WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2019

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

Dane
Fond du Lac
Green
Lincoln
Milwaukee
Ozaukee
Portage
Racine
Sheboygan

WEDNESDAY, SEPTEMBER 4, 2019

9:45 a.m.	17AP1104-CR	State v. Roy S. Anderson
10:45 a.m.	17AP1823	Lamar Central Outdoor, LLC v. Div. of Hearing & Appeals
1:30 p.m.	17AP1416-CR	State v. Matthew C. Hinkle

FRIDAY, SEPTEMBER 6, 2019

9:45 a.m.	17AP1720-CR	State v. Robert James Pope, Jr.
10:45 a.m.	17AP880-W	Joshua M. Wren v. Reed Richardson
1:30 p.m.	17AP1894-CR	State v. Stephan I. Roberson

MONDAY, SEPTEMBER 9, 2019

9:45 a.m.	17AP1977-CR	State v. Alexander M. Schultz
10:45 a.m.	17AP913-CR/	State v. Autumn Marie Love Lopez
	17AP914-CR	State v. Amy J. Rodriguez

THURSDAY, SEPTEMBER 19, 2019

9:45 a.m.	17AP822	Veritas Steel, LLC v. Lunda Construction Company
10:45 a.m.	18AP1129	City of Cedarburg v. Ries B. Hansen
1:30 p.m.	18AP2162	Town of Wilson v. City of Sheboygan

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

10AP1939-D Office of Lawyer Regulation v. Christopher A. Mutschler

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are 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 camera coverage of Supreme Court oral argument, contact media coordinator Hannah McClung at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
September 4, 2019
9:45 a.m.

2017AP1104-CR State v. Roy S. Anderson

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a Racine County Circuit Court judgment of conviction entered upon Roy S. Anderson's no contest plea for possession with intent to deliver cocaine, one gram or less, as a second or subsequent offender. Judge Michael J. Piontek presided over the circuit court proceedings.

This case brings into question the application of Wisconsin Act 79, which created multiple statutes that broaden law enforcement officers' authority to search people who: 1) are on probation for a felony or any violation of Wis. Stat. ch. 940, 948, or 961; 2) are on extended supervision; or 3) are on parole. Under these statutes, an officer may require an individual to submit to a search of their person, their residence, or their property if the officer reasonably suspects that the person is committing, is about to commit, or has committed a crime or a violation of a condition of their probation, extended supervision, or parole. In other words, Act 79 gives officers the right to conduct an evidentiary search of these individuals, their property, and their residences at the level of justification – reasonable suspicion – that ordinarily would only authorize a pat-down search.

Act 79 only applies to individuals placed on probation, extended supervision, or parole on or after the Act's effective date – December 14, 2013. It is not applicable to people who are placed on field supervision before December 14, 2013.

Here are the facts of the matter at hand: One afternoon in August 2015, a City of Racine police officer was driving in an area of Racine known for high drug trafficking. There, the officer observed Anderson riding a bicycle on a sidewalk in violation of a city ordinance. The officer pursued Anderson and observed him taking his left hand off the bicycle's handlebars and placing it into his front jacket pocket. The officer ordered Anderson to stop, which he did. The officer then conducted an evidentiary search of Anderson, which yielded two bags of cocaine, over $200 cash, and two cell phones.

The State charged Anderson with possession with intent to deliver cocaine, one gram or less, as a second or subsequent offense. Anderson filed a motion to suppress evidence obtained from the officer's search.

At the suppression hearing, the officer testified that he was familiar with Anderson because he had arrested him in 2012 for cocaine possession. The officer also testified that he knew that Anderson had been released on "probation" in March 2015, but he did not know the length of Anderson's term of "probation." (In actuality, Anderson had been released on extended supervision, not probation.) The officer further testified that he had received two tips from a confidential informant that Anderson was dealing drugs in a particular area and that he searched Anderson "per Act 79."

The circuit court denied Anderson's suppression motion. Anderson pled no contest to the charged offense and was sentenced to five years of initial confinement and five years of extended supervision.

Anderson appealed. He claimed on appeal that the circuit court erred in denying his motion to suppress evidence, arguing that the officer did not have sufficient basis to believe that he was subject to Act 79. Alternatively, he claimed that even if Act 79 applied, the officer lacked reasonable suspicion to believe he was committing, was about to commit, or had committed a crime.

The Court of Appeals affirmed the circuit court's decision. It ruled that the officer had a "sufficient basis" to believe that Anderson was subject to Act 79. Anderson seeks Supreme Court review, offering the following issues:

1. What constitutes sufficient knowledge of an offender's community supervision status where an officer wants to search him or her pursuant to Act 79?
2. Did officers lack reasonable suspicion to search Roy Anderson's person pursuant to Act 79?

WISCONSIN SUPREME COURT
September 4, 2019
10:45 a.m.

2017AP1823 Lamar Central Outdoor, LLC v. Division of Hearings & Appeals

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a Portage County Circuit Court judgment, Judge Jon M. Counsell, presiding, that affirmed a Division of Hearings & Appeals' decision that affirmed a Department of Transportation decision that Lamar Central Outdoor must remove an illegal outdoor advertising sign.

