WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
MARCH 2018

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
Dodge
Lafayette
Milwaukee
Washington
Waukesha

MONDAY, MARCH 12, 2018

9:45 a.m.	16AP2483-CR	State v. Patrick H. Dalton
10:45 a.m.	11AP48-D/	Office of Lawyer Regulation v. James M. Schoenecker
	15AP275-D	Office of Lawyer Regulation v. James M. Schoenecker
1:30 p.m.	16AP2196-CR	State v. Steven T. Delap

WEDNESDAY, MARCH 14, 2018

9:45 a.m.	16AP2017-CR	State v. Andre L. Scott
10:45 a.m.	16AP537	Adams Outdoor Advertising v. City of Madison
1:30 p.m.	14AP2187-CR	State v. Kyle Lee Monahan

FRIDAY, MARCH 16, 2018

9:45 a.m.	16AP1745-CR	State v. Michael L. Cox
10:45 a.m.	16AP883-CR	State v. Jamal L. Williams

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 argument in Madison, contact media coordinator Hannah McClung at (608) 271-4321. Synopses provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Monday, March 12, 2018
9:45 a.m.

2016AP2483-CR State v. Patrick H. Dalton

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Washington County, Judge Todd K. Martens, affirmed.
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Patrick H. Dalton, Defendant-Appellant-Petitioner

Issues presented: A central issue in this drunken driving appeal is whether the Court of Appeals' decision conflicts with the recent United States Supreme Court case, Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). Birchfield held that, under Fourth Amendment principles, states may not criminalize a person's refusal to a blood draw.

More specifically, the Supreme Court reviews:

- Under Missouri v. McNeely[, 133 S. Ct. 1552 (2013)] and Birchfield may a circuit court impose a harsher criminal punishment because a defendant exercised his constitutional right to refuse a warrantless blood draw?
- Was Patrick H. Dalton denied the effective assistance of counsel where his attorney failed to move to suppress the blood evidence on grounds that police lacked exigent circumstances to forcibly draw his blood without a warrant?

Some background: Dalton was charged with operating a vehicle while intoxicated (OWI) and operating a vehicle with a prohibited alcohol concentration (PAC), both as second offenses, and operating a vehicle with a revoked driver's license (OAR).

The charges stemmed from a single car crash in the village of Richfield on Dec. 12, 2013, in which Dalton was the driver. Witnesses said that Dalton was driving nearly 100 miles per hour and was swerving the car back and forth; the car then went into a ditch, rolled over several times, and came to a rest on its roof. Both Dalton and his passenger were injured. Dalton was air-lifted to a hospital in Milwaukee; there, two hours after the crash, a deputy sheriff had a nurse draw Dalton's blood without first obtaining a warrant. Prior to the blood draw, the deputy read the Informing the Accused form to Dalton; Dalton refused to consent. Dalton's blood alcohol content was 0.238 percent.

On the advice of counsel, Dalton decided not to file a motion to suppress the blood evidence. Instead, Dalton decided to plead no contest to OWI, as a second offense, and with a revoked driver's license. The charge for operating a vehicle with a PAC was dismissed and read in. The State recommended that the court impose 120 days in jail on the count charging OWI, to run consecutive to six months in jail on the count charging OAR.

Postconviction, Dalton moved to withdraw his plea because trial counsel was allegedly ineffective in: (1) not seeking suppression of the blood draw evidence that was obtained without a warrant; and (2) not seeking resentencing because the court punished him for exercising his constitutional right to refuse to consent to a blood draw.

The trial court denied Dalton's postconviction motion without an evidentiary hearing.

In a July 2016 decision, the Court of Appeals reversed and ordered the trial court: (1) to hold a Machner hearing (State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905) (Ct. App. 1979) on the ineffective assistance claim; and (2) to address Dalton's resentencing claim in light of the United States Supreme Court's decision in Birchfield. State v. Dalton, No. 2016AP6-CR.

Dalton's trial counsel testified at the Machner hearing that before taking the plea, Dalton expressed concerns that the police had taken his blood without a warrant. The lawyer said he considered whether there would be grounds to suppress the blood evidence, but concluded that there were exigent circumstances under McNeely that justified the withdrawal of Dalton's blood without a warrant.

The attorney advised Dalton that such a motion would lack merit, and Dalton decided to accept a plea. Dalton testified that if he thought there was a legal basis for a motion to suppress, he would have wanted the attorney to pursue it.

