## Criminal Law

### Bail Jumping – Failure to Comply with Terms of Bond After Having Been "Released From Custody"

***State v. Jacobs*, 2023 WI App 53 (filed Sept. 19, 2023) (ordered published Oct. 25, 2023)**

**HOLDING:** The defendant was not liable for bail jumping because he was no longer "released from custody" when he allegedly committed the crimes that were the bases for the bail jumping charges against him.

**SUMMARY:** Wis. Stat. section 946.49(1)(b) provides that "[w]hoever, *having been released from custody under [Wis. Stat.] ch. 969,* intentionally fails to comply with the terms of his or her bond" is guilty of a Class H felony if the offense with which the person was charged and released under Wis. Stat. chapter 969 is a felony. (Emphasis added.) Wis. Stat. section 969.03(2) provides that "[a]s a condition of release in all cases, a person released under [Wis. Stat. section 969.03] shall not commit any crime."

In this case the court was called upon to address the liability of a defendant for bail jumping in the following scenario: a person (hereinafter the defendant) is charged with a crime, the defendant is then released on bond, the defendant fails to appear at a subsequent court proceeding, the court issues a bench warrant for the defendant's arrest, and the defendant is arrested on the bench warrant and then while in custody commits a new crime before a court has held a hearing on the bench warrant. The issue is whether the commission of the new crime constitutes bail jumping.

In an opinion authored by Judge Gill, the court concluded that defendant Jacobs did not commit bail jumping.

The court adopted a two-step test to determine when – after being released from custody under Wis. Stat. chapter 969 – a defendant no longer meets the definition of "having been released." "First, the defendant must be placed in physical custody on the bond at issue. Second, there must be some court action regarding the bond under which the defendant was previously released" (¶ 3).

In this case, it was clear that the defendant had been placed in physical custody on the bond at issue. The parties disagreed, however, as to when the second requirement is met. According to the state, the second requirement is met only when a defendant returns to court for the case in question from which the person was released on bond. The defendant argued that the second requirement is met once a defendant is arrested on a bench warrant, regardless of whether the person has yet been brought before a circuit court (*see* ¶ 4).

The court of appeals agreed with Jacobs. "We conclude that a circuit court action sufficient to establish that a defendant is no longer 'released from custody under [Wis. Stat.] ch. 969' for purposes of Wis. Stat. § 946.49, includes the issuance of a bench warrant, the revocation of bond, or the modification of bond such that a defendant cannot obtain release. *See* Wis. Stat. § 968.09 (warrant on failure to appear); § 969.08 (grant, reduction, increase or revocation of conditions of release)" (¶ 5).

A circuit court can issue a bench warrant for a defendant's arrest when the defendant "fails to appear before the [circuit] court as required." *See* Wis. Stat. § 968.09(1). "'Prior to the defendant's appearance in [circuit] court after' his or her 'arrest under sub. (1), [Wis. Stat.] ch. 969 shall not apply.' Sec. 968.09(2)" (¶ 6). "Therefore, after his arrest under § 968.09(1), [Jacobs] could not have been subject to release under ch. 969 until he returned to court, and, thus, he was statutorily disqualified from prosecution under Wis. Stat. § 946.49 during that time" (*id.*).

## Criminal Procedure

### Drug Prosecutions – Property Forfeiture

***State v. Lanning*, 2023 WI App 52 (filed Sept. 19, 2023) (ordered published Oct. 25, 2023)**

**HOLDING:** The circuit court did not lose competency to proceed with a civil action to forfeit property allegedly used to distribute methamphetamine.

**SUMMARY:** The state charged defendant Lanning with several felony drug offenses. It also filed a civil action seeking

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forfeiture of a parcel of real property that Lanning allegedly used to distribute methamphetamine. *See* Wis. Stat. § 961.555(2). Lanning filed an answer to the forfeiture complaint.

In this appeal, Lanning argued that the circuit court lost competency to proceed with the forfeiture action because it failed to hold a hearing within 60 days after service of his answer to the state's forfeiture complaint. Lanning further contended that the 60-day hearing deadline in Wis. Stat. section 961.555(2)(b) applied even if the forfeiture proceedings were automatically adjourned under Wis. Stat. section 961.555(2)(a). In an opinion authored by Judge Hruz, the court of appeals rejected these arguments.

