WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 2020

The cases listed below will be heard by the in the Supreme Court Hearing Room, 231 East, State Capitol. The cases originated in the following counties:

Green Lake
Milwaukee
Waukesha

MONDAY, FEBRUARY 10, 2020

9:45 a.m.	17AP2364-CR	State v. David Gutierrez
10:45 a.m.	18AP623	David Skindzelewski v. Joseph Smith, Jr.
1:30 p.m.	18AP168	Waukesha County v. J.J.H.

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:

18AP1176-D Office of Lawyer Regulation v. Richard E. Reilly

Note: The Supreme Court calendar may change between the time you receive these synopses and when a cases 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. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Stephanie Fryer at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

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

2017AP2364-CR State v. David Gutierrez

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Waukesha), that reversed and remanded a Green Lake County Circuit Court judgment of conviction for three counts of first-degree sexual assault of a child under the age of thirteen, three counts of incest with a child by a stepparent, and three counts of child enticement. Judge W. Andrew Voigt presided over the circuit court proceedings.

This case asks the court to clarify the law regarding how appellate courts are to review a trial court's reasonable exercise of discretion, particularly in cases that involve a child sexual assault victim and rape shield law concerns.

In 2012, a twelve-year-old girl alleged that Gutierrez, her stepfather, had sexually assaulted her on at least three occasions and that he had forced her to watch pornographic movies. Prior to trial, Gutierrez moved to admit evidence from the State Crime Lab that underwear worn by the girl during the assault[1] showed no evidence of Gutierrez's DNA but did have DNA from five males, and a swab taken from the outside of the girl's mouth the day after the assault did not include Gutierrez's DNA but did have DNA from three males. None of the DNA was from saliva or semen. The State objected on rape shield grounds, arguing that the results would imply that the girl had had sexual contact with other males and it would invite the jury to speculate on the source of the DNA to the prejudice of the victim.

The circuit court allowed Gutierrez to introduce evidence that DNA testing was performed and that Gutierrez's DNA was not found, but it refused to allow Gutierrez to offer evidence that other males' DNA was found. Gutierrez argued that the DNA evidence from the other unknown males was important to counter the State's argument that one wouldn't expect to find DNA due to the passage of time. Gutierrez argued that without evidence that other male DNA evidence was found the jury would not get the complete story.

At trial, Gutierrez called the State Crime Lab analyst who testified that the underwear and mouth swabs belonging to the girl contained no evidence of Gutierrez's DNA. On cross-examination, the State elicited testimony from the analyst that DNA can be scrubbed, washed, or wiped off, and that someone who showered, cleansed themselves, or wiped themselves off would be likely to remove any DNA that had been deposited. Due to the trial court's pre-trial ruling, Gutierrez was not allowed to inform the jury that despite showering, washing, and wiping, all DNA had not been removed.

[1] There was confusion or uncertainty as to whether the underwear worn by the girl at the time of the assault actually got tested. The girl said she had been wearing purple underwear, but no purple underwear was found or tested. Two pair of underwear were tested. One pair was retrieved from the washing machine, wet, by the girl's mother. The second pair was retrieved from the laundry hamper by the girl, who told officers that was the underwear she had been wearing, although it was not purple as she had previously reported.

The jury found Gutierrez not guilty of exposing a child to harmful materials and guilty on the other counts: three counts of first-degree sexual assault of a child under the age of thirteen; three counts of incest with a child by a stepparent; and three counts of child enticement. Gutierrez's post-conviction motion seeking a new trial was denied. Gutierrez appealed.