The trial court denied Dalton's motion to vacate the plea based on ineffective assistance of counsel. The trial court ruled that it would have denied a motion to suppress by Dalton because exigent circumstances existed that obviated the need to obtain a warrant.

The trial court held that with the passage of two hours, there was "a legitimate fear about the dissipation of alcohol in [Dalton's] system," which was an exigent circumstance to take into consideration.

The Court of Appeals affirmed, holding that Dalton's Fourth Amendment rights were not violated, as there were exigent circumstances that justified the warrantless draw of Dalton's blood.

Before the Supreme Court, Dalton argues, among other things, that the trial court erred when it considered his refusal to consent to the blood draw as an aggravating factor for sentencing. Dalton also argues that there were no exigent circumstances here that would justify the warrantless blood draw. He claims that the police had probable cause to get a warrant within minutes of arriving on scene, but they chose to prioritize other activities ahead of getting a warrant.

Wisconsin Supreme Court
Monday, March 12, 2018
10:45 a.m.

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

2011AP48-D and 2015AP275-D OLR v. James M. Schoenecker

In this case, Attorney James M. Schoenecker has appealed the referee's recommendation that his petition for reinstatement of license to practice law in Wisconsin be denied.

Schoenecker was licensed to practice law in Wisconsin in 2004. In 2011 his license was suspended for three years. Much of the misconduct arose out of his personal and professional relationship with Schoenecker's former fiancé. Schoenecker and the woman opened a joint checking account in 2007. She also obtained a home equity line of credit and made a loan of $48,500 to Schoenecker. Schoenecker executed a promissory note whereby he promised to repay the loan with interest. Two days after making the loan to Schoenecker, his former fiancé learned that Schoenecker had made cash withdrawals from her checking account at a casino, leaving a negative balance in her account. The woman closed the joint checking account and ended her engagement to Schoenecker.

In 2008, Schoenecker used the woman's personal information to enter her business account without her permission and make checks payable to himself. As a result, Schoenecker was charged in two criminal proceedings.

In a Walworth County case, he pleaded guilty to one felony count of identity theft, was placed on two years of probation, and ordered to make restitution and pay court costs.

In a Waukesha County case, Schoenecker pleaded guilty to a misdemeanor charge of theft-moveable property. The Waukesha County Circuit Court imposed and stayed a sentence of four months in jail and placed Schoenecker on probation for one year. He was also ordered to pay his former fiancé restitution and pay court costs.

In 2008, while an associate at a law office in Delavan, Schoenecker set up his own separate law firm on the side and failed to inform the firm where he was an associate.

The final part of Schoenecker's misconduct, which gave rise to the three-year suspension, involved making fraudulent statements in his personal bankruptcy proceeding.

In 2016, Schoenecker received an additional one year license suspension as a result of his involvement in a business partnership he entered inti in 2012 with two other men. The three men established a limited liability company called Game Master, LLC. The other men contributed money as capital contributions. Schoenecker deposited the bulk of the money into his own personal checking account, used company funds to pay his personal credit card bills, and withdrew funds from company accounts to gamble at a casino.

In January 2017, Schoenecker filed a petition seeking the reinstatement of his law license. The OLR opposed reinstatement. Following a hearing, Referee James W. Mohr, Jr. recommended that the reinstatement petition be denied.

Schoenecker testified at the reinstatement hearing that he has sought treatment for his gambling addiction, attends Gamblers Anonymous meetings, and has self-banned from a casino. Schoenecker's former fiancé, as well as one of the Game Master partners, and an attorney at the law office all testified and opposed Schoenecker's reinstatement.

The referee said the case was "a difficult matter" but ultimately concluded that given the seriousness of Schoenecker's past misconduct, failure to account for moral lapses other than blaming a gambling addiction, and failure to present significant testimony necessary to overcome the strong testimony of three of his victims, the referee could not in good conscience say that Schoenecker has met the high burden of proof imposed on him to warrant reinstatement of his license.

Schoenecker argues that the referee's recommendation is not supported by the evidence and that the testimony of the three witnesses was based on outdated information and hearsay. The OLR argues that the referee correctly concluded that Schoenecker failed to meet his burden of proof for reinstatement.

The Supreme Court is expected to decide whether Schoenecker's law license should be reinstated.

Wisconsin Supreme Court
Monday, March 12, 2018
1:30 p.m.