In 1999, Lamar Central Outdoor, LLC acquired an outdoor advertising sign located adjacent to an interstate highway in Wisconsin. At that time, the sign was legal but nonconforming under Wisconsin law. Several years after acquiring the sign, Lamar put extension panels on the sign which added to the surface area. In 2012, the Department of Transportation (DOT) determined that the entire sign must be removed because Lamar's enlargement of the sign caused it to lose its nonconforming status and become an illegal sign subject to removal. The Division of Hearings and Appeals (DHA) affirmed that determination, and the Portage County circuit court and the Court of Appeals also affirmed.

Wisconsin Statute § 84.30 generally prohibits the erection and maintenance of any signs along the interstate system, in accordance with the Federal Highway Beautification Act of 1965. There are some exceptions; some nonconforming signs may continue to exist for certain periods of time or upon certain conditions. The general expectation, however, is that the signs will be removed eventually.

Wisconsin Statute § 84.30(5)(a) and (b) provide that a nonconforming sign "shall be removed by the end of the 5th year" after it becomes nonconforming and, typically, the DOT must pay just compensation for the removal of nonconforming signs. However, removal "shall not occur" if the DOT lacks funds to pay just compensation. Wis. Stat. §§ 84.30(6), (15). So, the sign at issue remains standing, over 20 years after it became nonconforming in 1996.

In addition to the statutes, the DOT has promulgated several rules governing signs in Wis. Admin. Code ch. TRANS 201. Under § TRANS 201.09, "any nonconforming sign which subsequently violates s. 84.30, Stats., or these rules, shall be subject to removal as an illegal sign" without just compensation. A sign loses its nonconforming status and becomes an illegal sign if any of the conditions in § TRANS 201.10(2) are not satisfied or are violated.

Petitioners, the Lamar Company, LLC, d/b/a Lamar Advertising of Central Wisconsin, and TLC Properties, Inc., dispute that removal of the sign is appropriate. Lamar contends there was no statutory prohibition against enlarging the sign; says it should have been afforded a right to cure, noting that it has removed the extension panels; and points to recent legislation, 2017 Wisconsin Act 320, that it says should control and would allow it to maintain the sign.

Lamar presents the following issues for review:

1. Whether DHA erroneously interpreted a provision of law.
    a. Whether DHA erred in finding that Wis. Stat. § 84.30 and Wisconsin Administrative Code Trans. § 201.10 prohibit the enlargement of nonconforming, off-premise signs erected after March 18, 1972.

   b. Whether DHA misinterpreted and misapplied common law authorities relating to nonconforming uses.
2. Whether DHA erred as a matter of law by finding that the right to cure provision in Wis. Stat. § 84.30 (11) does not apply to Lamar's sign.
3. Whether DHA erred as a matter of law by failing to require DOT to resolve statutory ambiguities by engaging in rulemaking.
4. Whether DOT's change of policy relating to the addition of extensions to nonconforming signs without promulgating a formal rule pursuant to Wis. Stat. § 227.10(1) constituted unlawful rulemaking.
5. Whether Wis. Stat. § 227.10(1) required DOT to promulgate as rule its revised interpretation of Wis. Stat. § 84.30(11).

WISCONSIN SUPREME COURT
September 4, 2019
1:30 p.m.

2017AP1416-CR State v. Matthew C. Hinkle

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a decision by the Fond du Lac County Circuit Court, Judge Robert J. Wirtz, presiding, to waive a juvenile into adult criminal court because the juvenile had been waived into adult criminal court in another county.

This appeal turns on an interpretation of the Juvenile Justice Code that provides adult criminal courts with jurisdiction over juveniles who have allegedly violated a state criminal law, when a juvenile court has previously waived its jurisdiction over the juvenile for criminal charges that are still pending.

The facts of the case are relatively straightforward. In July 2015, 16-year-old Matthew Hinkle stole a car in Milwaukee and drove it to Fond du Lac. When approached by officers there, he led police officers on a high-speed chase, striking other vehicles and driving across lawns. Ultimately, he lost control of the vehicle and fled on foot, at which point he was apprehended.

The case before the Supreme Court is one of two criminal proceedings to arise out of this incident, and the issue before the Court stems from a procedural step in the matter. The State filed juvenile delinquency petitions in both Milwaukee and Fond du Lac counties. In both cases, the prosecutors petitioned for waiver into adult criminal court. In Fond du Lac County, prosecutors also filed a separate adult criminal complaint against Hinkle alleging four traffic law violations. Even though Hinkle was a juvenile, the adult criminal court had original jurisdiction over the traffic offenses because adult criminal court jurisdiction is automatic for the traffic offenses Hinkle committed.

The Milwaukee County circuit court addressed the State's waiver petition first. It held a hearing on the petition in late October 2015 and subsequently ordered that Hinkle be waived into adult criminal court.

