger from seeking and obtaining penalties and contempt sanctions from Thoma for agricultural use in 2014-2017?

    d. Did Slinger fail to identify a zoning ordinance that had been violated and did Slinger fail to present evidence of a zoning code violation?

    e. One of the factors in imposing forfeitures is evidence of the forfeitures imposed on similarly situated offenders. State v. Boyd, 2000 WI App 208, ¶14, 238 Wis. 2d 693, 618 N.W.2d 251. Was it prejudicial error for the trial court to have precluded offered evidence of the lack of fines imposed on similarly situated offenders?

WISCONSIN SUPREME COURT
November 16, 2020
9:45 a.m.

2020AP1718-OA Jeré Fabick v. Tony Evers

The Supreme Court accepted jurisdiction over the original action petition filed by Jeré Fabick, which challenged two of Governor Tony Evers executive orders declaring a state of emergency.

The primary statute at issue in this original action is Wis. Stat. § 313.10, which, as pertinent here, authorizes the governor to declare a state of emergency as follows:

> ***Declaration by Governor.*** *The governor may issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. If the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state and may designate the department of health services as the lead state agency to respond to that emergency. . . . A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. . . . The executive order may be revoked at the discretion of either the governor or the legislature by joint resolution.*

On March 12, 2020, near the beginning of the effects of the COVID-19 pandemic in Wisconsin, Governor Evers issued Executive Order #72 (EO #72). In that order, the Governor "[p]roclaim[ed] that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin." The order cited five statutes as support for the Governor's declaration, including Wis. Stat. § 323.10. In the order, the Governor designated the Department of Health Services (DHS) to act as the lead agency to respond to the public health emergency and directed DHS to "take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State." The Governor also suspended all portions of administrative rules that the DHS Secretary determined would prevent, hinder or delay necessary actions to respond to the health emergency.

Over the next 60 days, both the Governor and DHS Secretary-Designee Andrea Palm issued a series of orders based on the Governor's declaration of a public health emergency. Among other things, those orders closed schools, restricted public gatherings, and suspended certain rules and actions of some state administrative agencies.

EO #72 did not contain any date on which the order was to expire. Under Wis. Stat. § 323.10, a public health state of emergency declared by the Governor may not exceed 60 days. Under that statute, the public health emergency declared under EO #72 expired 60 days after it was issued, on May 11, 2020.

On July 30, 2020, Governor Evers issued Executive Order 82 (EO #82). EO #82 again declared that "a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin." It cited the four of the five same statutes listed in EO

#72 as authority for that declaration, including Wis. Stat. § 323.10. It also again designated DHS to be the lead state agency to respond. The final paragraph of EO #82 specified an end date for the order: "Pursuant to Section 323.10 of the Wisconsin Statutes, this Public Health Emergency shall remain in effect for 60 days, or until it is revoked by the Governor or by joint resolution of the Wisconsin State Legislature."

On the same day that he issued EO #82, Governor Evers also issued Emergency Order #1 pursuant to EO #82. That order primarily required anyone present in the state to wear face coverings when in an indoor space or enclosed space if one or more individuals who do not belong to the same household or living unit are present, subject to certain exceptions.

On Sept. 22, 2020, before EO #82 expired, Governor Evers issued Executive Order #90 (EO #90). After describing the status of COVID-19 pandemic, like EO #72 and EO #82, EO #90 declared that a public health emergency existed in the state and designated the DHS as the lead agency to respond to COVID-19. The five numbered provisions of EO #90 were nearly the same as had been set forth in EO #82.

On Oct. 15, 2020, Jeré Fabick filed a petition for leave to commence an original action in the Supreme Court and alleged a statutory claim—that Governor Evers' issuance of EO #82 and EO #90 exceeded his authority under Wis. Stat. § 323.10. Fabick asserted that EO #72, EO #82, and EO #90 all stem from a single public health emergency, i.e., the COVID-19 pandemic, which has continued to varying degrees but without interruption since at least February of this year. Fabick contended that Wis. Stat. § 323.10 authorizes a governor to declare only one state of emergency (or public health emergency) that relates to a particular illness or pandemic.