2016AP2196-CR State v. Delap

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dodge County, Judge Steven G. Bauer, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Steven T. Delap, Defendant-Appellant-Petitioner

Issue presented: This case examines whether the doctrine of "hot pursuit" always justifies a forcible warrantless entry into the residence of one suspected of minor criminal activity. Specifically, the Supreme Court reviews whether the arrest made here is subject to a separate Fourth Amendment reasonableness analysis even if the prerequisites for the "hot pursuit" exception to the warrant requirement are present. The Court considers this issue in light of Welsh v. Wisconsin, 466 U.S. 740 (1984) and State v. Weber, 2016 WI 96, 372 Wis. 2d 202, 887 N.W.2d 554.

Some background: Two Dodge County Sheriff's deputies planned to execute two arrest warrants on Steven T. Delap in Neosho. The deputies were apparently unaware of the specific underlying offenses related to the warrant and did not have a photo of Delap. However, they knew that he was a white male between 25 and 30 years old, that he had a history of resisting and assaulting law enforcement officers, and that he had recently fled from two traffic stops.

The officers parked a block away from the residence where they believed Delap to be residing and approached the home on foot. As they approached, they saw a man in the street and another man walking down the driveway from Delap's residence. When the man in the driveway saw the officers, he turned and began to walk back toward the house.

One of the officers believed that the man in the driveway was Delap, which turned out to be correct. The officer pointed his flashlight at Delap and shouted, "Stop, police." Delap then began to run toward the residence. The officer ran after Delap. Delap entered the rear door of the house and tried to close the door, but the officer stopped the door before it latched. The other officer arrived, and the two of them forced the door open. They entered the house and arrested Delap.

The state charged Delap with obstructing an officer and possession of drug paraphernalia, as a repeat offender. Both of the charged offenses were misdemeanors. Delap represented himself in the circuit court and filed a motion to suppress, arguing that the warrantless arrest in his home was unlawful. The circuit court denied the motion, concluding that the officers had probable cause to believe that Delap had obstructed an officer by fleeing, which was a jailable offense, and that they were justified in following him into his home to arrest him because they were in hot pursuit.

After losing his suppression motion, Delap pled no contest to the two charges and filed a notice of appeal. Delap argued that the exigent circumstance of hot pursuit was not present because he was not being continuously pursued from a crime scene. The Court of Appeals rejected this argument, stating that the crime scene was the area in the driveway from which

Delap had fled –where he had obstructed the officer's investigation into his identity – and that the officers had continuously chased Delap into his house.

Delap also argued that even if the officers had probable cause and were engaged in hot pursuit of a fleeing suspect, the warrantless, forced entry into his home to arrest him was unlawful because it was unreasonable under the Fourth Amendment for a minor offense – forcibly continuing into his house when an officer had told him to stop.

Delap asserts that the Court of Appeals' decision upholding the officer's forcible entry into his home is inconsistent with both the reasoning of Welsh and statements in the lead opinion in Weber.

Wisconsin Supreme Court
Wednesday, March 14, 2018
9:45 a.m.

2016AP2017-CR State v. Andre L. Scott

Supreme Court case type: Bypass
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Jeffrey A. Kremers
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Andre L. Scott, Defendant-Appellant

Issues presented:

- Whether, despite [State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1994),] a circuit court may use § 971.14(4)(b) to require a nondangerous defendant to be treated to competency against his will, and if so, whether § 971.14(4)(b) is unconstitutional on its face because it does not comport with [Sell v. United States, 539 U.S. 166 (2003)].
- Whether an order requiring an inmate to be involuntarily treated to competency is a nonfinal order that should be challenged by a Wis. Stat. § 809.50 petition for interlocutory appeal or a final order of a special proceeding that is appealable as a matter of right via Wis. Stat. § 808.03(1).
- Whether the court of appeals exercises its discretion erroneously when it denied a motion for relief pending appeal without explaining its reasoning: that it applied the proper legal standard to the facts of record and used a rational process to reach a reasonable decision.

Some background: In 2009, a jury found Andre L. Scott guilty of battery, disorderly conduct, and kidnapping. He was sentenced to 13 years and three months of initial confinement and ten years of extended supervision. After Scott filed a timely notice of intent to pursue postconviction relief, his attorney abandoned him.

In 2015, the Court of Appeals reinstated Scott's postconviction/appellate deadlines, and the State Public Defender appointed new counsel to represent him.