The Fond du Lac County juvenile circuit court advised the parties in November 2015 that it anticipated the waiver in Milwaukee County would result in Hinkle being waived into adult criminal court in Fond du Lac County pursuant to Wis. Stat. § 938.183(1)(b). After receiving a copy of the Milwaukee County criminal complaint, the court reconvened a hearing on the State's waiver petition. The circuit court ultimately ruled that due to the Milwaukee County waiver and the pending adult criminal complaint in Milwaukee County adult criminal court, the Fond du Lac County adult criminal court would have exclusive jurisdiction over the criminal charges in that county pursuant to Wis. Stat. § 938.183(1)(b). For reasons that are unclear, however, the circuit court's written order stated that Hinkle was waived into adult criminal court because he had not contested the waiver petition under Wis. Stat. § 938.18.

After the hearing, the State added the 14 non-traffic counts that had been pending in juvenile court to the four traffic counts that were already pending in the adult criminal court proceeding. Hinkle subsequently pled no contest to seven counts, and the remaining counts were dismissed and read in.

Hinkle filed a post-conviction motion to withdraw his no contest pleas. He argued that the adult criminal court had lacked competency to proceed on the 14 non-traffic counts because the waiver order had been invalid and because his counsel had been ineffective for failing to object to the waiver.

The post-conviction court denied Hinkle's motion, concluding that the waiver into adult criminal court in Milwaukee County had required all future criminal charges against Hinkle be adjudicated in adult criminal court. The post-conviction court further ruled that trial counsel had not been ineffective for failing to challenge the competency of the adult criminal court because trial counsel's interpretation of the waiver statute had been the same as the circuit court's.

Hinkle's appeal turned on the interpretation of the phrase "the court assigned to exercise jurisdiction under this chapter and ch. 48" in Wis. Stat. § 938.183(1)(b). Hinkle argued that the legislature's use of the determinate "the court" in this phrase, rather than "a court" or "any court," meant that the legislature was referring to the same court in which the current juvenile charges were pending, not any court where the juvenile had been charged.

A divided panel of the Court of Appeals affirmed the circuit court's decision. The majority disagreed with Hinkle's argument based on the plain language of the statute. It interpreted the phrase "the court" simply to refer to the prior court that had exercised and then waived juvenile jurisdiction. Court of Appeals Judge Paul F. Reilly dissented. He agreed with Hinkle's interpretation of the phrase "the court" in § 983.183(1)(b) as meaning only the same juvenile court in which current delinquency charges are pending.

Hinkle seeks the Supreme Court's interpretation of Wis. Stat. § 938.183(1)(b) to resolve the disagreement.

Hinkle's petition raises the following issues:

1. Did the Fond du Lac County criminal court lack competency under § 938.183(1)(b) to proceed on Hinkle's non-traffic counts, when competency was based solely on Milwaukee County's previous waiver?
2. Did trial counsel provide ineffective assistance when she failed to object to the non-traffic counts in criminal court and to the order waiving juvenile jurisdiction?

WISCONSIN SUPREME COURT
September 6, 2019
9:45 a.m.

2017AP1720-CR State v. Robert James Pope, Jr.

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 Jeffrey A. Conen, presiding, that ordered a new trial for the defendant, Robert James Pope, Jr.

This case is being heard on the same day as Joshua M. Wren v. Reed Richardson, No. 2017AP880-W, because the cases have important similarities. Both Pope and Wren had the same underlying problem: appointed lawyers who neglected to file a notice of intent to pursue post-conviction relief after sentencing. The cases present a common issue: whether a defendant's direct appeal rights may be affected by legal errors arguably made by the defendant while he lacked the assistance of counsel.

This matter differs from Wren in that Pope was successful in getting his direct appeal rights reinstated. However, because so much time has passed since Pope's conviction, the transcripts of his trial are no longer available, and the court reporters' notes have been destroyed. The Milwaukee County circuit court ordered that a new trial was the remedy to this problem. The Court of Appeals disagrees.

The facts here are as follows. In May 1996, a jury convicted Robert James Pope, Jr. of two counts of first-degree homicide as a party to the crime. Pope was represented by counsel appointed by the State Public Defender's (SPD) Office. In July 1996, Pope was sentenced to two life sentences. On that same day, Pope's attorney filed a form with the trial court, signed by Pope and himself, with a checked box indicating: "The defendant intends to seek post-conviction relief. The required notice will be timely filed by trial counsel." But Pope's attorney never filed a notice of intent to pursue post-conviction relief.

Later in July 1996, Pope wrote two letters to his attorney, seeking information on his appeal. It is unknown whether the attorney ever received these letters; however, there is no dispute that the attorney never filed a notice of intent to pursue post-conviction relief, as required to commence a direct appeal. As a result, Pope's direct appeal rights expired with no appeal initiated.

In September 1997, Pope filed with the Court of Appeals a pro se motion to reinstate his direct appeal rights. Pope attached to the motion a letter he had received from the SPD's office. The SPD's letter explained that a notice of intent to pursue post-conviction relief had been due in the trial court within 20 days of sentencing and that the SPD's office did not know why the Notice was not timely filed. The SPD's letter assured Pope that the Court of Appeals would grant a motion for an extension of time to file the Notice of Intent if he could provide a reasonable excuse why the Notice of Intent was not filed.

But the Court of Appeals did not grant Pope's motion. In October 1997, Pope tried again. He filed a pro se Wis. Stat. § 974.06 post-conviction motion in the Milwaukee County circuit court, seeking to reinstate his direct appeal rights. The circuit court denied Pope's motion, stating that the Court of Appeals' prior decision had resolved the matter.