The Court of Appeals reversed and remanded, with then-Judge Brian K. Hagedorn, dissenting. The Court of Appeals' majority found that the circuit court erred in denying Gutierrez's request to use the DNA evidence as rebuttal to the State's evidence as to why DNA evidence was not found. They noted that the appellate court reviews a decision to admit or exclude evidence for an erroneous exercise of discretion. The majority noted that this case largely turned on the girl's testimony versus Gutierrez's testimony. For that reason, it said the DNA evidence, both the presence and lack thereof, was critical. The majority said that "the lack of Gutierrez's DNA was central to his defense. The State's case was improperly bolstered when the jury was indirectly presented with a fact not in evidence, i.e., that no DNA evidence was present as it had been washed off." The majority concluded that allowing the State to proffer that Gutierrez's DNA had been washed off but not allowing him to rebut that evidence by showing that not all DNA had been washed off was error and undermined confidence in the outcome of the trial. For that reason, the majority reversed and remanded.

The dissent agreed that evidence that a mixture of male DNA was found on various items and that Gutierrez was excluded as a contributor to the DNA was obviously favorable to Gutierrez, but noted that the State emphasized the unreliability of the DNA sample. The dissent noted that the trial court allowed Gutierrez to discuss the likelihood that his DNA would still be found after cleaning, wiping, passage of time, etc. but he made no efforts along those lines. The dissent concluded that the circuit court's decision was well-considered and that the circuit court did not erroneously exercise its discretion.

The State petitioned the Supreme Court for review. The issues raised for review are:

1. Did the Court of Appeals violate the elementary principle of appellate review of trial court evidentiary rulings when it second-guessed the wisdom of the trial court's decision: (a) to exclude defense evidence that DNA from five unidentified males was found on the child sexual assault victim's underwear, and the DNA of three unidentified males was found on the outside of her mouth, 24 hours after the alleged oral assault by Gutierrez; (b) to allow Gutierrez to prove that his DNA was not found on her mouth or on her underwear; and (c) to allow defense counsel to examine the expert witness about how long transferred DNA might remain on the victim's mouth and underwear, and how easily it can be removed?
2. Did the Court of Appeals act contrary to the interests protected by Wis. Stat. § 972.11(2)(b), Wisconsin's rape shield law, when it rejected out of hand the trial court's concern that the jury might infer that the victim had sexual contact with one or more of the unidentified males, not including Gutierrez, whose DNA was found on the victim's underwear and on the outside of her mouth 24 hours after the assault?
3. Did the Court of Appeals err when it held that the trial court's evidentiary ruling led to a misleading inference that the absence of Gutierrez's DNA around the victim's mouth and on her underwear could be explained by her having washed it off immediately after he sexually assaulted her, even though the DNA of other males was found 24 hours later?

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

No. 2018AP623 David Skindzelewski v. Joseph Smith, Jr.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Milwaukee County Circuit Court order that granted summary judgment to Attorney Joseph Smith, Jr., in this legal malpractice action. Judge Mary E. Triggiano presided over the circuit court proceedings.

This appeal involves the question whether a criminal defendant bringing a legal malpractice action against his former defense attorney for failing to recognize and plead a defense that would have resulted in the dismissal of the criminal charges must prove that he is innocent of the underlying criminal charge in order to obtain a money judgment against the attorney, or whether there is an exception to the innocence requirement for certain types of legal negligence by a criminal defense attorney.

In March 2014 the State filed a criminal complaint charging Skindzelewski with one misdemeanor count of theft by contractor in an amount less than $2,500. The complaint alleged that in 2010 Skindzelewski had taken money from a couple to install roof vents on their home, but had never performed the work, using the money instead for rent and vehicle repairs.

Attorney Smith, an assistant state public defender, was appointed to represent Skindzelewski. After pretrial proceedings that lasted about one year, Skindzelewski pled guilty to the charged offense. The circuit court accepted his plea and sentenced him to eight months in jail, consecutive to an unrelated revocation sentence.

Skindzelewski's postconviction counsel (a different attorney) realized the charge was barred by the 3-year statute of limitations, see Wis. Stat. § 939.74(1) (2009-10), and moved to vacate the conviction on that ground. The circuit court granted the motion and vacated Skindzelewski's conviction. He was released from jail on April 12, 2016.