Newly appointed counsel had concerns about Scott's ability to assist with post-conviction proceedings and make decisions, so counsel asked for a competency evaluation. As a result of the evaluation, Scott was diagnosed with schizoaffective disorder. The evaluator, Dr. Robert Rawski concluded that Scott demonstrated a lack of substantial capacity to coherently explain his understanding of legal proceedings and was substantially incapable of assisting in his defense.

Doctors and staff at the Wisconsin Resource Center who previously evaluated Scott did not find him to be dangerous, and he had not previously been medicated against his will. Dr. Rawski opined, "Even though he has not been treated for the last nine years, it is more likely than not that Mr. Scott's competency to proceed can be restored with institution of appropriate psychotropic treatment."

In August 2016, the circuit court held a hearing where Scott considered himself "competent to proceed." Dr. Rawski testified and confirmed that Scott has either schizophrenia or schizoaffective disorder; his symptoms are treatable; but Scott has declined medication because he lacks insight into his illness and the need for treatment. Dr. Rawski said he did not regard Scott as dangerous or threatening.

The circuit court held that Scott was not competent to proceed and not competent to refuse medication and treatment. The court ordered involuntary treatment. Defense counsel said Scott did not want an involuntary medication order and likely would not have pursued an appeal if a medication order were required. Postconviction counsel also pointed out Scott had never been found to be dangerous to himself or anyone else. The circuit court ordered that Scott be involuntarily medicated, staying its involuntary medication order for 30 days so Scott could seek appellate relief.

Scott filed a petition for leave to appeal. The court of appeals extended the stay of the medication order until Oct. 14, 2016. On Oct. 7, 2016, the appellate court denied leave to appeal and lifted the stay. On October 11, 2016, Scott appealed the involuntary medication order as a matter of right and filed an emergency motion to stay the medication order pending appeal. On Oct. 14, 2016, the court of appeals denied the stay but allowed the direct appeal to proceed. As a result, the Department of Health Services began medicating Scott.

On May 8, 2017, the circuit court found Scott competent to proceed in postconviction proceedings and reinstated his appeal.

Scott acknowledges that the government has an essential state interest to subject an inmate to involuntary treatment where the inmate is dangerous to himself or others and the medication is in the inmate's medical interest. See Riggins v. Nebraska, 504 U.S. 127, 135 (1992). Scott also agrees that in some circumstances, rendering a defendant competent to stand trial may also qualify as an essential or overriding state interest, but the U.S. Supreme Court has said those instances may be rare. See Sell, 539 U.S. at 180.

Scott asks the Supreme Court to determine whether, under Debra A.E., a postconviction court may use § 971.14(4)(b) to order that a nondangerous defendant be involuntarily treated to competency and, if so, whether the statute is facially unconstitutional.

Scott argues that the circuit court violated Debra A.E. and his right to substantive due process when it required him to be involuntarily medicated. He says the state had the burden to prove he was incompetent to participate in postconviction proceedings, but it only asked Dr. Rawski if Scott was capable of understanding the advantages, disadvantages, and alternatives to treatment and the state never asked, nor did the doctor's report opine, whether Scott failed the standard prescribed by Debra A.E. Scott says the circuit court's conclusion that once Scott invoked his right to appeal the court had the right to protect the appellate process by forcibly medicating him was a clear violation of Debra A.E.

Scott says the state incorrectly argues that Scott forfeited or waived his right to argue that the circuit court order violated Sell, but Scott says a facial challenge to the constitutionality of a statute is a matter of subject matter jurisdiction which cannot be waived.

A decision by the Supreme Court is expected to establish the appellate procedure for challenging a circuit court order requiring a defendant to be treated to competency against his will.

Wisconsin Supreme Court
Wednesday, March 14, 2018
10:45 a.m.

2016AP537 Adams Outdoor Advertising Limited Partnership v. City of Madison

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Richard G. Niess, affirmed
Long caption: Adams Outdoor Advertising Limited Partnership, Plaintiff-Appellant-Petitioner, v. City of Madison, Defendant-Respondent

Issue presented: This case involves a dispute between the city of Madison and an advertising company that owns a legal non-conforming (grandfathered) billboard along the Beltline Highway. The billboard is two-sided. The city authorized construction of a pedestrian and bicycle bridge over the Beltline that blocks view of the sign from motorists traveling east. The Supreme Court reviews whether that obstruction constitutes a taking of a protected property interest of the property owner.