Pope filed a pro se appeal of the circuit court's order. The Court of Appeals summarily affirmed the circuit court's order, and Pope filed a petition for review with the Supreme Court, which was denied.

In June 2003, Pope filed yet another pro se motion in the Court of Appeals requesting an extension of time to file his Notice of Intent to pursue direct post-conviction relief. The Court of Appeals summarily denied that motion, concluding that Pope was just repeating his prior request, which the court had already denied.

The case then sat dormant for 11 years. In July 2014, Pope renewed his efforts. He filed with the Court of Appeals a pro se petition for writ of habeas corpus, claiming ineffective assistance of counsel because his trial lawyer failed to file a Notice of Intent to pursue post-conviction relief, despite Pope's instructions to do so.

The Court of Appeals viewed the matter differently than it had before, and remanded the matter to the circuit court for an evidentiary hearing and findings of fact.

The circuit court appointed counsel for Pope and conducted the evidentiary hearing. After the hearing, the State and Pope jointly moved for reinstatement of Pope's direct appeal rights. The Court of Appeals granted the motion and an order reinstating Pope's direct appeal rights was entered.

So, Pope filed a notice of intent to pursue post-conviction relief with the circuit court, and requested the court transcripts and record from his 1996 case. However, because no appeal had been filed before, trial transcript had never been prepared, and the court reporters' notes had been destroyed.

Pope filed a motion for a new trial, on the ground that the unavailability of any trial transcripts denied him his right to appeal. The circuit court agreed and granted the motion. The State appealed.

The Court of Appeals' decision agreed with the State that Pope had failed to identify any errors that occurred at trial, and that, by failing to request the trial transcripts himself, he had failed to perfect his appeal. Pope seeks Supreme Court review and presents the following issues:

1. Where no transcripts of a jury trial occurring over 20 years ago are available in a direct appeal and appellate counsel is new to the case, does application of State v. Perry's requirement that appellant assert a "facially valid claim of error" that might be supported by a portion of a missing transcript deny the constitutional right to meaningful appellate review?
2. Whether a statement on transcript filed in an appeal binds an appellant in all future appeals in the same case?

WISCONSIN SUPREME COURT
September 6, 2019
10:45 a.m.

2017AP880-W Joshua M. Wren v. Reed Richardson

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that denied Joshua M. Wren's petition for writ of habeas corpus. Wren's petition sought reinstatement of his direct appeal rights, which he claims were denied because his attorney failed to file the required notice of intent to pursue post-conviction relief. The Milwaukee County Circuit Court proceedings were presided over by Judge Carolina Stark.

This case is being heard on the same day as State v. Robert James Pope, Jr., No. 2017AP1720-CR, because the cases have important similarities. Both Wren and Pope had the same underlying problem: appointed lawyers who neglected to file a notice of intent to pursue post-conviction relief after sentencing. The cases present a common issue: whether a defendant's direct appeal rights may be affected by legal errors arguably made by the defendant while he lacked the assistance of counsel.

Here, Wren, who was 15 years old at the time of the crime, was charged with and pled guilty to first-degree reckless homicide. On the day of sentencing, Wren's attorney filed with the court the standard form entitled, "Notice of Right to Seek Post-conviction Relief." The box that was checked indicated that Wren was undecided about whether he wanted to pursue post-conviction relief. The attorney never filed a notice of intent to seek post-conviction relief.

In the years that followed, Wren filed several pro se motions in the circuit court, all of which were denied. In May 2017, Wren filed, in the Court of Appeals, the pro se petition for habeas corpus at issue here. Wren claimed that after his sentencing, he and his family repeatedly contacted his trial attorney about his appeal, but never received a response. Wren noted in his habeas petition that the complete denial of the assistance of counsel on direct appeal is per se ineffectiveness. Wren further argued that laches – which is a defense against a claim on the ground that there was an unreasonable delay in making the claim – should not prevent the reinstatement of his direct appeal rights given that he had no understanding of these rights until he happened upon an inmate who understood them, and given that his trial attorney had a disciplinary history that involves failing to communicate properly with his clients.

The Court of Appeals remanded the case to the circuit court for a fact-finding hearing, which established certain facts regarding post-conviction communications among Wren, his family, and Wren's now-deceased trial attorney. Ultimately, the Court of Appeals denied Wren's habeas petition by applying laches. The Court of Appeals justified the application of laches on the grounds that Wren had unreasonably waited over ten years to raise concerns about the lack a direct appeal, and this delay prejudiced the State.

Wren seeks Supreme Court review of the Court of Appeals' decision and offers the following issues for review:

1. Whether Mr. Wren was deprived of his direct appeal due to the ineffectiveness of his trial counsel.
2. Whether the defense of laches should preclude granting relief to Mr. Wren.

WISCONSIN SUPREME COURT
September 6, 2019
1:30 p.m.

2017AP1894-CR State v. Stephan I. Roberson

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed a Wood County Circuit Court suppression order, Judge Nicholas J. Brazeau, Jr., presiding, which had suppressed evidence that the victim, C.A.S, had identified the accused, Stephan Roberson.

