

**IN THE WISCONSIN SUPREME COURT**

**STATE OF WISCONSIN**  
**Plaintiff-Respondent,**

**Statement in Support of**  
**Petition for Review**  
**§ 808.10 and § 809.62(2)&(4)**

**v.**

**2010AP1050-CR**  
**Circuit Case No. 09 CF 48**

**KENNETH LEROY DRIESSEN**  
**Defendant-Appellant-Petitioner**

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**Appendix**

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**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 22, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1050-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2009CF48**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KENNETH L. DRIESSEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sawyer County:  
ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kenneth Driessen, pro se, appeals a judgment of conviction for possession of marijuana, second and subsequent offense; possession of drug paraphernalia; and operating while intoxicated, second offense. Driessen argues the circuit court erroneously denied his pretrial suppression motion. He

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further contends it is unconstitutional to criminalize marijuana possession, for various reasons. We reject Driessen's arguments and affirm.

### BACKGROUND

¶2 Deputy Brian Knapp observed a truck that had a loud exhaust and appeared to be speeding. Knapp followed. As Knapp activated his emergency lights and sirens, he observed the truck driving on the wrong side of the road. During the stop, Knapp found marijuana and a brass smoking pipe on Driessen's person. Driessen was ultimately arrested for operating while intoxicated.

¶3 Driessen, proceeding pro se, moved to suppress evidence found during the stop. The circuit court denied the motion after an evidentiary hearing. Driessen was found guilty at a jury trial. Driessen moved for postconviction relief, again challenging the search and seizure. After a hearing, the court denied the motion in a written order "for the reasons set forth on the record at the time of the hearing." Driessen now appeals.

### DISCUSSION

¶4 Driessen first challenges the stop of his vehicle and a pat-down search of his person prior to arrest. The record on appeal does not contain a transcript of either the pretrial or postconviction motion hearings dealing with Driessen's Fourth Amendment challenges.<sup>1</sup>

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<sup>1</sup> Driessen asks us to compare a police report with an audio recording of an officer's testimony, which Driessen apparently recorded and posted online at blip.tv and youtube.com. Our review is limited to the record on appeal. See WIS. STAT. RULES 809.15, 809.19(1)(d)-(e).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 This court reviews a circuit court's determination of whether a person was seized under the Fourth Amendment as a constitutional fact. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. We accept the circuit court's findings of evidentiary or historic fact unless clearly erroneous. *Id.* However, we independently determine whether or when a seizure occurred. *Id.*

¶6 Driessen challenges the factual findings underlying the circuit court's decision to deny his suppression motion. In the absence of transcripts, his argument fails. "It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal." *Lee v. LIRC*, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). When the record is incomplete, we will assume the missing material supports the circuit court ruling under attack. *See State v. Holmgren*, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999).

¶7 We next turn to Driessen's challenge to the constitutionality of marijuana possession laws. In the circuit court, Driessen filed a "Notice of Claim of Unconstitutionality" arguing the criminalization of marijuana violated multiple constitutional rights because: 40.6% of Americans have used marijuana; people have an inherent right to the control of their minds and bodies; he holds a religious belief regarding marijuana use; potential jurors who have used marijuana would be too fearful to appear for his trial; and marijuana has proper medical uses. Driessen subsequently filed a nineteen-page motion to dismiss, challenging the constitutionality of WIS. STAT. §§ 961.41(3g)(e) and 961.573(1), further developing the issues raised earlier. It is unclear from Driessen's brief whether the court took any action regarding Driessen's filings.