Some background: Adams Outdoor Advertising owns an irregularly shaped parcel next to the Beltline Frontage Road in Madison, just east of where the Cannon Ball Bicycle bridge was built across the Beltline Highway in 2013. Adams has a two-sided billboard on that property. No other building or structure is located on the parcel.

The billboard was constructed in 1995, and Adams bought the property with the existing billboard in 2007. Although the zoning regulations have changed over time, Adams' billboard is a legal non-conforming use, which means that Adams cannot change the billboard's height or location. The bridge is near, but not on Adams' property, and the city did not take any of Adams' land for the bridge.

Adams filed suit, alleging four grounds for relief: (1) the city's obstruction of the west-facing side of its billboard resulted in an unconstitutional taking (a deprivation of all or substantially all the beneficial use of the property), requiring compensation as an inverse condemnation under Wis. Stat. § 32.10 (2015-16); (2) by allowing a nearby Culver's to move its sign but not allowing Adams to make any changes, the city violated Adams' constitutional right to equal protection; (3) Adams was denied procedural due process; and (4) the bridge is a private nuisance that the city must abate.

The trial court granted summary judgment to the city on all claims.

In its briefing to the Court of Appeals, Adams raised the same four arguments, which were rejected by the Court of Appeals.

Adams argued to the Court of Appeals that it is entitled to relief under the inverse condemnation procedure of Wis. Stat. § 32.10, which allows a landowner to recover just compensation for a taking of its private property. In order to be eligible for relief under Wis. Stat. § 32.10, Adams must first establish that the city has taken a protected property interest of Adams. *See* Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979). Adams argued that the facts demonstrate a taking because the west-facing side of its billboard has lost all economic value.

The city argued that Adams' claim of a taking requiring compensation under constitutional law was foreclosed by two Wisconsin Supreme Court decisions. Specifically, it argued that Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73 (1933) stands for the proposition that a property owner's right to an unobstructed view from the roadway is not a protected property interest. The city also argued that, under Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996), the fact that the east-facing side of the billboard is unaffected means that Adams cannot establish a taking because the property as a whole still retains some value.

Adams argued against this position on a variety of grounds.

Ultimately, the Court of Appeals held that in light of the Randall and Zealy decisions, the trial court properly granted the city summary judgment on Adams' inverse condemnation claim. The city argues that these cases establish that: (1) Adams has no property interest in the continued visibility of its west-facing sign; and (2) in any event, Adams has not shown a taking, given that the east-facing panel of the sign remains fully visible, and Adams' own appraiser has valued the property, after the bridge construction, at $720,000.

Wisconsin Supreme Court
Wednesday, March 14, 2018
1:30 p.m.

2014AP2187-CR State v. Kyle Lee Monahan

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Lafayette County, Judge William D. Johnston, judgment affirmed; order reversed and causes remanded with directions
Long caption: State of Wisconsin, Plaintiff-Respondent-Cross-Appellant, v. Kyle Lee Monahan, Defendant-Appellant-Cross-Respondent-Petitioner

Issue presented: May a reviewing court find a trial error harmless by examining the evidence and drawing inferences in the light most favorable to the state? More specifically here, the Supreme Court reviews whether the Court of Appeals properly found that a guilty verdict in a homicide by intoxicated use of a motor vehicle case was not attributable to an admitted error.

Some background: The event at issue in this case is an August 2011, single-car accident outside Shullsburg involving Kyle Lee Monahan and his girlfriend, Rebecca Cushman. Both were thrown considerable distances from the car in which they were the sole occupants. Neither was wearing a seat belt. Cushman died; Monahan was seriously injured and had to be flown from the scene to a hospital for emergency surgery. Blood tests showed that both Monahan and Cushman were intoxicated; Monahan had a 0.14 Blood-alcohol content (BAC) and Cushman had a 0.112 BAC. According to a GPS evidence admitted at trial, the car was speeding at close to 100 miles per hour at the time of the accident.

Monahan's defense at trial was that Cushman had been driving. He and two other witnesses testified that Cushman had been driving when they left a party north of Shullsburg. Monahan also presented the testimony of a crash reconstruction expert who opined that, based on his investigation, it was possible that either Monahan or Cushman was the driver.

Monahan told first responders at the scene that he "guessed" he was driving or that he "probably" was driving and explained how he lost control of the vehicle. Monahan told a med-flight medic and nurse that he was the driver and, incorrectly, that he was wearing his seat belt.