A "showup" is an out-of-court pretrial identification procedure in which a suspect is presented to a witness for identification purposes, not in a lineup, but singly. In general, under due process law developed by the U.S. Supreme Court, identification evidence arising out of a showup has historically been analyzed as to whether the showup procedure was unnecessarily suggestive, and if so, whether the evidence may still be admissible because it was nonetheless reliable under the totality of the circumstances (the "suggestiveness/reliability" standard). See Neil v. Biggers, 409 U.S. 188 (1972). In State v. Dubose, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582, this Court held that the due process provision of the Wisconsin Constitution requires that "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary", which has become known as the "necessity" standard.

This case revolves around whether the "necessity" standard of Dubose applies or should apply to the showing of a single photograph of a suspect to a victim. The crux of the dispute on appeal is the identification of the accused, Stephan Roberson, by C.A.S., the victim, during an out-of-court interview.

According to C.A.S., over the course of several days, he and a man he knew as "P" had a number of in-person and telephone contacts. The first contact began in a WalMart parking lot when P approached C.A.S. and asked for help in obtaining some marijuana. C.A.S. then accompanied P to another location to buy marijuana from a third party. The next day the two communicated over the telephone, but did not meet in person. The following day, C.A.S. again personally accompanied P to buy marijuana. When P dropped C.A.S. off at his home following the purchase, P asked C.A.S. if he could sell some of the marijuana that P had just purchased. C.A.S. agreed to do so. While C.A.S. was subsequently attempting to sell P's marijuana to a third party, the buyer robbed C.A.S. of the marijuana at gunpoint. C.A.S. texted P and informed him of the robbery. According to C.A.S., P picked him up as he walked down a road, drove him to a park, fired a shot over his head, and initiated a physical altercation, which resulted in P shooting C.A.S. in the leg.

Because C.A.S. was on probation at the time, he did not report the shooting to the police. A confidential informant, however, disclosed the shooting to the police. Approximately two weeks after the shooting, C.A.S. was interviewed by investigators.

Because investigators believed they knew that P was Roberson, the police did not ask C.A.S. about P's appearance, other than to inquire about the clothing P wore at the time he shot C.A.S. During the interview, however, a detective showed C.A.S. a Facebook profile photograph of Roberson and indicated to C.A.S. that the police believed the person in the photo

was the shooter. C.A.S. immediately and affirmatively stated that the photograph of Roberson did indeed show the man who had shot him.

The State charged Roberson with first-degree reckless injury, as a repeater. Roberson filed a motion to suppress C.A.S.'s identification of him during the police interview due to the fact that the police had suggestively used a single photo to identify him rather than presenting C.A.S. with a non-suggestive photo array.

The circuit court held an evidentiary hearing, at which C.A.S. and a detective testified. The circuit court agreed with Roberson that the use of a single photograph was unnecessarily suggestive and granted the suppression motion. The court ruled that not only would the evidence regarding C.A.S.'s prior identification of Roberson be suppressed, but that C.A.S. would also be prohibited from identifying Roberson in court during the trial.

The State petitioned for an immediate interlocutory appeal, which the Court of Appeals granted. The Court of Appeals concluded that the showing of a single photograph did not constitute a "showup" under Dubose. It also rejected Roberson's alternative argument that the Dubose "necessity" standard should be extended to the showing of single photographs, believing that the Supreme Court had decided not to extend Dubose in State v. Luedtke, 2015 WI 42, 362 Wis. 2d 1, 863 N.W.2d 592.

Roberson petitioned for and was granted Supreme Court review. Roberson's petition asked the Court to decide the following single issue: Whether identifications made out-of-court using a single photo are "showups" and inadmissible absent a showing of necessity.

WISCONSIN SUPREME COURT
September 9, 2019
9:45 a.m.

2017AP1977-CR State v. Alexander M. Schultz

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a Lincoln County Circuit Court, Judge Robert R. Russell, presiding, judgment of conviction entered upon Alexander M. Schultz's guilty plea for second degree sexual assault of a child.

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution provides protection against a second prosecution for the same offense after acquittal. For purposes of a double jeopardy analysis, separate prosecutions are for the "same offense" if the charged offenses are identical both in law and in fact. This case raises questions about how to conduct a double jeopardy analysis when the facts are ambiguous.

The case is thus. In December 2012, a City of Merrill police officer began a sexual assault investigation. During the investigation, pregnant 15-year-old Melanie said she had had sexual intercourse with 20-year-old Alexander Schultz more than five times, and that the "intercourse started at the middle of the year of 2012 and had gone on for a couple of months." Based on this information, Schultz was charged with repeated sexual assault of a child. An Information – which is the formal accusation of a criminal offense – alleged that Schultz had sexually assaulted Melanie at least three times "in the late summer to early fall of 2012." The case went to a jury trial.

At trial, Melanie testified she started having sex with Schultz sometime between July and August of 2012. She said she could not recall how many times she had sex with him, but it was definitely more than five times, and she said she and Schultz broke up in the beginning of September 2012. Ultimately, the jury acquitted Schultz.