¶8 First, we address Driessen's argument that the laws prohibiting marijuana possession violate his First Amendment rights. We apply the

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“compelling state interest/least restrictive alternative test” when reviewing a claim that a state statute violates freedom of exercise and freedom of conscience. *State v. Miller*, 202 Wis. 2d 56, 66, 549 N.W.2d 235 (1996). The challenger carries the burden to prove he has a sincerely held religious belief that is burdened by application of the state law at issue. *Id.* Only if the defendant meets this burden does the burden shift to the State to prove the law is based on a compelling state interest, which cannot be served by a less restrictive alternative. *Id.*

¶9 Driessen fails to demonstrate he has a sincerely held religious belief that is burdened by the application of the state law criminalizing marijuana possession. *See id.* Rather, he merely states in his brief that he “believe[s] cannabis use to be an important part of [his] religious and spiritual experiences,” and offers to attend a hearing to express his sincerity in further detail. Driessen fails to inform us whether the circuit court made the factual determination that Driessen does or does not hold such a belief. In the absence of transcripts or citation to the record, Driessen’s claim fails. *See Holmgren*, 229 Wis. 2d at 362 n.2; *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (citing WIS. STAT. RULE 809.19(1)(e)).

¶10 Moreover, even if we were to shift the burden to the State to prove the law is based on a compelling state interest that cannot be served by a less restrictive alternative, Driessen’s claim fails. We have previously held that because marijuana causes serious problems for society, there is a compelling state interest that overrides the First Amendment interest in using marijuana for religious purposes. *See State v. Peck*, 143 Wis. 2d 624, 634-35, 422 N.W.2d 160 (Ct. App. 1988).

¶11 Driessen next argues there is or should be a medical necessity defense to possession of marijuana and that its omission leads to cruel and unusual punishment under the Eighth Amendment. Driessen states he has depression, and provides an internet citation to show that a psychologist has concluded marijuana is safe and effective for treating depression. Driessen does not assert, however, that any medical doctor has determined Driessen should use marijuana for medicinal purposes or that he has a prescription for such use. Nor does Driessen assert he requested a jury instruction on necessity based on WIS. STAT. § 939.47. We therefore decline to address his argument, as it is inadequately developed. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶12 Driessen next asserts “unconstitutionality due to overwhelming popularity of use.” While he cites various cases and constitutional provisions, Driessen fails to develop a proper legal argument in support of this claim. We therefore decline to address his argument. *See id.*

¶13 Finally, Driessen argues he should have been charged with ordinance violations rather than statutory criminal violations. Driessen’s argument is largely incomprehensible. *See id.* Regardless, the State has great discretion in deciding whether to prosecute a particular case. *State v. Kramer*, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35. In order to exercise this discretion, a prosecutor employs a degree of selectivity. *Id.* A defendant must make a prima facie showing of discriminatory prosecution before he or she is entitled to an evidentiary hearing on the claim. *Id.*, ¶13. Driessen fails to make such a showing.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

State of Wisconsin vs. Kenneth L Driessen

**Judgment of Conviction**

and Sentence to the  
County Jail/Fine/Forfeiture



Date of Birth: 10-19-1956

Case No.: 2009CF000048

The defendant was found guilty of the following offense(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Possession of THC (2nd+ Offense)	961.41(3g)(e)	Not Guilty	Felony I	03-28-2009	Jury	11-13-2009
2	Operating While under Influence (2nd)	346.63(1)(a)	Not Guilty	Misd. U	03-28-2009	Jury	11-13-2009
4	Possess Drug Paraphernalia	961.573(1)	Not Guilty	Misd. U	03-28-2009	Jury	11-13-2009

The defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Begin date	Begin time	Agency	Comments
1	01-08-2010	Forfeiture / Fine					@ \$ 50/mo. st. 02-08-2010. Defendant to return his copy of the PSI to the court. Contraband forfeited.
1	01-08-2010	Local jail	100 DA			Sawyer County Jail	HUBER AUTHORIZED. Def. to contact Sawyer County Sheriff's Department w/in 10 days to set up jail start date. Jail credit to be calculated by the Sawyer County Sheriff's Dept.
1	01-08-2010	DOT License Suspended	6 MO				
1	01-08-2010	Other Sentence					Def. is to provide DNA sample w/out cost to defendant.
2	01-08-2010	Forfeiture / Fine					@ \$ 50/mo. st. 02-08-2010.
2	01-08-2010	Local jail	10 DA			Sawyer County Jail	HUBER AUTHORIZED.
2	01-08-2010	DOT License Revoked	14 MO				
2	01-08-2010	Alcohol assessment					and Victim Impact Panel. Def. must comply w/recommendations of AODA assessor.
4	01-08-2010	Forfeiture / Fine					@ \$ 50/mo. st. 02-08-2010.
4	01-08-2010	Local jail	30 DA			Sawyer County Jail	HUBER AUTHORIZED
4	01-08-2010	DOT License Suspended	6 MO				