Wis. Stat. section 961.555(2)(b) provides that "[u]pon service of an answer, [a civil forfeiture] action shall be set for hearing within 60 days of the service of the answer but may be continued for cause or upon stipulation of the parties." The court of appeals has previously held that this 60-day hearing deadline is mandatory and that a circuit court must dismiss a forfeiture petition with prejudice unless the requisite hearing is held within the 60-day period or it is continued in accordance with Wis. Stat. section 961.555(2)(b) (*see* ¶ 15). *See State v. One 2000 Lincoln Navigator,* 2007 WI App 127, 301 Wis. 2d 714, 731 N.W.2d 375.

On the other hand, Wis. Stat. section 961.555(2)(a) provides that "the forfeiture proceedings shall be adjourned until after the defendant is convicted of any charge concerning a crime which was the basis for the seizure of the property." In other words, the forfeiture proceedings are automatically adjourned upon the commencement of a forfeiture action that precedes the relevant judgment of conviction (*see* ¶ 16).

Applying these statutes to the case at hand, the court of appeals held as follows: "Wisconsin Stat. § 961.555(2)(a) automatically adjourns forfeiture proceedings 'until after the defendant is convicted of any charge concerning a crime which was the basis for the seizure of the property.' In order to give reasonable effect to that mandatory adjournment, we conclude that the sixty-day hearing deadline in subsec. (2)(b) cannot begin until after the defendant's requisite conviction. Once the defendant has been convicted of a requisite charge and has filed an answer to the State's forfeiture complaint, the circuit court is required to hold a hearing within sixty days or else it loses competency pursuant to our holding in *One 2000 Lincoln Navigator*. Here, because Lanning had not yet been convicted of a charge that was the basis for the seizure of his property, the forfeiture proceedings were adjourned under subsec. (2)(a), and the court could not lose competency under subsec. (2)(b)" (¶ 2).

## Torts

### Medical Malpractice – Informed Consent – Treating Physician

***Wetterling v. Southard*, 2023 WI App 51 (filed Sept. 12, 2023) (ordered published Oct. 25, 2023).**

**HOLDING:** Wisconsin law does not create a duty or liability on the part of individuals other than a patient's treating physician to determine whether the patient is capable of providing informed consent.

**SUMMARY:** The plaintiff underwent a CT-guided biopsy to evaluate a lesion in her lung. After the procedure, she developed complications stemming from "punctures in her spleen" that necessitated a splenectomy. The plaintiff later sued the physician who performed the biopsy and the hospital at which the procedure took place. The hospital moved to dismiss the claims, specifically contending that the duty to obtain informed consent rests entirely with the treating physician and that the treating physician was not its employee. The circuit court granted summary judgment in favor of the hospital.

The court of appeals affirmed in an opinion authored by Judge Hruz. "Well-established Wisconsin law provides that the treating physician – not the hospital – bears the duty of advising a patient of a treatment's risks and ensuring that the patient provides his or her informed consent" (¶ 17). The plaintiff contended that a nurse violated a duty of ordinary care in administering medication to her before the physician obtained informed consent and by failing to tell the physician that he (the nurse) had given the plaintiff the medication (valium and hydrocodone).

The court rejected this argument. "The absence of an express duty or standard of care for an individual who interacts with a patient prior to the physician is consistent with a physician's obligations in Wis. Stat. § 448.30 and the nature of an informed consent discussion" (¶ 22).

"It … follows that a physician has an inherent responsibility under Wis. Stat. § 448.30 to assess whether the patient understands the provided information and whether the patient is capable of using that information to intelligently exercise his or her right to consent to a treatment. This responsibility also comports with the general purpose of an informed consent discussion, which is to ensure that patients receive information that enables them 'to intelligently exercise [their] right to consent or to refuse the treatment or procedure proposed'" (¶ 23) (citations omitted).

"Regardless of what might have occurred before this conversation, the physician can – and must – determine for [himself] or herself whether the patient understands the physician's communications and whether the patient is capable of providing informed consent for a treatment" (¶ 24).

In short, the hospital could not be held liable under the doctrine of *respondeat superior* for any negligent actions by the nurse that occurred before the physician discussed informed consent with the plaintiff. **WL**