WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER 2020

NOTICE: Due to the COVID-19 pandemic, oral arguments during September 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 the WisconsinEye Public Affairs network or on www.wicourts.gov. Summaries of cases to be heard on Sept. 29 will be provided at a later date.

The cases listed below originated in the following counties:

Chippewa
Dunn
Milwaukee
Vilas
Walworth
Waukesha

TUESDAY, SEPTEMBER 8, 2020

9:45 a.m.	18AP283	Moreschi v. V. of Wms. Bay and Tn. of Linn ETZ ZBA
10:45 a.m.	18AP1518	Ted Ritter v. Tony Farrow

FRIDAY, SEPTEMBER 11, 2020

9:45 a.m.	18AP594-CR	State v. Leevan Roundtree
10:45 a.m.	18AP731-CR	State v. Kevin L. Nash

MONDAY, SEPTEMBER 14, 2020

9:45 a.m.	18AP858-CR	State v. Brian L. Halverson
10:45 a.m.	18AP2104	State v. Jamie Lane Stephenson

TUESDAY, SEPTEMBER 29, 2020 (Summaries to be provided at a later date)

9:45 a.m.	19AP2397/ 20AP112	Timothy Zignego v. Wisconsin Elections Commission
10:45 a.m.	20AP557-OA	Mark Jefferson v. Dane County

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
September 8, 2020
9:45 a.m.

2018AP283 Moreschi v. Village of Williams Bay and Town of Linn ETZ Zoning Board of Appeals

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a judgment of the Walworth County Circuit Court, Judge David M. Reddy, presiding, affirming the Board's decision to grant the setback variance application.

William and Suzanne Edwards and Gail Moreschi owned neighboring properties in Lake Geneva. The Edwards decided to tear down their existing structure and build a new residence. In November 2016, the Edwards applied for a variance from the setback requirements of Village of Williams Bay Extraterritorial Zoning (ETZ) Ordinance § 18.1703M(D).[1]

On May 23, 2017, the Village of Williams Bay and Town of Linn Extraterritorial Zoning Board of Appeals (the Board) held a public meeting and voted to grant the application. Moreschi opposed the variance request and subsequently filed a complaint with the circuit court seeking certiorari review of the Board's decision. Moreschi filed this action before the Board had approved and finalized the minutes from the public hearing. Moreschi then obtained meeting minutes using an open records request. After the next meeting, the Board submitted the written decision – which contained an extended narrative on the Board's factual findings and conclusions and was signed by the four Board members who granted the application – to the circuit court as part of the record to be reviewed in the certiorari action. The circuit court affirmed the Board's decision based on the record including the Board's written decision.

Moreschi appealed, challenging two aspects to this case: what the Board decided, and the record upon which it made its decision. Moreschi contends that the court should review the transcript of the oral ruling from the May 23 meeting, or alternatively, the meeting minutes she obtained through her open records request because the written decision was finalized after the certiorari action was filed. The Court of Appeals noted that it was not immediately clear what constituted an appealable decision of the Board, but concluded that "the decision" must be something written and signed by the Board, so the written decision was correctly included in the record as the appealable decision.

The court then reviewed whether Board failed to follow ETZ Ordinance § 18.1716(H), which dictates the Board may only grant a variance if it finds – and indicates in its meeting minutes – that five conditions exist beyond a reasonable doubt: preservation of intent, exceptional circumstances, economic and self-imposed hardship not sole basis, preservation of property rights, and absence of detriment. The written decision completed after litigation commenced included these five conditions, but the initial meeting minutes that Moreschi received did not. The Court of Appeals determined that because the decision was determined based on the written decision, as opposed to the minutes or a transcript of the hearing, the Board had properly reached its decision.

[1] The ordinance requires that unsewered single-family residences maintain minimum setbacks of twenty-five feet for rear yards and fifteen feet for side yards. ETZ Ordinance § 18.1703M(D). The Edwards sought a rear-yard setback of eighteen feet and a side-yard setback of six feet.

The Court of Appeals affirmed and Moreschi now seeks supreme court review.