**Sentence Concurrent With/Consecutive Information:**

Ct.	Sentence	Concurrent With/Consecutive To	Comments
1	DOT License Suspended	Concurrent	Ct. # 2
2	Local jail	Consecutive	Ct. # 1
4	Local jail	Consecutive	Ct. # 2
4	DOT License Suspended	Concurrent	Ct. # 2

State of Wisconsin vs. Kenneth L Driessen

**Judgment of Conviction**

and Sentence to the  
County Jail/Fine/Forfeiture

Date of Birth: 10-19-1956

Case No.: 2009CF000048

**Obligation Detail:**

Ct.	Schedule	Amount	Days to Pay	Due Date	Failure to Pay Action	Victim
1	Felony Violations	328.50	60	03-09-2010	Commitment	
2	Misd Driving Violations	904.00	60	03-09-2010	Commitment	
4	Misdemeanor Violations	224.00	60	03-09-2010	Commitment	

**Obligation Summary:**

Ct.	Fine & Forfeiture	Court Costs	Attorney Fees	<input type="checkbox"/> Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge	Totals
1	215.50	20.00			8.00	85.00			328.50
2	451.00	385.00			8.00	60.00			904.00
4	136.00	20.00			8.00	60.00			224.00

**Total Obligations: 1456.50**

The following charges were Dismissed but Read In

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Date(s) Read In
3	Operating with PAC .08 or More (2nd)	346.63(1)(b)	Not Guilty	Misd. U	03-28-2009	01-08-2010

**It is adjudged that 0 days sentence credit are due pursuant to § 973.155, Wisconsin Statutes**

**It is ordered that the Sheriff shall deliver the defendant into the custody of the Department.**

BY THE COURT:

**Distribution:**

Robert Eaton, Judge  
Bruce R. Poquette, District Attorney  
County Sheriff  
DEFENDANT



Circuit Court Judge/Clerk/Deputy Clerk

January 11, 2010

Date

STATE OF WISCONSIN                      CIRCUIT COURT                      SAWYER COUNTY

State of Wisconsin,

Plaintiff,

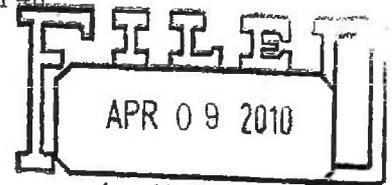
**ORDER**

vs.

Case No.: 09CF48

Kenneth L. Driessen,

Respondent.



Anne Marie Danielson  
Sawyer County  
Clerk of Circuit Court  
Hayward, WI 54843

Defendant's, KENNETH DRIESSEN'S, motions for post-conviction relief came on for hearing on April 9, 2010. The state appeared by Assistant District Attorney, Bruce Poquette; the Defendant appeared in person, pro se.

For the reasons set forth on the record at the time of the hearing:

IT IS HEREBY ORDERED, that the Defendant's motions for post-conviction relief are denied.

Dated this 9<sup>th</sup> day of April, 2010.

Robert E. Eaton  
Honorable Robert Eaton

From: DRLPracticeFAQ3@wisconsin.gov  
To: kendriessen@hotmail.com  
Date: Fri, 15 Apr 2011 12:46:50 -0500  
Subject: RE: Controlled Substances Board

Mr. Driessen,

After speaking with our legal counsel, the only direction I can give you is that possessing or using marijuana is illegal in the State of Wisconsin. This means that "medical" marijuana is not able to be legally prescribed or dispensed.