Five days later, Melanie informed the State that she had received paternity test results and they showed a 99.99998 percent probability that Schultz was the father of Melanie's child. The State obtained Melanie's medical records, which indicated that her date of conception was on or about October 19, 2012. Based on the new information about the child's paternity and date of conception, the State charged Schultz with second-degree sexual assault of a child.

Schultz moved to dismiss the charge on the grounds that it violated his constitutional right to be free from double jeopardy. He argued that October 19, 2012 was a date in the "early fall of 2012," and thus he had already been charged with, and acquitted of, sexually assaulting Melanie on October 19, 2012. The State argued that Melanie never testified in the first trial that she had sex with Schultz after September 2012, so the first prosecution involved sexual assaults that occurred at a different time. Thus, the State argued, double jeopardy did not apply.

The circuit court denied Schultz's motion to dismiss, relying on Melanie's trial testimony to determine the timeframe of the prior charges were July, August, and September 2012. The circuit court concluded Schultz was not charged and not tried for an alleged sexual assault that occurred on October 19, 2012. Schultz then pled guilty and was sentenced to five years of initial confinement and five years of extended supervision.

Schultz filed a post-conviction motion arguing again that his prosecution violated his constitutional right to be free from double jeopardy. The circuit court denied the motion, and the Court of Appeals affirmed. Schultz now seeks Supreme Court review of the following issues:

1. [W]hen determining whether two offenses charged in successive prosecutions are the same in fact, for purposes of the Double Jeopardy Clause, may a court determine the scope of jeopardy in the first prosecution based upon testimony which was adduced at trial? Or alternatively, must a court determine the scope of jeopardy based upon whether a reasonable person familiar with the totality of the facts and circumstances would have [to] construe the initial charging documents, *at the time jeopardy attached in the first case*, to cover the offense that is charged in the charging document of the subsequent prosecution? To put it in plainer language, how do you determine the scope of jeopardy? Do you look at the charging documents in light of the facts and circumstances known when jeopardy attached, which in the case of a jury trial is when the jury is sworn, or may a court narrow the scope of jeopardy based upon testimony that was later adduced at trial?
2. [I]f there should be any ambiguity in the timeframe of a charging document, for purposes of the Double Jeopardy Clause, who should bear the burden resulting from the ambiguity, the defendant or the State?

WISCONSIN SUPREME COURT
September 9, 2019
10:45 a.m.

2017AP913-CR State v. Autumn Marie Love Lopez
& 2017AP914-CR State v. Amy J. Rodriguez

These consolidated appeals come to the Supreme Court from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals' decision reversed the Green County Circuit Court's decision, Judge James R. Beer, presiding, that dismissed retail theft charges against Autumn Lopez and Amy Rodriguez.

This appeal asks the Supreme Court to determine if several incidents of retail theft can be aggregated, such that smaller retail thefts that would result in misdemeanor convictions, if charged singly, may be lumped together and charged as one felony count of retail theft.

The thefts at issue in this case occurred seven times over a 15-day period in January 2017. Autumn Lopez, a WalMart employee, assisted Amy Rodriguez to steal items from WalMart. Rodriguez would walk up to a self-checkout terminal where Lopez would appear to assist her. Lopez would pretend to scan items, would intentionally fail to scan items, and would void items that had been scanned. The per-trip value of the items for which Rodriguez did not pay varied from $126.33 to $313.95. The total value from all seven incidents was $1,452.12.

The State charged both women with retail theft of merchandise worth between $500 and $5,000, as a party to the crime, in violation of Wis. Stat. §§ 943.50(1m)(c) and (4)(bf). Given the total value of merchandise stolen in all seven incidents, the statute would classify the retail theft, if aggregated, as a Class I felony. The complaint aggregated the value of the seven incidents as one continuing crime under Wis. Stat. § 971.36(3)(a) in order to reach that threshold.

Both Lopez and Rodriguez moved to dismiss the charge. They argued that Wis. Stat. § 971.36(3)(a) allows for the aggregation of value from multiple incidents only when the State is charging "theft" under Wis. Stat. § 943.20. Because the State charged "retail theft" under Wis. Stat. § 943.50, they argued that Wis. Stat. § 971.36(3)(a) did not apply.

The circuit court granted the defendants' motions to dismiss. It concluded that because Wis. Stat. § 971.36 referred only to "thefts," it applied only to counts alleging the crime of theft under Wis. Stat. § 943.20 and did not apply to counts alleging the crime of retail theft under Wis. Stat. § 943.50.

The State appealed, and the Court of Appeals reversed the dismissal of the charge against the two defendants. It construed Wis. Stat. § 971.36(3)(a) to apply to all types of theft, not just to theft under § 943.20. It rejected the defendants' arguments as reading into the statute a limitation that the plain language of the statute does not contain. See State v. Kozel, 2017 WI 3, ¶39, 373 Wis. 2d 1, 889 N.W.2d 423. It noted that there are ten separate statutes that criminalize various forms of theft and that even the general theft statute, Wis. Stat. § 943.50, identifies five distinct theft offenses. The Court of Appeals reasoned that if the Legislature had intended Wis. Stat. § 971.36(3)(a) to apply only to one or more of those numerous types of theft, it would have identified those specific types in the statute. Since it did not do so, the Court of Appeals concluded that the Legislature did not intend to limit the scope of the statute.