Moreschi raises the following issues for review:

1. The novel question of whether a board can create new minutes and new decisions after receipt of a writ of certiorari action must be addressed by the Supreme Court to preserve the due process protections of writ certiorari actions.
2. The Court of Appeals' majority opinion's determination of what constitutes a "triggering event" for purposes of appeal on a writ of certiorari conflicts with Wis. Stats. § 62.23(7); ETZ ordinances; or the Court of Appeals' holding in Zelman.
3. Whether the Board's failure to follow the correct theory of law is a question of law, not fact that is likely to recur unless resolved by the Supreme Court.

WISCONSIN SUPREME COURT
September 8, 2020
9:45 a.m.

2018AP1518 Ritter v. Farrow

This is a review of a decision of the Wisconsin Court of Appeals, District III that affirmed the grant of summary judgment to Bibs Resort Condominium, Inc. by the Vilas County Circuit Court, Judge Michael H. Bloom, presiding.

In 1986, a corporation owned by Ted and Carolyn Ritter (the Ritters), Bibs Resort, Inc. (BRI), purchased a lakefront resort property on Little St. Germain Lake. Upon purchasing the property, the Ritters changed the name of the resort to "Bibs Resort." For the next 12 years BRI operated the resort and marketed it to the public under that trade name.

In May 1998 BRI converted the property to a condominium. The declaration created a 13-unit condominium, called Bibs Resort Condominium, and a condominium association to be called Bibs Resort Condominium, Inc. (the Association). The Ritters, through BRI, continued to own all of the condominium units (i.e., cottages and the main building) and to rent out the cottages under the name "Bibs Resort." Between 1998 and 2005 BRI sold four units to outside buyers. Each buyer entered into a management agreement with BRI, under which BRI rented out the cottage on behalf of the unit owner under the name "Bibs Resort."

In 2006, Tony and Arlyce Farrow, d/b/a/ Farrow Enterprises, Inc. (FEI), purchased condominium Unit 13 (the main resort building) and the business known as "Bibs Resort." BRI also sold FEI the personal property used in operating the resort business (e.g., fishing boats, bedding, cleaning supplies, bar inventory, etc.). After the asset sale was completed, the Ritters changed the name of BRI to Ritter Enterprises, Inc., which continued to own a number of condominium units. All of the unit owners entered into new property management contracts with FEI, which could be terminated by either party upon 90-day notice.

Disputes emerged about the operation of the resort. In or around February 2008, Ritter Enterprises, Inc. and the other unit owners cancelled their property agreements with FEI. Ritter Enterprises, Inc. then resumed renting out the cottages at the resort, now using the name "Bibs Cottages." This case concerns whether the Ritters or their corporation infringed on any trademark rights held by the Farrows or FEI by using the name "Bibs Resort" after the sales transaction with the Farrows and FEI.

In February 2010 the Ritters filed a lawsuit against the Farrows in small claims court, asserting various claims that are not relevant to this appeal. The Farrows (or FEI) asserted multiple counterclaims, including trademark infringement arising out of Ritter Enterprises, Inc.'s continued use of the name "Bibs Resort." After the Ritters' initial claims were dismissed, the case proceeded toward trial on the Farrows' counterclaims. One month before the trial, the Association moved to intervene on the ground that it had an interest in the name "Bibs Resort Condominium." The circuit court denied the motion to intervene. It subsequently held a jury trial, at which the jury found that the Ritters had infringed upon the trade name, Bibs Resort, which the jury found to belong to the Farrows (or FEI). The Ritters appealed. The Court of Appeals ruled that the circuit court had erred in denying the Association's motion to intervene.

It therefore vacated the circuit court's judgment in favor of the Farrows and remanded the case to the circuit court.

On remand both the Ritters and the Association filed motions for summary judgment. The circuit court granted the Association's motion. It found that (1) "Bibs Resort" was a trade name entitled to trademark protection, (2) that name "became part of" the Association at the time of the 1998 condominium conversion, (3) the "[p]rinciples applicable to collective trademarks compel[led] the conclusion that each individual owner of a condominium unit belonging to [the Association] holds rights in and to [the name] 'Bibs Resort'" so there is no exclusivity of ownership, which prevents the Farrows from prevailing on their trademark infringement claim. The circuit court determined that the factual dispute over whether the 2006 transaction was intended to transfer the trade name "Bibs Resort" and its goodwill was immaterial because the Ritters (at that time BRI) did not have exclusive ownership of the trade name at the time of the transaction so they could not transfer exclusive ownership of the name to the Farrows.