Thank you,

Kelli Kaalele | Division of Board Services | State of Wisconsin Dept. of Regulation and Licensing

**From:** ken Driessen [mailto:kendriessen@hotmail.com]  
**Sent:** Wednesday, April 13, 2011 9:34 AM  
**To:** DRL Boards  
**Subject:** FW: Controlled Substances Board

Dear Board Members:

I am a citizen of Wisconsin and I am asking you kindly to do your job. This is the second email regarding the subject noted below. A fax with the same question will follow. No response will result complaints being filed stating that you people are not doing your jobs. I would much rather get a straight up answer from you one way or another.

Sincerely,

Ken Driessen  
715-699-9010

From: kendriessen@hotmail.com  
To: drlboard@wisconsin.gov  
Subject: Controlled Substances Board  
Date: Wed, 6 Apr 2011 19:17:00 -0500

Hello:

This question is directed to the Controlled Substances Board. I have a friend who is going through chemotherapy. I'm not a doctor but I think my friend could get relief from marijuana/cannabis. I have not been able to find them a doctor that would prescribe such medication in Wisconsin. What would the board do to a doctor if said doctor did in fact write a prescription for marijuana and the patient was able to obtain marijuana from another state where medicinal marijuana is legally available? Would they report the doctor to the DEA or are there provisions or measures where the board would take the doctor's license or what? If not and it is possible, legal and acceptable to the board that regulates controlled substances for a Wisconsin doctor to provide a prescription for marijuana, please let me know.

Thank you,

Ken Driessen

From: Thomas.Ryan@wisconsin.gov  
To: kendriessen@hotmail.com  
Date: Fri, 15 Apr 2011 08:22:11 -0500  
Subject: FW: CITIZEN INQUIRY RE MEDICAL MARIHUANA

Mr. Driessen: Below is a response to your question. I hope this satisfies you.

Dear Mr. Driessen:

You have asked the Department of Regulation and Licensing what the Medical Board would do if a physician who is licensed and practicing in Wisconsin writes a prescription for medical marihuana, the patient is in Wisconsin but the prescription would ultimately be filled in a jurisdiction in which medical marihuana is lawful. I sought advice from an attorney with the Department.

We are happy to provide legal information, however please be aware that because we represent the interests of all citizens, we cannot offer legal *advice* to any individual citizen. We can tell you what the law says, we cannot advise you about what to do. Similarly, we cannot tell you what the Board will do in any future case because the Board makes its decisions on a case-by-case basis, because policy positions may change as the Board's composition changes, and as the Board changes its positions on particular issues. Additionally, as an attorney, it is unethical for me to attempt to predict the outcome of any case that is or could be litigated. Therefore, if, after reading this response you have not arrived at a decision concerning the course of practice you wish to pursue, we encourage you to consider contacting private counsel.

**THE SHORT ANSWER:** a physician who practices in Wisconsin, who is treating a patient who resides in Wisconsin, **MAY NOT** lawfully write a prescription for medical marihuana, expecting that the prescription will be filled in another state where medical marihuana is permitted under state law. In doing so, the physician would violate Wisconsin state criminal law, federal law, DEA regulations and rules of the Medical Examining Board.

#### **HOW THE MEDICAL BOARD MIGHT ADDRESS SUCH A COMPLAINT:**

- 1) If the Department received a complaint of physician conduct such as you describe, the complaint would be treated like all other complaints of physician conduct submitted to the Department. Each month a "screening panel" of physician Board members, citizen Board members and a prosecuting attorney meet to review complaints that arrive at the Department. The screening panel reviews complaints to see whether the conduct complained of, if true, constitutes a violation of the rules of the Medical Examining Board. The panel then decides whether to open an investigation. About 70% of cases are closed at screening.
- 2) However, the conduct you propose violates federal law and vitiates a physician's DEA registration. Marihuana is currently a Schedule I substance. The federal DEA does not issue registrations that authorize prescription of Schedule I substances. Therefore, prescribing marihuana *in any jurisdiction*, for use *in any jurisdiction* is illegal under federal law.
- 3) Additionally, if a physician is disciplined in any jurisdiction, his or her DEA registration is vulnerable to revocation in any jurisdiction, including those outside the jurisdiction in which the violation occurred. So, for example, if the Wisconsin Board disciplined a physician for

illegal prescribing practices, his DEA registration in Wisconsin and in any other jurisdiction in which he or she was registered would be vulnerable to revocation.