Following emergency surgery, he informed a hospital nurse that he had gone too fast over a hill and lost control of the car. The state also presented testimony from a crash reconstruction expert whose investigation showed that Monahan was the driver. The state also introduced evidence that Monahan's DNA was found on the driver's side air bag.

GPS showed that the car travelled from the party to Shullsburg, where it stopped for two minutes. The car then drove east of Shullsburg for four minutes until the accident occurred. Monahan wanted to introduce GPS evidence about the drive from the party to Shullsburg because he said it would reveal patterns that showed Cushman was driving the vehicle when the crash occurred. However, the trial court agreed with the state and allowed GPS evidence only for the Shullsburg-to-accident leg of the trip, indicating other data was inadmissible because it was "propensity evidence, you are having character, habit evidence, other acts evidence."

On appeal, Monahan argued that the trial court erred in excluding the GPS data of the car's high speed during the party-to-Shullsburg leg of the trip. The state conceded error. It wrote

in its appellate response brief that it "agrees with Monahan that the trial court erred when it excluded the [party-to-Shullsburg] speed evidence as inadmissible other acts evidence. The vehicle's speed after it left the [party] was not other acts evidence but part of the continuum of facts relevant to the crime."

Monahan argued that the prosecutor during closing arguments gave the jury the false impression that Cushman was not the at-fault driver because she would never have driven so fast given her unfamiliarity with the roads. Monahan considers this a misleading assertion given that the prosecutor knew: (1) that several witnesses testified that Cushman had driven away from the party; and (2) that the excluded GPS data showed high-speed driving had occurred during the party-to-Shullsburg leg of the trip. The Court of Appeals ruled that the exclusion of the party-to-Shullsburg GPS data was error, but it was harmless error.

Before the Supreme Court, Monahan argues, among other things, that a reviewing court cannot use a jury's credibility determination as proof that an error is harmless when the error at issue is that the jury did not hear evidence it should have heard.

Wisconsin Supreme Court
Friday, March 16, 2018
9:45 a.m.

2016AP1745-CR State v. Michael L. Cox

Supreme Court case type: Certification
Court of Appeals: District I (District III judges)
Circuit Court: Milwaukee County, Judge William W. Brash III and Judge T. Christopher Dee
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Michael L. Cox, Defendant-Appellant.

Issue presented: This certification examines whether a sentencing court retains any discretion under Wis. Stat. § 973.046 (2015-16) to waive DNA surcharges for crimes committed after Jan. 1, 2014.

Some background: The state charged Michael L. Cox with one count of second-degree recklessly endangering safety and one count of possession of tetrahydrocannabinols (THC), second or subsequent offense. The charges came after a March 14, 2015 incident in which Cox drove intoxicated against oncoming freeway traffic for more than three miles.

Cox pleaded guilty to the one count of second-degree recklessly endangering safety, and the other charge was dismissed and read in. At the sentencing hearing, the Milwaukee County Circuit Court, Judge William W. Brash III presiding, ordered Cox to submit a DNA sample only if he had not previously done so, on the assumption that he had provided a DNA sample in a prior case cited by the state. Judge Brash also ordered that he was "going to waive the imposition of the DNA surcharge with regards to this matter."

The written judgment of conviction prepared by the clerk, however, stated in the comments that Cox was to pay the DNA surcharge, as well as court costs and the victim/witness surcharge.

Cox filed a post-conviction motion to amend the written judgment of conviction, arguing that the requirement of paying the DNA surcharge was a clerical error that contradicted the oral judgment imposed by the court at the sentencing hearing.

The circuit court, Judge T. Christopher Dee now presiding, denied the motion. Dee ruled that even if Brash believed he could waive the DNA surcharge, that was incorrect. Dee ruled that the circuit court was required under Wis. Stat. § 973.046 to impose the DNA surcharge because the sentencing had occurred after Jan. 1, 2014, the effective date of 2013 Wis. Act 20 (Act 20), the 2013-14 state budget act.

Cox appealed, leading to this certification. The Supreme Court reviews the issues in light of Act 20, which revised the statutes regarding the imposition of the DNA surcharge and the imposition of the Crime Victim and Witness Assistance Surcharge (the victim/witness surcharge).