The Farrows appealed, and the Court of Appeals affirmed, although on a different legal basis than the circuit court had used. The Court of Appeals concluded that there was an implicit agreement between the Ritters (BRI) and the Association to sell the trademark "Bibs Resort" to the Association when the condominium was declared. Thus, no trademark could have been transferred to the Farrows and FEI in the 2006 sales transaction. This reached the same result as the circuit court, but it differed in the rationale because the Court of Appeals rejected the circuit court's reliance on the law of collective trademarks to conclude that each unit owner also owned an interest in the trademark "Bibs Resort."

The Farrows petitioned for and were granted supreme court review. The Farrows' petition lists the following issues to be reviewed:

1. Does Wisconsin trademark law permit an implied assignment of trademarks to a new owner when no other business assets or services are transferred?
2. Does Wisconsin's Condominium Ownership Act require that control of business services and corresponding trademarks transfer to a condominium association when the real property where the services are provided is converted to a condominium?

WISCONSIN SUPREME COURT
September 11, 2020
9:45 a.m.

2018AP594 State v. Roundtree

This is a review of a decision of the Wisconsin Court of Appeals, District I, which affirmed a Milwaukee County Circuit Court judgment, William S. Pocan and David A. Hansher, presiding, that convicted the defendant, Leevan Roundtree, of being a felon in possession of a firearm and its order that denied his postconviction motion.

This case concerns two questions of constitutional law: whether the Wisconsin firearm ban for all felons, as codified by Wis. Stat. § 941.29(2), is constitutional when applied to someone previously convicted of the nonviolent felony of failing to pay child support, and whether an individual can mount an as-applied constitutional challenge after entering a guilty plea or whether the guilty plea waives any such challenge.

In 2003, Leevan Roundtree was convicted of two felony counts of failing to pay child support. In 2015, Roundtree was charged with being a felon in possession of a firearm, contrary to Wis. Stat. § 941.29(2) (2013-14). Roundtree pled guilty to the charged offense, and the circuit court accepted his plea. The circuit court sentenced Roundtree to 18 months of initial confinement and 18 months of extended supervision.

Roundtree then filed a postconviction motion, in which he argued that Wis. Stat. § 941.29(2) was unconstitutional as applied to him because his prior felony conviction had been for a nonviolent crime. The circuit court denied the motion on the basis that Roundtree had waived any constitutional challenge to the statute when he had entered his guilty plea.

On appeal Roundtree renewed his as-applied constitutional challenge to the felon-in-possession statute and argued that his as-applied challenge was not subject to the guilty plea waiver rule. The Court of Appeals did not reach the waiver issue because it concluded that Roundtree's as-applied challenge was foreclosed by its prior rulings that the firearm possession ban constitutionally applies to all felonies-both violent and nonviolent.[2] Accordingly, the Court of Appeals affirmed Roundtree's conviction and the denial of his postconviction motion.

Roundtree's petition for review, which the Supreme Court granted, listed the following issues as presented for review by the Supreme Court:

1. Is Wis. Stat. § 941.29(2) unconstitutional as applied to a person convicted of failure to pay child support?
2. In the aftermath of *Class v. United States*, ____U.S. ___, 138 S. Ct. 798 (2018), does a guilty plea waive a claim that the statute of conviction is unconstitutional as applied?

[2] In State v. Pocian, the Court of Appeals held "that the ban on felons possessing firearms is constitutional and that the ban extends to all felons." State v. Pocian, 2012 WI App 58, ¶2, 341 Wis. 2d 380, 814 N.W.2d 894; see also State v. Culver, 2018 WI App 55, 384 Wis. 2d 22, 918 N.W.2d 103, rev. denied, 2019 WI 8, 385 Wis. 2d 206, 923 N.W.2d 165.

WISCONSIN SUPREME COURT
September 11, 2020
9:45 a.m.