Skindzelewski subsequently filed a legal malpractice claim against Attorney Smith, alleging that his failure to assert the statute of limitations as a defense constituted legal malpractice that had caused him to serve four months of imprisonment that he should not have had to serve. Attorney Smith did not dispute that he had violated the standard of care by failing to recognize and plead the statute of limitations as a bar to Skindzelewski's conviction and to seek dismissal of the criminal complaint against Skindzelewski. Attorney Smith, however, moved for summary judgment of Skindzelewski's malpractice complaint on the ground that Skindzelewski was obligated to allege and prove his actual innocence of the theft-by-contractor charge before he could obtain relief on a legal malpractice claim arising out of his criminal case. In response to Attorney Smith's motion, Skindzelewski once again did not dispute that he had committed the conduct that constituted theft-by-contractor. The circuit court granted Attorney Smith's motion and dismissed Skindzelewski's complaint.

Skindzelewski appealed. The Court of Appeals affirmed the circuit court's grant of summary judgment in favor of Attorney Smith. Citing Hicks v. Nunnery, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809, it noted that there are generally four elements of a legal malpractice claim: (1) the existence of an attorney-client relationship; (2) acts or omissions by the attorney that constituted negligence; (3) causation; and (4) injury to the plaintiff. It further

quoted Hicks for the establishment of a fifth element based on public policy where a criminal defendant brings a malpractice claim against his/her former defense counsel: a former criminal defendant must "prove he is innocent of the charges of which he was convicted in order to prevail on a claim of legal malpractice." Hicks, 253 Wis. 2d 721, ¶46 The policy reason that it gave in Hicks for this actual innocence requirement is that persons who actually commit criminal offenses for which they are convicted should not be allowed to recover money damages from their former attorneys because that would shift responsibility for the crime away from the convict.

The Court of Appeals stated that Skindzelewski had acknowledged that, without an exception to the actual innocence rule set forth in Hicks, his legal malpractice claim would be barred because he had admitted committing the offense of theft by contractor. To the extent that Skindzelewski urged the adoption of an exception to the actual innocence rule, the Court of Appeals responded that the creation of any such exception would constitute a modification of the holding of Hicks, which only the Supreme Court may do. Accordingly, the Court of Appeals affirmed the circuit court's grant of summary judgment in favor of Attorney Smith.

Skindzelewski petitioned the Supreme Court for review. His petition asks this court to review the following issue:

> Should Wisconsin join the growing list of jurisdictions that have recognized exceptions to the innocence requirement in malpractice cases against criminal defense counsel where the lawyer's negligence resulted in an unlawful conviction or sentence?

WISCONSIN SUPREME COURT
February 10, 2020
1:30 p.m.

No. 2018AP168 Waukesha County v. J.J.H

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that dismissed the appeal of an order by the Waukesha County Circuit Court (Judge Lloyd Carter, presiding) to place J.J.H. in a mental health facility under a temporary guardianship and protective placement.

This appeal involves the issue of whether an appeal from a 30-day temporary guardianship and protective placement as an alternative to involuntary civil commitment should be dismissed as moot[2] when the commitment ends before a notice of appeal can be filed or before the appeal can be heard. This case also concerns whether the circuit court erred in proceeding a probable cause hearing on the civil commitment (which must occur within 72 hours) when a sign language interpreter for the subject of the hearing was not available.

J.J.H., who is now 21 or 22 years old, has been cognitively delayed since age two. She has developmental disabilities and is deaf. According to the commitment petition, J.J.H.'s communication skills are limited because she has refused to learn how to use sign language. She communicates either by using her own form of sign language or in writing.