Prior to the effective date of the relevant provisions in Act 20, there were two operative subsections of Wis. Stat. § 973.046 that addressed the imposition of a DNA surcharge, which is intended to fund the collection of DNA samples, the maintenance of a DNA databank, and the analysis of DNA evidence collected from crime scenes:

> *(1g) Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.*
> *(1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), [or] 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250. Wis. Stat. § 973.046 (2011-12).*

Thus, for certain sexual offenses, the statute said that the sentencing court "shall impose" a single DNA surcharge, and that for all other felony offenses, the court "may impose" a single DNA surcharge. There were no DNA surcharges for misdemeanor offenses.

Act 20 changed the DNA surcharge statute (now renumbered to Wis. Stat. § 973.046(1r)) as follows: "(1r)(intro.) If a court imposes a sentence or places a person on probation ~~for a violation of s. 940.225, 948.02(1)(or (2), 948.225 948.085~~, the court shall impose a deoxyribonucleic acid analysis surcharge ~~of $250.~~, calculated as follows:…" 2013 Wis. Act 20, § 2354 (renumbering and amending Wis. Stat. § 973.046(1r)).

Subsection (a) that followed specified that the DNA surcharge was now $250 for each felony conviction, and subsection (b) specified that the surcharge was now $200 for each misdemeanor conviction. Thus, the new statute now states that a sentencing court "shall impose" a DNA surcharge for each conviction, and it now includes misdemeanors as convictions for which DNA surcharges are required (although at a slightly lower rate). The statute no longer uses the phrase "may impose" for any DNA surcharge.

At the same time, the Legislature also made changes to the language of the statute governing victim/witness surcharges. Until the effective date of Act 20, the relevant statute simply stated that "[i]f the court imposes a sentence or places a person on probation, the court shall impose a crime victim and witness assistance surcharge . . . ." Former Wis. Stat. § 973.045(1).

The Legislature retained the "shall impose" language in the version of Wis. Stat. § 973.045(1) revised by Act 20, but it now also added a sentence that expressly stated that a victim/witness surcharge "may not be waived, reduced, or forgiven for any reason." This language prohibiting a victim/witness surcharge from being waived, reduced, or forgiven is not found in the revised statute governing DNA surcharges.

Cox relies, in part, on the difference in the language between the revised version of the DNA surcharge statute and the revised version of the victim/witness surcharge statute. He emphasizes that the Legislature did not include a sentence forbidding circuit courts to "waive, reduce, or forgive" the DNA surcharge, as it had done for the victim/witness surcharge statute. Cox believes this difference in treatment evinces a legislative intent to treat the DNA surcharge differently – namely, to leave discretion in the circuit courts to waive or reduce the DNA surcharge in appropriate cases.

The state argues that Cox's statutory interpretation argument ignores several points. First, the state notes that a series of decisions has already treated the "shall impose" language in the revised DNA surcharge statute as mandatory. See, e.g., State v. Hill, 2016 WI App 29, ¶27, 368 Wis. 2d 243, 878 N.W.2d 709; State v. Scruggs, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; State v. Elward, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756; State v. Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. The argument in those cases that

the statute was being applied in an improper ex post facto manner relied on the fact that the change in the statute effected by Act 20 made the imposition of the DNA surcharge mandatory.

The state also points to the presumption that the use of the word "shall" means that the Legislature intended a mandatory requirement. Bank of New York Mellon, 361 Wis. 2d 23, ¶21. Moreover, in this instance, the Legislature changed the operative language from "may impose" to "shall impose," which supports the use of the presumption and the mandatory nature of the revised statute.

A decision by the Supreme Court could provide guidance on the proper interpretation of the revised DNA surcharge statute as to whether sentencing judges now have any discretion to waive DNA surcharges for crimes that occurred after the effective date of Act 20.

There are two other cases involving related issues concerning the revised DNA surcharge statute that are currently pending before the Wisconsin Supreme Court, State v. Odom, 2015AP2525-CR and State v. Williams, 2016AP883-CR.

Wisconsin Supreme Court
Friday, March 16, 2018
10:45 a.m.

2016AP883-CR State v. Jamal L. Williams

Supreme Court case type: Petitions for Review
Court of Appeals: District I (Dist. II judges)
Circuit Court: Milwaukee County, Judge Timothy J. Dugan and Ellen R. Brostrom, Judgment affirmed in part, reversed in part; order reversed and cause remanded for further proceedings.
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Jamal L. Williams, Defendant-Appellant-Petitioner

Issues presented: In this case, the Supreme Court examines issues related to DNA surcharges and whether a court may consider refusal to agree to restitution in fashioning a sentence.

