

### Criminal Procedure Subject-Matter Jurisdiction – Ineffective Assistance of Counsel – Plea Withdrawal – Sufficiency of Evidence

*State v. Davis*, 2023 WI App 25 (filed April 4, 2023) (ordered published May 31, 2023)

**HOLDINGS:** The circuit court did not lose subject-matter jurisdiction over the defendant's case. Additional holdings are addressed in the analysis that follows.

**SUMMARY:** The state charged Davis in two separate cases. In the first case, the state charged Davis with multiple offenses, including false imprisonment and robbery as acts of domestic violence. In the second case, the state charged him with fleeing an officer (and one other charge that was later dismissed).

On Aug. 3, 2020, at 9:26 a.m., the circuit court called the false imprisonment and robbery case and inquired whether it was ready for trial. The state responded that it was not prepared to move forward due to an issue with subpoenas and inconsistent contact with the victim. Defense counsel moved to dismiss, and the circuit court dismissed the case without prejudice. A few minutes later and during the same hearing, the victim appeared and the state indicated that it could move forward with the trial. The court rescinded its prior oral ruling (which had not yet been entered by the clerk on the docket) and transferred the case to another judge, who conducted the false

imprisonment and robbery jury trial that same day. The defendant was convicted as charged. Following the guilty verdict, the defendant pleaded guilty to the fleeing charge that had been filed in a separate case.

Davis filed a postconviction motion in which he argued that the circuit court lost subject-matter jurisdiction in the false imprisonment and robbery case when the court dismissed the case without prejudice. He contended that the dismissal constituted a “final disposition” of the case that caused subject-matter jurisdiction to “expire” and that the subsequent trial and conviction amounted to a “legal nullity” (¶ 13). He also argued that trial counsel was ineffective for failing to object to a lack of personal jurisdiction in the false imprisonment and robbery case (an argument similar to the subject-matter-jurisdiction argument), that he should be able to withdraw his guilty plea in the fleeing case because that plea was motivated by the unfavorable jury verdict in the false imprisonment and robbery case, and that the evidence was insufficient to support the robbery verdict. The circuit court denied the postconviction motion.

In an opinion authored by Judge Dugan, the court of appeals affirmed. It concluded that on the facts of this case, “the circuit court had the power to rescind its oral dismissal of the charges” (¶ 19).

“[I]t is firmly established in Wisconsin law that a circuit court has the inherent authority to reconsider its own rulings

during ongoing proceedings” (¶ 20). “Again, evaluating the facts of this case, the circuit court made an oral ruling at the beginning of the hearing and, due to a change in the circumstances that occurred during the same hearing, reconsidered that same ruling minutes later. We conclude that the circuit court's actions here were, therefore, nothing more than an exercise of its inherent authority to reconsider its own rulings and its subject matter jurisdiction over Davis's case did not expire” (*id.*). The circuit court's oral ruling was not a final disposition, as David argued, and the jury trial and verdict were not a legal nullity (see ¶ 21).

Having rejected Davis's argument that the circuit court lacked subject-matter jurisdiction on the basis that Davis's case was finally disposed of, the court of appeals said that it “necessarily must also reject Davis's two arguments for ineffective assistance of counsel and plea withdrawal that are similarly premised on his final disposition argument in [the false imprisonment and robbery case,] and the lack of a legally valid complaint to continue the proceedings” (¶ 24). After extended factual analysis, the court of appeals also concluded that there was sufficient evidence to convict Davis on the robbery charge (see ¶ 27).

### Family Law

#### Termination of Parental Rights – Felony Child Neglect – Direct Commission – Death of Child

*Brown Cnty. Dep't of Hum. Servs. v. S.K. (In re Termination of Parental Rts. to R.M.)*, 2023 WI App 27 (filed April 18, 2023) (ordered published May 31, 2023)

**HOLDING:** In a termination of parental rights (TPR) action, a conviction for neglect of child resulting in death as a party to the crime qualifies as a “serious felony” justifying termination of rights “if the individual in question directly committed that crime.”