Governor Evers has argued in this matter that the question of whether a governor may declare a state of emergency is a matter committed by the statute to the political branches of government (the executive and legislative) and therefore may not be reviewed by the judicial branch. He has further argued that Fabick lacks standing to bring a judicial challenge to his orders declaring a state of emergency. In addition, Governor Evers has contended that EO #82 and EO #90 were authorized by Wis. Stat. § 323.10 because that statute allows a governor to issue separate state of emergency orders based on different occurrences that relate to a single underlying cause, such as the COVID-19 pandemic. Finally, Governor Evers has asserted that Wis. Stat. § 323.10, even if it allows a governor to issue separate state of emergency orders related to the same underlying cause, does not constitute an improper delegation of legislative power.

On Oct. 28, 2020, the Supreme Court granted the petition for leave to commence an original action. In addition to agreeing to resolve the statutory question listed in Fabick's petition, the Supreme Court added a second question that the parties have addressed in their briefs. Accordingly, the following two questions have been presented for resolution by the Supreme Court in this matter:

1. Whether Governor Tony Evers violated Wis. Stat. § 323.10 when he issued multiple and successive executive orders declaring a state of emergency beyond 60 days in response to the COVID-19 pandemic.
2. If Executive Order #82 and Executive Order #90 are authorized by Wis. Stat. § 323.10, whether that statute is an unconstitutional delegation of legislative power to the executive branch.

WISCONSIN SUPREME COURT
November 17, 2020
9:45 a.m.

2018AP1952-CR State v. Mark D. Jensen

This is a review of a decision of the Wisconsin Court of Appeals, District II reversing the judgment of conviction entered by Kenosha County Circuit Court, Chad G. Kerkman, presiding, for first-degree intentional homicide and remanding for a new trial.

This case has an extensive history that will be only briefly recounted here. In 2008, Mark Jensen was charged with first-degree intentional homicide for the death of his wife, Julie. Prior to her death, Julie had made several oral and written statements indicating that she believed her husband was planning to kill her. Whether these statements could be admitted at Jensen's trial was a critical issue, because the Sixth Amendment's Confrontation Clause gives criminal defendants the right to cross-examine witnesses who testify against them. Initially, the circuit court excluded these statements as "testimonial" and thus inadmissible under the then recent decision, Crawford v. Washington, 541 U.S. 36 (2004). This court agreed that the statements were "testimonial" but remanded for a hearing to consider whether the statements were nonetheless admissible under the doctrine of "forfeiture by wrongdoing." That doctrine provides that an accused cannot challenge the admission of a declarant's statement on confrontation grounds if it was the accused's wrongful conduct that prevented cross-examination of the declarant. The circuit court then concluded that Jensen had forfeited his right to confront Julie, by causing her absence from trial. Julie's statements were admitted at trial and a jury convicted Jensen of first-degree intentional homicide.

After Crawford, the United States Supreme Court issued several decisions that further developed the Confrontation Clause analysis. Jensen sought relief in federal court and the federal court ruled that Jensen's Confrontation Clause rights were violated when the State introduced Julie's statements at trial. The federal court vacated Jensen's conviction and remanded the case to the circuit court.

The Kenosha County Circuit Court considered the matter and determined that under current law, the statements introduced at trial were not "testimonial" and thus not subject to the Confrontation Clause. Over Jensen's objection, the circuit court reinstated Jensen's conviction for first-degree intentional homicide.

Jensen appealed his reinstated judgment of conviction. The Court of Appeals reversed, holding the circuit court lacked authority to reevaluate whether Julie's statements were testimonial because this court had concluded they were testimonial in its 2007 decision. The Court of Appeals said: "Neither we nor the circuit court are at liberty to decide that the letter nor other statements Julie made to [before her death] are nontestimonial. Under *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case. That is what the circuit court erroneously did and what the State asks us to affirm in this case." The Court of Appeals reversed and remanded for a new trial.

The State appealed. The State contends that the circuit court and Court of Appeals are not bound by a prior Wisconsin Supreme Court decision when, as here (it contends) the applicable law has changed. The State argues that changes in applicable law permit the lower

courts to revisit the question of whether Julie's statements were testimonial. And, the State contends, the definition of "testimonial" has narrowed, such that the statements at issue here are admissible. Jensen disputes this, noting that several courts have held that Julie's statements were testimonial and thus inadmissible. He maintains that he is entitled to a new trial.