The Supreme Court granted Lopez's petition for review, which raises the following issue: Does Wis. Stat. § 971.36 or prosecutorial charging discretion allow for seven separate acts of

retail theft of merchandise valued at $126-$314 each and committed over a two-week period to be charged as a single count of felony retail theft of merchandise totaling $1,452.12?

WISCONSIN SUPREME COURT
September 19, 2019
9:45 a.m.

2017AP822 Veritas Steel, LLC v. Lunda Construction Company

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a judgment of the Dane County Circuit Court, Judge Frank D. Remington, presiding, that dismissed Lunda Construction Company's liability and fraudulent transfer claims against Veritas Steel, LLC, and related entities.

This is a factually complicated case that seeks clarification of Wisconsin corporate law. Generally, when a company gets purchased by another company, the purchasing company does not assume the selling company's debts and liabilities. However, there are exceptions to this general rule, including: 1) when the purchasing company consolidates or merges with the selling company ("de facto merger" exception); and 2) when the purchasing company is merely a continuation of the selling company ("mere continuation" exception). A 34-year-old case, Fish v. Amsted Indus. Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985), decided the scope of how these exceptions are applied, though it was a close decision that has sparked debate over the years. Among other things, this case seeks clarification of the scope of a successor company's liabilities in light of Fish and subsequent case law.

Here, we have Lunda Construction Company, a company that holds an unsecured $16 million judgment against a steel fabricator, PDM Bridge, LLC. Through a series of complicated transactions, Veritas Steel, LLC acquired PDM's assets in exchange for PDM getting out from under its outstanding debts to its lenders. Lunda Construction filed a successor liability claim against Veritas Steel, and a fraudulent transfer claim against Veritas Steel and related entities. Both claims are based on Lunda's allegation that Veritas and related entities structured a purchase of all of PDM's assets in exchange for inadequate consideration, and that these transactions in turn prevented Lunda from satisfying its $16 million judgment against PDM.

The circuit court summarily dismissed Lunda's claims by applying the general rule that an acquiring company does not assume the acquired company's liabilities, and deciding that the "de facto merger" and "mere continuation" exceptions do not apply here. The circuit court also dismissed Lunda's fraudulent transfer claims. The Court of Appeals affirmed. Lunda Construction seeks Supreme Court review and offers the following issues:

1. Did the court's decision in Fish v. Amsted Indus. Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (1985), "significantly" refine the court's analysis in Tift v. Forage King Industries Inc., 108 Wis. 2d 72, 322 N.W.2d 14 (1982)?
2. Does Fish require proof of "identity of ownership" to establish successor liability?
3. Did Fish establish a rule of law that an actual transfer of stock or the sell to the buyer is a required element to establish successor liability under the de facto merger and continuation exceptions to rule of successor non-liability even though such a transaction is not a requirement of a statutory merger under Wis. Stat. § 180.1101(2)(c)?

4. Is Wis. Stat. § 242.08(5)(b) a complete defense to the claim [sic] to the fraudulent transaction claim asserted by Lunda in light of this court's recent decision in Springer v. Nohl Electric Products Corp., 2018 WI 48, 381 Wis. 2d 438, 912 N.W.2d 1?

WISCONSIN SUPREME COURT
September 19, 2019
10:45 a.m.

2018AP1129 City of Cedarburg v. Ries B. Hansen

This case, taken on a petition to bypass the Court of Appeals, generally asks the Supreme Court to determine a municipal court's authority to act in a first offense operating while intoxicated (OWI) case that is mischarged due to an unknown prior offense. This case concerns an Ozaukee County Circuit Court decision, Judge Paul V. Malloy, presiding, that held that a municipal court lacks subject matter jurisdiction under those circumstances, and therefore the municipal court conviction against Ries B. Hansen was null and void.

This case asks whether this Court's holding in City of Eau Claire v. Booth, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738, which eliminates subject matter jurisdiction challenges to mischarged first offense OWIs in *circuit court*, also applies to mischarged first offense OWIs in *municipal court*, given that the two types of courts have different constitutional grants of subject matter jurisdiction. The Wisconsin Constitution, Article VII, § 8, grants circuit courts "original jurisdiction in all matters civil and criminal within this state," while Article VII, § 14, grants municipal courts "jurisdiction limited to actions and proceedings arising under ordinances of the municipality in which established."

The municipal court at issue here is the Mid-Moraine Municipal Court, which handles all non-criminal cases, including traffic and ordinance violations, for many of the municipalities in Washington and Ozaukee Counties, including the City of Cedarburg. In 2005, the City of Cedarburg charged Hansen with first offense OWI. Hansen pled guilty. The City did not know that Hansen had a 2003 drunk driving conviction in Florida, and that Hansen's 2005 OWI should have been charged as a second offense OWI and prosecuted by the State in the Ozaukee County circuit court.

Eleven years later, in 2016, Hansen was arrested in Ozaukee County for OWI. The State charged him with OWI and operating with a prohibited alcohol content – both as third offenses.