On September 12, 2017, Waukesha County filed a 3-party petition that sought an examination under Wis. Stat. § 51.20 as to whether J.J.H. should be civilly committed for treatment. The petition alleged that J.J.H. had a mood disorder and anxiety, that she was developmentally disabled, and that she had been displaying increased agitation. The petition further alleged that J.J.H. had initially agreed to be admitted to the Aurora Psychiatric Hospital, but had changed her mind and refused to proceed when her mother arrived for her admission to the hospital. The petition also alleged that J.J.H. is unable to care for herself, that she requires 24/7 care, and that her mother can no longer provide care for J.J.H. because of the level of J.J.H.'s disabilities and due to threats J.J.H. had been making to her mother. The petition contained some examples of the threats of harm to the mother.

Under Wis. Stat. § 51.20(7), if a person who is the subject of a commitment petition is detained, a court must conduct a hearing within 72 hours of the person's detention to determine if there is probable cause to support the petition. On September 15, 2017, a family court commissioner began to conduct the probable cause hearing for J.J.H. The court commissioner noted that no qualified sign language interpreters were available to assist J.J.H. She said that the court had called "every possible interpreter service that is available to us including out of state, out of country including Madison, Chicago, Minnesota, and there are no available interpreters today." Counsel for J.J.H. then objected to proceeding without a certified interpreter as a violation of J.J.H.'s due process rights since J.J.H. would not be able to understand what was

[2] The mootness doctrine applies when the resolution of a case will have no practical effect on an existing controversy. City of Racine v. J-T Enters of Am., Inc., 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974). There are exceptions to the mootness doctrine under which courts will still decide a legal matter despite the fact that the decision will not have a practical effect on the parties to the case.

happening in court and to communicate with her attorney. Facing this dilemma, the court commissioner decided to refer the matter to the circuit court judge, the Hon. Lloyd Carter. When Judge Carter resumed the hearing, counsel for respondent repeated her due process objection to proceeding without an interpreter. After noting the due process objection and repeating the court's efforts to locate a sign language interpreter, Judge Carter stated that he saw no viable option other than proceeding with the doctor's testimony on the § 51.20 commitment petition and "try[ing] to address this as best we can."

The court then proceeded with the probable cause hearing. The circuit court ruled that, given the record made at the hearing, a chapter 51 commitment was not warranted. It converted the matter, however, to a proceeding for temporary guardianship and protective placement under Wis. Stat. § 51.67. It found that those standards had been satisfied. It ordered that J.J.H. be protectively placed at a state mental health facility for not more than 30 days, as it could find no other appropriate facility at which to place her.

Counsel for J.J.H. then filed a notice of intent to pursue postcommitment relief. By the time that the court reporter had filed the transcript from the probable cause hearing, J.J.H.'s 30-day temporary guardianship and protective placement had been expired for almost two months. Counsel for J.J.H. nonetheless filed an appeal on her behalf. Given the timing issue, the county argued that J.J.H.'s appeal was moot because the resolution of the appeal could have no practical effect on any controversy about the now-expired order. The Court of Appeals agreed that the appeal was now moot and dismissed it.

J.J.H. argues on appeal that the Supreme Court should establish a policy that allows for appellate review of temporary orders for commitment or protective placement despite the fact that the matter has become moot due to the expiration of the temporary order. J.J.H. also alleges that her due process rights were violated by the circuit court when it proceeded with a probable cause hearing in the absence of an interpreter for her.

J.J.H.'s petition to the Supreme Court asks it to review the following issues:

1. Whether the mootness doctrine should apply to an appeal from a commitment order?
2. Whether the circuit court violated due process under the 5th and 14th Amendments when it held a Chapter 51 probable cause hearing, which resulted in a 30-day temporary guardianship and temporary protective placement or services, without providing J.J.H., the subject of the proceeding who is deaf, sign language interpreters?
3. Whether the circuit court erred by entering a § 51.67 conversion order: (a) at the probable cause stage of a Chapter 51 commitment hearing, and (b) without making any of the statutorily-required findings for such an order?
4. What is the mechanism for appealing a § 51.67 order of conversion to temporary guardianship and temporary protective placement and/or services?