The State now raises the following issues for Supreme Court review:

1. Did the Court of Appeals ignore an established exception to the law-of-the-case doctrine when it concluded that it and the circuit court were bound to follow this Court's 2007 holding that Julie Jensen's statements were testimonial?
2. Did the circuit court correctly determine that, under the narrower definition of testimonial adopted by the Supreme Court since 2007, Julie's statements are nontestimonial?
3. Should this Court remand to address the remaining issues that the Court of Appeals did not decide because of its holding that it was bound by this Court's prior decision?

WISCONSIN SUPREME COURT
November 17, 2020
10:45 a.m.

2018AP1887 Waupaca County v. K.E.K.

This is a review of a decision of the Wisconsin Court of Appeals, District II, that affirmed two Waupaca County Circuit Court decisions, Judge Vicki L. Clussman, presiding, that extended K.E.K.'s involuntary commitment and required her involuntary medication and treatment.[5]

In 2017, Waupaca County filed a petition to involuntarily commit K.E.K. under Wis. Stat. § 51.20(1)(a)2.e., known as the "fifth standard" of dangerousness. This standard allows for commitment of "mentally ill persons whose mental illness renders them incapable of making informed medication decisions and makes it substantially probable that, without treatment, disability or deterioration will result."[6] Following a jury trial, the circuit court entered an order committing K.E.K. for six months.

In 2018, the County filed a petition to extend K.E.K.'s commitment for another 12 months. This petition was filed 17 days before the initial order's expiration date; it is undisputed that it was untimely under Wis. Stat. § 51.20(13)(g)2r.[7] K.E.K. moved to dismiss, alleging the circuit court lacked competency to proceed because the petition was untimely. The circuit court denied K.E.K.'s timeliness motion and ordered a 12-month outpatient recommitment.

K.E.K. appealed. She argued the recommitment standards violate substantive due process facially and as applied to her, because the government cannot commit a person who is mentally ill but not dangerous. K.E.K. maintains that she was recommitted without evidence of recent acts or omissions showing a substantial likelihood that if treatment were withdrawn she would become a proper subject for commitment. She also maintains that the circuit court did not have competency to grant the recommitment petition because it was filed after the 21-day deadline.

The Court of Appeals affirmed the circuit court decision. The Court of Appeals concluded that the only reasonable reading of the language "does not affect the jurisdiction of the court" in Wis. Stat. Stat. § 51.20(13)(g)2r is that courts retain "competency to exercise" jurisdiction, so it ruled that the circuit court could consider the recommitment. With respect to K.E.K.'s challenge to whether there was sufficient evidence of current dangerousness, the Court of Appeals cited Portage Cty. v. J.W.K., 2019 WI 54, 386 Wis. 2d 672, ¶24, 927 N.W.2d 509, and held that "each extension hearing requires proof of current dangerousness" such that Wis. Stat. § 51.20(1)(am) satisfies due process. The Court of Appeals stated that it was unable to discern an as-applied challenge to Wis. Stat. § 51.20(1)(a)2.e. and so did not specifically address that claim.

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[5] K.E.K. does not appeal the involuntary medication order in the Wisconsin Supreme Court.

[6] See State v. Dennis H., 2002 WI 104, ¶¶14, 33, 255 Wis. 2d 359, 647 N.W.2d 851.

[7] Wisconsin Stat. § 51.20(13)(g)2r, in relevant part, provides that the county "shall file" a recommitment petition "[t]wenty-one days prior to expiration of the period of commitment," and states that, "[a] failure . . . to file an evaluation and recommendation under this subdivision does not affect the jurisdiction of the court over a petition for recommitment."

K.E.K. now presents these issues for review by the Wisconsin Supreme Court:

1. Whether the circuit court lacked competency to exercise subject matter jurisdiction over [K.E.K.'s] recommitment proceeding due to Waupaca County's conceded violation of § 51.20(13)(g)2r?Whether § 51.20(1)(am) violates substantive due process and equal protection of the law on its face (and as applied)?
2. Did the circuit court lose competency to conduct a recommitment hearing because the County did not file the evaluation of K.E.K. at least 21 days before the expiration of her commitment, as required by § 51.20(13)(g)2r.?
3. Is the recommitment standard in § 51.20(1)(am) facially unconstitutional under the 14th Amendment because it violates the guarantees of substantive due process and equal protection of the law or abridges the privileges or immunities of citizens?
4. Is the recommitment standard in § 51.20(1)(am) unconstitutional as applied to K.E.K.?