While that Ozaukee County case was pending, Hansen moved the Mid-Moraine municipal court to vacate his 2005 OWI conviction on the ground that it should have been prosecuted as a criminal offense in the circuit court, and that the municipal court had lacked subject matter jurisdiction over him. The municipal court denied the motion.

Hansen appealed that decision to the circuit court, which overruled the municipal court. The circuit court held that the municipal court did not have subject matter jurisdiction to decide the 2005 OWI charge because it was indeed a criminal matter, and therefore Hansen's 2005 OWI conviction was "null and void."

The City appealed, arguing that under Booth, mischarging an OWI only affects the circuit court's competency, not its subject matter jurisdiction. Because Hansen failed to object to the municipal court's competency to decide his first OWI in 2005, that objection has been forfeited, leaving no reason for that conviction to be vacated. The City insisted that although Booth concerned a challenge to a *circuit court's* subject matter jurisdiction, there was no reason why its holding should not also apply to a municipal court.

In response, Hansen argued that Booth only applies to cases commenced in circuit court –

not to actions improperly commenced in municipal court. A municipality simply lacks jurisdiction to prosecute a case that is factually a criminal matter, Hansen said.

Shortly after the close of briefing in the Court of Appeals, the City filed the bypass petition now before the Supreme Court. It offers the following issue for this court's review: This Court held in City of Eau Claire v. Booth, 2016 WI 65, 370 Wis2d. 595, 882 N.W.2d 738, that when a circuit court handles a first offense OWI that is mischarged due to an unknown prior offense, it is a defect in the circuit court's competency but not the circuit court's subject matter jurisdiction. Id. at ¶ 1. Accordingly, a defendant must timely object to the circuit court's lack of competency or the objection is forfeited. Id.

Is the same true when the mischarged OWI is in a municipal court?

WISCONSIN SUPREME COURT
September 19, 2019
1:30 p.m.

2018AP2162 Town of Wilson v. City of Sheboygan

This case was taken on a petition to bypass the Court of Appeals, filed by the Town of Wilson. The petition challenges an order of the Sheboygan County Circuit Court, Judge Daniel J. Borwoski, presiding, that dismissed the Town of Wilson's efforts to block the City of Sheboygan's annexation of land located in the Town.

Issues concerning annexation have been before the Supreme Court on many occasions. In this instance, it is the inconsistencies and conflicts as to how the contiguity requirement of the annexation statutes has been interpreted and applied that are of concern. Indeed, contiguity has been an issue since the Supreme Court's holding in Town of Mt. Pleasant v. City of Racine, 24 Wis. 2d 41, 127 N.W.2d 757 (1964).

This case involves 247 acres of land along Lake Michigan owned by Kohler Co. Prior to its annexation, the land was located in the Town of Wilson and was more than a mile from the City of Sheboygan. In March 2014, Kohler submitted an application to the Town for a conditional use permit to develop a golf course on this lake-front property. The application was incomplete, and the Town's plan commission suspended its review while Kohler obtained the necessary approvals from the Wisconsin Department of Natural Resources and other regulatory agencies. In February 2017, Kohler said it would complete the application by early fall of 2017.

The Town claims Kohler became concerned about the political climate in the Town, doubted the chances for getting the golf course approved, and began discussing having the golf course connected to Sheboygan. The Town says Kohler built a string of properties to connect the golf course property to Sheboygan. The Town says the string of parcels is more than a mile long and splits individual properties between the Town and Sheboygan; is as narrow as 190 feet at one point between neighboring residential developments; and the parcels used for connection are not part of the targeted golf course development.

Sheboygan approved Kohler's annexation in August of 2017, re-zoned Kohler's land at Kohler's request, and approved a Pre-Annexation Agreement which obligated Kohler to pay legal fees for Sheboygan to defend the annexation.

In September 2017 the Town filed suit, seeking temporary and permanent injunctive relief. The circuit court denied the Town's motion for a temporary injunction, and denied the Town's request for a declaratory judgment and a permanent injunction. The circuit court also denied the Town's request for a stay and injunction pending appeal. The Town appealed, and, after briefing in the Court of Appeals, petitioned this Court for bypass.

The Town of Wilson's petition to bypass raises the following issues:

1. Was the Kohler Company's petitioned-for annexation a contiguous annexation under Wisconsin's annexation statutes, when Kohler admitted it constructed a narrow string of properties to connect its land to Sheboygan in order to avoid the Town of Wilson and its residents and construct a golf course in the Town (and more than a mile away from Sheboygan)?

2. Did the annexation strictly comply with the statutes when the Department of Administration did not certify the population count or estimate set forth in Kohler's petition?
3. Did the annexation strictly comply with the signature requirements in Wis. Stat. § 66.0217(3), Kohler used the "one half" of "assessed value" for measuring signatures, even though no "assessed value" was available for the hundreds of acres of state land Kohler included in the petition, and the "unit of acreage" measure provided in the statute was available to ensure all land in the annexation was accounted for in the signature requirement?
4. Did Kohler's annexation petition satisfy the judicial rule of reason, and specifically the requirements that a need be demonstrated for the annexation, and that Sheboygan did not abuse its discretion in approving the annexation, where Kohler admitted it did not need to annex to Sheboygan but did so because of political opposition to its development in the Town?