2018AP731-CR State v. Nash

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that affirmed a judgment of the Waukesha County Circuit Court, Judge Ralph M. Ramirez, presiding, convicting him of second degree sexual assault of a child and an order denying his post-sentencing motion to withdraw his entry of an Alford plea.

Wisconsin case law defines an Alford[3] plea as a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. Under State v. Smith[4], there must be "strong proof of guilt" for a court to find a factual basis to accept an Alford plea. This case explores what method a court should use to ensure this standard is met.

Kevin Nash was charged in an amended criminal complaint with (1) first-degree sexual assault of a child under age 12, based on an allegation that he had sexual intercourse with C.W.; and (2) repeated sexual assault of A.N. As the trial date drew near, the parties appeared at a plea hearing. The State filed an amended information to a single, lesser charge: sexual assault of a child under 16. The defense filed a completed plea questionnaire and waiver of rights form, which indicated that Nash was pleading no contest to the charge. Nash's counsel explained that the plea could be understood as an Alford plea. Nash told the court that his plea was no contest, and took the position that, while he had not in fact committed the charged offense, he understood that the State had enough evidence that he could be found guilty at trial. The court accepted the negotiated plea offered by the parties.

After sentencing, Nash filed a motion arguing in pertinent part that the court did not find strong proof of guilt for his Alford plea. The court rejected Nash's argument, in part on the ground that the criminal complaint had provided the court, at the time of the plea, with details describing proof of Nash's alleged sexual intercourse with an identified underaged person.

Nash appealed, unsuccessfully. The Court of Appeals held that the amended complaint and the representations of the prosecutor described "strong evidence of guilt" on each of the two elements of the offense: sexual intercourse and age of the victim. The Court of Appeals also rejected any suggestion that the strong-evidence-of-guilt standard requires the State to elicit testimony, submit exhibits, update witness lists, or otherwise offer evidence in a trial-like mode as part of the plea process.

Nash now presents the following issue for review:

> When accepting a guilty plea under Alford v. North Carolina, 400 U.S. 25 (1970), a circuit court may find there is a factual basis for the plea only if there is "strong proof of guilt." May a court find strong proof of guilt based only on the information contained in the criminal complaint, or must the court hear additional evidence before it can make that finding?

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[3] North Carolina v. Alford, 400 U.S. 25, 37-38 (1970)

[4] State v. Smith, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996)

WISCONSIN SUPREME COURT
September 14, 2020
9:45 a.m.

No. 2018AP858-CR State v. Halverson

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that reversed the judgment of the Chippewa County Circuit Court, Judge Steven R. Cray, presiding, granting a motion to suppress

This case concerns whether an incarcerated person is per se "in custody" for Miranda purposes.[5] In July 2016, Brian L. Halverson was accused of stealing and destroying several documents. The investigating police officer learned that Halverson was then detained at the Vernon County jail, so he asked to speak with Halverson by telephone. The officer introduced himself to Halverson, explained why he was calling, and questioned Halverson on his knowledge of the destroyed documents. The entire phone call lasted 3-4 minutes. The officer didn't raise his voice or threaten Halverson but did not provide Halverson with a Miranda warning. Halverson eventually admitted that he had destroyed the documents. Halverson was subsequently charged with criminal damage to property and misdemeanor theft, both as repeat offenses.

Halverson then moved to suppress all evidence obtained and derived from his phone call with the police officer. Halverson asserted that because he was in jail, his conversation with the officer was a custodial interrogation such that the officer was required to inform Halverson of his Miranda rights before questioning him. It is not disputed that Officer Danielson failed to do so. At the suppression hearing, the circuit court granted Halverson's suppression motion, citing State v. Armstrong, 223 Wis. 2d 331, 355, 588 N.W.2d 606 (1999) (holding "that a person who is incarcerated is per se in custody for purposes of Miranda.")