**SUMMARY:** Robert, born in 2017, was the biological child of Stephanie and Jacob. (These are the pseudonyms the court used for certain individuals in the case.) Shortly after Robert's birth, Jacob and Stephanie brought the dead body of his half-sister to a hospital emergency room, and evidence of severe abuse on the child's body was observed.

Robert was adjudicated in need of protective services. Jacob later pleaded no contest to reckless homicide of a child

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as party to the crime. Stephanie entered a no-contest plea to neglect of a child resulting in death as party to the crime.

In 2021, the county began this TPR action to terminate Stephanie's parental rights to Robert on the single ground that she had committed a "serious felony against a child, pursuant to Wis. Stat. § 48.415(9m)" (¶ 6). The county moved for partial summary judgment based on Stephanie's child-neglect conviction. The circuit court granted the motion and later terminated Stephanie's parental rights to Robert.

The court of appeals reversed and remanded in an opinion authored by Judge Gill. The county contended that because Stephanie was convicted of a serious felony it made no difference that she was charged as a party to the crime (see ¶ 24). The court of appeals held "that a conviction for neglect of a child resulting in death, as a party to the crime, qualifies as a serious felony if the individual in question directly committed that offense. It is not absurd to conclude that the legislature intended to allow the termination of parental rights for individuals who did not directly commit the more serious offenses listed in subd. 1. of § 48.415(9m) (b), but intended to limit the termination of parental rights based on neglect of a child resulting in death to individuals who directly committed that offense" (¶ 26). The court of appeals remanded the case for a determination of whether Stephanie directly committed the offense (see ¶ 28).



BLINKA



HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at [www.wisbar.org/wislawmag](http://www.wisbar.org/wislawmag).

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**Nuisance Pleadings – Failure to State a Claim – Statute of Limitation**  
**Enz v. Duke Energy Renewable Servs., 2023 WI App 24 (filed April 4, 2023) (ordered published May 31, 2023)**

**HOLDING:** The circuit court properly dismissed private-nuisance claims filed against operators of a wind turbine farm.

**SUMMARY:** David and Rosemary Enz and Darren and Susan Ashley (hereinafter the "families") alleged that they suffered damages by the "operators" of a wind turbine farm. They pleaded the claims as private nuisances. The circuit court dismissed their private-nuisance claims, some for failure to state an actionable claim and others as barred by the statute of limitation. The families appealed.

The court of appeals affirmed in an opinion authored by Judge Gill that addressed three overarching issues. First, because the record showed that the families' claims were dismissed without prejudice, there was no need for the court to discuss whether to have done so would have been error. (A "final" order does not mean that a claim was dismissed with prejudice, unless otherwise specified and especially because errors

can be remedied by correcting pleadings) (see ¶ 25).

Second, the claims alleging permanent nuisances and for personal injury and property damages were barred by applicable statutes of limitation (see ¶ 31). The families' claims for personal injury were barred by the three-year statute in Wis. Stat. section 893.54(1m)(a) because these injuries ended when the families moved from their homes in May 2011 (see ¶ 41). And because claims for property damages based on disrupted "views and vistas" were not ongoing or repeated, they were barred by Wis. Stat. section 893.52(1) (¶ 43).

Finally, claims arising out of alleged vibrations, low-frequency noise, and "infrasound" were also properly dismissed. The court assumed without deciding that the families adequately alleged a private nuisance to their properties (see ¶ 51). The families failed, however, to adequately plead that the operators created "an intentional common law nuisance" (¶ 65). The opinion explored this failure in a lengthy critical analysis of the pleadings and the case law. The families alleged that the nuisance was "unreasonable" but did not explain "why that is so" (¶ 84).