4) The conduct you describe would likely violate the following rules of the Medical Examining Board:

- Wis. Admin Code sec MED 10.02(2)(h), practice constituting a danger to the health, welfare or safety of patient or public;
- Wis. Admin Code sec MED 10.02(2)(p), administering, dispensing, prescribing, supplying, or obtaining controlled substances as defined in sec. 961.01(4) Stats, or otherwise than in the course of legitimate professional practice, or as otherwise prohibited by law;
- Wis. Admin Code sec MED 10.02(2)(z) violating or aiding and abetting the violation of any law or administrative rule or regulation the circumstances of which substantially related to the circumstances of the practice of medicine;
- Wis. Admin Code sec MED 10.02(za) failure by a physician...to maintain required patient health care records.

If the DEA took the physician's registration, the physician has violated 10.02(2)(h)(q), which makes it a violation to have a federal agency take adverse action against the physician. The physician's act in conspiring or aiding and abetting illegal possession of a Schedule I controlled substance could also expose the physician to criminal liability, and if a criminal prosecutor in Wisconsin or elsewhere obtained a conviction on the conduct, the physician could also be in violation of MED 10.02(2)(r).

Be aware that physician's conduct may violate the rules set forth above even if the physician merely "attempted" the violation, or aided another in committing a violation.

- 5) At screening, based on my past experiences with the Board, we would expect such a complaint to be opened for investigation. An investigator would be assigned to gather evidence under the direction of the prosecuting attorney. Significantly, every case is assigned a case advisor, who is a member of the Board who works with the prosecutor and investigator in determining what should happen in the case.
- 6) Depending on the evidence produced, the prosecution team and the case advisor would arrive at an agreed upon disposition. The prosecutor would attempt to achieve that disposition, either through negotiated agreement or through a formal hearing. As a prosecutor, we must tell you that a violation based on the conduct you described would be relatively easy to prove if the conduct came to the attention of the Board because it would create a clear paper trail, and other states use databanks to track prescription activity.
- 7) If the prosecution moved forward and if there was a hearing or a negotiated settlement, the team would then take the matter to the full Medical Examining Board. The full Board votes on whether or not to accept the hearing results or the negotiated agreement.

- 8) If the Board disciplined the physician, the discipline is published through our website, and is reported to multiple databanks that make the information available to other entities, including, we believe, the DEA. Even if the Board did not affirmatively report the violation, we believe the DEA requires physicians to report adverse actions against their own licenses. Therefore, discipline for this particular offense would likely have collateral consequences/

This information should not be construed as a policy statement on behalf of the Board or the Department; it is the opinion as an individual attorney who works with the Medical Examining Board. We should emphasize that the Medical Examining Board has officially recognized the need to provide relief from chronic and severe pain, even in patients who happen to be addicts. I have no indication, however, that the Board would overlook the significant legal barriers to the conduct you propose. We have not attempted to point to every possible violation of state, federal or regulatory law, nor to likely collateral consequences of such conduct.

We are sorry to hear that your friend is in pain. We hope this information is helpful to you.

From: kendriessen@hotmail.com  
To: drlboards@wisconsin.gov  
Subject: cancer  
Date: Wed, 6 Apr 2011 18:57:07 -0500

Hello:

This question is directed to the Medical Board. I have a friend who is going through chemotherapy. I'm not a doctor but I think my friend could get relief from marijuana/cannabis. I have not been able to find them a doctor that would prescribe such medication in Wisconsin. What would the board do to a doctor if said doctor did in fact write a prescription for marijuana and the patient was able to obtain marijuana from another state where medicinal marijuana is legally available? Would they report the doctor to the DEA or are there provisions or measures where the board would take the doctor's license or what? If not and it is possible, legal and acceptable to the board that regulates doctors for a Wisconsin doctor to provide a prescription for marijuana, please let me know.

Thank you,

Ken Driessen