As presented by the parties:

The state's petition

1. Is the imposition of a single mandatory $250 DNA surcharge an ex post facto violation with respect to a defendant who committed his offense when the surcharge was discretionary and who previously had provided a DNA sample in another case?
2. Should this Court overrule the Court of Appeals' decisions in [State v. Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758] and [State v. Elward, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756]?

Defendant Jamal Williams' cross-petition

Is Jamal Williams entitled to resentencing because the circuit court sentenced him based on an improper factor, namely, the fact that Williams refused to stipulate to restitution for which he was not legally responsible?

Some background: Williams reached a plea agreement with the state whereby he pleaded guilty to a reduced charge of attempted armed robbery, as a party to the crime. At the plea hearing Williams agreed with the central facts alleged in the complaint. The complaint alleged that Williams and his brother, Tousani Tatum, arranged a drug deal with a victim and then attempted to rob him. As a second victim, who had arrived with the first victim tried to drive away from the attempted robbery, Tatum shot him. The second victim's three-year-old daughter was in the vehicle during the shooting.

Williams and Tatum drove away from the scene while the second victim was still alive but did not seek to help him or call for aid.

In preparing a pre-sentence investigative report, a parole agent indicated that Williams showed "an atrocious lack of remorse" and minimized the wrongfulness of his lengthy history of criminal behavior. The court at sentencing noted the report's comments about Williams being proud of his crimes and how he had essentially beaten the criminal justice system over the years.

The circuit court ultimately sentenced Williams to 10 years of initial confinement and seven and a half years of extended supervision. It also ordered Williams to "submit the mandatory DNA sample" and imposed "the mandatory surcharge." The court indicated it did not have authority to require restitution to the family of the victim who had been shot because Williams had pleaded guilty only to the attempted armed robbery. Nonetheless, the court

commented that Williams' unwillingness to pay any restitution reflected his lack of remorse, which the court was considering in its sentencing analysis.

After the circuit court denied a postconviction motion, the Court of Appeals rejected Williams' claim that he had been sentenced based on an improper factor. It concluded that Williams had not established that the sentencing court had relied on his refusal to stipulate to pay restitution to form part of the basis for the sentence it had imposed.

With respect to Williams' challenge to the DNA surcharge, the Court of Appeals agreed with Williams that application of the new mandatory DNA surcharge violated the ex post facto clause, and it remanded the case to the circuit court with directions to apply the discretionary DNA surcharge statute that had been in effect at the time of Williams' crime.

The Court of Appeals determined itself bound by its decisions in Elward and Radaj to find that the application of the mandatory DNA surcharge requirement to Williams violated the ex post facto clause. Specifically, the Court of Appeals reasoned that because Williams had provided a DNA sample in connection with an earlier case and the state conceded that no DNA-analysis-related activity had occurred or would occur in relation to Williams' attempted armed robbery, the state was receiving money for doing nothing, which constituted punishment in violation of the ex post facto clause.

The state contends in the Supreme Court that both Radaj and Elward need to be revisited because the reasoning of those decisions conflicts with the Supreme Court's reasoning in State v. Scruggs, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. Both Radaj and Elward looked for a rational connection between the imposition of a mandatory, per count surcharge and the DNA collection and analysis costs incurred by the state in connection with that particular crime and defendant.

In Scruggs, however, the Supreme Court stated that the purpose of the new mandatory, per-count surcharge was "to offset the increase burden on the DOJ in collecting, analyzing, and maintaining the additional DNA samples" that resulted from the other provisions of 2013 Wis. Act 20, which revised the DNA surcharge statute. 373 Wis. 2d 312, ¶47. In other words the Supreme Court did not focus solely on the state's DNA-related costs connected to the particular offense and prosecution.

Regarding the issue he raises in the Supreme Court, Williams argues that a defendant has a statutory right to contest restitution claims and that many defendants choose to exercise that right. He contends that if sentencing courts may properly consider a defendant's objection to restitution as an aggravating factor, this will have a chilling effect on defendants' exercise of that statutory right.

A decision in this case is expected to determine whether there is an actual conflict between the Supreme Court's decision in Scruggs and the Court of Appeals' decisions in Elward and Radaj, and to consider whether a sentencing judge may consider a defendant's refusal to pay restitution is a permissible sentencing consideration, whether by itself or in the context of the larger issue of a lack of remorse.