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**Unemployment Compensation  
Definition of “Employee” – Wis.  
Stat. § 108.02(12)**

**Amazon Logistics Inc. v. LIRC, 2023 WI App 26 (filed April 6, 2023) (ordered published May 31, 2023)**

**HOLDING:** Amazon Logistics’ “delivery partners” were “employees” for purposes of unemployment insurance taxation.

**SUMMARY:** Amazon Logistics Inc. coordinates the delivery of products purchased by customers of Amazon.com. It contracts with entities to move and deliver packages. These entities include UPS, the United States Postal Service, and FedEx. Amazon Logistics also created a program called “Amazon Flex” that uses a smartphone application to coordinate package deliveries made by individual drivers who apply to perform delivery services as “delivery partners.” These delivery partners sign an agreement titled “Amazon Flex Independent Contractor Terms of Service.” Using the Flex app, the drivers can sign up for “delivery blocks.” A delivery block is usually two to four hours. Amazon Logistics pays the delivery partners what it refers to as a “service fee” to

deliver the packages in a delivery block. Packages are picked up for delivery at an Amazon Logistics warehouse. Delivery partners use their own smartphones and vehicles to do the deliveries.

The Wisconsin Department of Workforce Development (DWD) conducted an audit of services performed by more than 1,000 delivery partners and determined that nearly all partners qualified as “employees” for unemployment compensation taxation purposes, although Amazon Logistics did not consider the drivers to be its employees. Because of this determination, the DWD assessed Amazon Logistics more than \$200,000 in delinquent taxes. The Labor and Industry Review Commission (LIRC) upheld the DWD’s determination. The circuit court set aside LIRC’s decision. In an opinion authored by Judge Fitzpatrick, the court of appeals reversed the circuit court.

Under Wisconsin’s unemployment insurance law, *employee* is defined as “any individual who is or has been performing services for pay for an employing unit.” See Wis. Stat. § 108.02(12)(a). If an individual performs services for pay, the individual is presumed to be an employee for

unemployment compensation purposes and the burden shifts to the employing unit to prove that the individual is exempt under one of the exceptions to Wis. Stat. section 108.02(12)(a).

Amazon Logistics could rebut the presumption that the delivery partners were “employees” by proving at least six of nine factors specified in Wis. Stat. section 108.02(12)(bm)2.a.-i. The court of appeals concluded that it proved only five of the nine factors.

Amazon Logistics did establish that 1) the delivery partners performed most of the services in a location of their choosing and used their own equipment or materials in performing the services, 2) the delivery partners incurred the main expenses related to the services they performed under contract, 3) the delivery partners were subject to a monetary penalty for unsatisfactory work, 4) the delivery partners might have realized a profit or suffered a loss under the terms of service agreement they executed with Amazon Logistics, and 5) the delivery partners had recurring business liabilities or obligations.

However, Amazon Logistics failed to establish that 1) the delivery partners advertised or otherwise affirmatively held themselves out as being in business, 2) the delivery partners operated under multiple contracts with one or more employing units to perform specific services, 3) the services performed by the delivery partners did not directly relate to Amazon Logistics, and 4) the delivery partners were not economically dependent upon Amazon Logistics with respect to services performed. The court’s very lengthy opinion analyzes the substance of each of these nine factors and their application to the facts of this case.

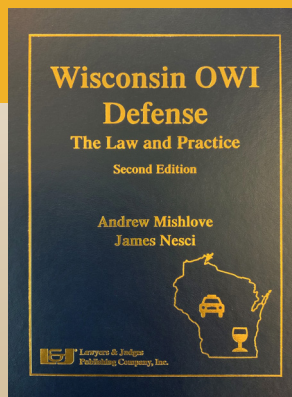
Because Amazon Logistics satisfied its burden of proof only to five, not to six or more, of the nine statutory factors, the court of appeals concluded that the LIRC correctly determined that the delivery partners qualify as “employees” under Wis. Stat. section 108.02(12) (see ¶ 141).

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