The State appealed and the Court of Appeals reversed. The Court of Appeals concluded that the United States Supreme Court's decision in Howes v. Fields, 565 U.S. 499, 507 (2012), effectively overruled the per se custody rule from State v. Armstrong. Instead, the Court ruled that the test for whether a person is in custody is an objective, two-part inquiry in which courts analyze the totality of the circumstances surrounding the interrogation. Accordingly, the Court of Appeals followed the totality-of-the-evidence standard from Howes. The court reasoned that during the telephone call Halverson was alone and unrestrained, and he never requested an attorney. The court also considered the short duration of the call and the officer's calm demeanor. Based on these circumstances, the Court of Appeals determined that a reasonable person would have felt comfortable ending the phone call, so Halverson was not in Miranda custody. The Court of Appeals declined to consider Halverson's argument that Wisconsin's state constitution might offer broader protections than the federal constitution, such that the "per se" custody rule should be maintained.

Halverson now presents the following issues for review:

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[5] In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that, under the Fifth Amendment, law enforcement officers must inform individuals in their custody of their right to an attorney and right to remain silent.

1. Does incarceration automatically produce Miranda custody under the Wisconsin Constitution?
2. Did the totality of the circumstances surrounding the defendant's interrogation put him in Miranda custody?

WISCONSIN SUPREME COURT
September 14, 2020
9:45 a.m.

2018AP2104 State v. Stephenson

This is a review of a decision of the Wisconsin Court of Appeals, District III that affirmed the decision denying the petition for discharge by Dunn County Circuit Court, Judge Rod W. Smeltzer, presiding.

In 2011, the State filed a petition to commit Stephenson as a sexually violent person pursuant to ch. 980[6]. Following a bench trial in 2012, the circuit court found that Stephenson qualified as a sexually violent person and ordered him committed for institutional care in a secure mental health facility. Stephenson filed petition for discharge in January of 2017. A hearing on the petition was held in October 2017.

At a discharge hearing, the State must prove that Stephenson continues to meet the requirements for commitment as a sexually violent person: (1) that Stephenson had been convicted of a sexually violent offense; (2) that Stephenson had a mental disorder; and (3) that Stephenson was dangerous to others because he had a mental disorder that made it more likely than not that he would engage in one or more future acts of sexual violence. There was no dispute about the first element, so the testimony at the hearing focused on the other two elements.

The State called psychologist Donn Kolbeck, a member of the evaluation unit at Sand Ridge Secure Treatment Center where Stephenson has been confined since 2011, to testify at the discharge hearing. Kolbeck concluded in the 2017 evaluation that Stephenson did not "reach the standard of more likely than not to commit another act of sexual violence or another sexually violent offense." Kolbeck said Stephenson had an approximately 40.6% risk of being arrested or charged with a sexual offense within ten years of release. Thus, Kolbeck opined it was not more likely than not that Stephenson would commit a future act of sexual violence. At the end of the hearing, the circuit court ultimately concluded that Stephenson continued to meet the criteria for commitment as a sexually violent person, and it denied the discharge petition. It did grant Stephenson supervised release. A motion for postcommitment relief was later denied.

Stephenson appealed and argued that the State failed to meet its burden to prove that he was dangerous because the State did not introduce expert testimony that it was more likely than not he would commit a future act of sexual violence. The Court of Appeals said neither this court nor the United States Supreme Court

[6] As relevant to this appeal, a sexually violent person is "a person who has been convicted of a sexually violent offense … and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." WIS. STAT. § 980.01(7). The term "mental disorder" means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Sec. 980.01(2). "Likely" means "more likely than not." Sec. 980.01(1m).

have squarely addressed whether expert testimony is required for a determination on the question of future dangerousness. The Court of Appeals agreed that a ch. 980 committee's dangerousness must be connected to his or her mental disorder, but it agreed with the State that in testifying that a person has a qualifying mental disorder, an expert has already linked the person's dangerousness to his or her mental disorder. The Court of Appeals affirmed the circuit court decision.

Stephenson now raises two issues for review:

1. To prove that a person meets the criteria for commitment under Chapter 980, must the State present expert opinion testimony that the person is "dangerous" as defined under ch. 980?

2. Should the standard of review of the sufficiency of the evidence of dangerousness in a Chapter 980 case be changed to require that a reviewing court conduct a de novo review of whether the evidence satisfies the legal standard of dangerousness?