Criminal Procedure

Sentence Credit – "Read-In" Charges

***State v. Fermanich*, 2023 WI 48 (filed June 14, 2023)**

HOLDING: The defendant was entitled to sentence credit for time spent in confinement on dismissed and read-in charges.

SUMMARY: In the span of approximately two hours, Fermanich stole and drove three trucks in Langlade County, eventually driving the third truck into Oneida County. The state brought charges first in Oneida County. The Oneida County Circuit Court imposed cash bail that Fermanich could not post, so he stayed in jail. Several months later, while Fermanich remained in the Oneida County jail, the state brought charges in Langlade County. The Langlade County Circuit Court imposed a signature bond. Ultimately, the two cases were consolidated in Langlade County.

Fermanich pleaded no contest to three charges – one from Langlade County and two from Oneida County. The other charges from both counties were dismissed and read in. ["Read-in charges are charges that are not prosecuted but can be considered by the circuit court during sentencing" (¶ 7 n.3).] Fermanich was sentenced to concurrent terms on each of the three counts.

The circuit court granted the defendant 433 days' sentence credit on the two Oneida County charges for the time he spent in custody on the Oneida County charges. The parties agreed on that award of credit. However, they disagreed on the credit owed for the Langlade County charge because the defendant was "free" on a signature bond for that charge. Ultimately, the circuit court awarded 433 days of credit on all three charges (including the Langlade County charge) for time the defendant spent in the Oneida County jail.

In a per curiam opinion, the court of appeals reversed. In a majority opinion authored by Justice Hagedorn, the supreme court reversed the court of appeals.

The issue before the court was whether Fermanich is entitled to sentence credit on the Langlade County charge for time served in the Oneida County jail. The majority concluded that he is.

"A defendant is entitled to sentence credit for pre-trial confinement 'for all days spent in custody in connection with the course of conduct for which sentence was imposed,' which includes 'confinement related to an offense for which the offender is ultimately sentenced.' Wis. Stat. § 973.155(1)(a) (2021-22). Under *State v. Floyd*, pre-trial confinement on a dismissed and read-in charge relates to an offense for which the offender is ultimately sentenced. 2000 WI 14, ¶ 32, 232 Wis. 2d 767, 606 N.W.2d 155, *abrogated on other grounds* by *State v. Straszkowski*, 2008 WI 65, ¶¶ 89, 95, 310 Wis. 2d 259, 750 N.W.2d 835. Three of Fermanich's Oneida County charges – for which he was confined pre-trial – were dismissed and read in at sentencing on the Langlade County charge. Therefore, under *Floyd*, confinement on the dismissed and read-in Oneida County charges relates to the Langlade County charge for which Fermanich was ultimately sentenced. Accordingly, he is entitled to credit on that charge" (¶ 2).

Justice Dallet, a member of the majority, also filed a concurring opinion. Chief Justice Ziegler filed a dissent that was joined in by Justice R.G. Bradley.

Probable Cause – Arrests – Odor of Marijuana

***State v. Moore*, 2023 WI 50 (filed June 20, 2023)**

HOLDING: The odor of marijuana supported the defendant's arrest on drug charges.

SUMMARY: A police officer stopped a vehicle when the officer observed a traffic violation. The officer "detected an odor of raw marijuana." The officer called for backup, and the two officers then arrested the driver, Moore. Upon later searching Moore, the officers found several baggies of other drugs concealed in the waistband of his pants.

The circuit court granted the defendant's motion to suppress the evidence on the ground that the police officers had no probable cause to arrest him. In an unpublished decision, the court of appeals affirmed.

The supreme court reversed in an opinion authored by Justice Hagedorn. The issue came down to whether, under the totality of the circumstances, a reasonable police officer would believe the defendant probably committed or was committing a crime. Here, the officer observed a traffic violation and then a "liquid fly out the driver's window." Upon stopping the car, the officer "smelled raw marijuana." An initial search turned up no incriminating evidence. A second search turned up the drugs.

"The officers need not know with certainty that Moore was committing or had committed illegal activity, but they had more than enough to meet the modest bar that it was probably true" (¶ 12). The lack of any evidence regarding the officers' training or experience detecting marijuana based on smell went to their credibility, which the trial judge did not question (*see* ¶ 16).

Justice Dallet dissented, joined by Justice A.W. Bradley and Justice Karofsky. Essentially, the dissent contended that the traffic stop did not support the defendant's later arrest and search of his person pursuant to the doctrine of search incident to a lawful arrest (*see* ¶ 18).

Sentencing – Conditions of Extended Supervision and Probation – Supervision by the Court

***State v. Williams-Holmes*, 2023 WI 49 (filed June 20, 2023)**

HOLDING: Although circuit courts can impose conditions of probation and extended supervision, control over defendants and the administration of the terms of probation and extended supervision belong to the Department of Corrections (DOC). Modification of the terms of probation and extended supervision must be accomplished through a statutorily authorized process.

SUMMARY: While on probation for a felony battery conviction, Williams-Holmes assaulted his girlfriend. The state brought charges, and the defendant eventually pleaded guilty to two counts of battery, one count of false imprisonment, and one count of bail jumping,

BLINKA

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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each as a repeat offender. The circuit court imposed a combination of dispositions, including confinement-extended supervision and probation. On both the extended supervision and probation periods, the court further imposed a condition that the defendant not live with any women or unrelated children without the court's permission.

The defendant moved for postconviction relief asking the court to amend the judgment of conviction to require that permission to reside with women or unrelated children must come from the DOC – not the court. The circuit court denied the motion. In a published decision, the court of appeals affirmed. *See* 2022 WI App 38. In a majority opinion authored by Justice Hagedorn, the supreme court reversed the court of appeals.

Although circuit courts can impose conditions of probation and extended supervision, control over defendants and the administration of the terms of probation and extended supervision belong to the DOC (*see* ¶¶ 9-10). "While the circuit court is not involved in the day-to-day administration of probation or extended supervision, its role is not necessarily extinguished" (¶ 12). The statutes provide that conditions imposed by the court for both modes of supervision can be modified.

In this case, "the record strongly suggests the circuit court intended to administer this condition of supervision itself, and not leave future permission to a statutorily authorized modification. In its postconviction explanation, the circuit court appears to have envisaged Williams-Holmes (or a probation or parole agent) communicating with the court directly and as needed to obtain the necessary approval for him to live with a woman or an unrelated child. This would constitute impermissible supervision and administration of the conditions of probation by the court, which the legislature has entrusted to DOC.... Therefore, we reverse and remand the cause to the circuit court to afford it an opportunity to either clarify how the condition imposed is consistent with the law or to modify its order accordingly" (¶ 14).

Chief Justice Ziegler filed a dissent that was joined in by Justice Roggensack and Justice R.G. Bradley.

Double Jeopardy – Scope of Jeopardy – Issue Preclusion

***State v. Killian*, 2023 WI 52 (filed June 21, 2023)**

HOLDINGS: 1) Double jeopardy does not bar the present prosecution against the defendant. 2) Issue preclusion under the Double Jeopardy Clause and common-law issue preclusion do not bar the present prosecution.

SUMMARY: In March 2015, the state charged defendant Killian with first-degree sexual assault of a child under the age of 12; the victim (referred to as Britney) was 10 years old at the time and the complaint alleged that the defendant "grabbed her buttocks" in August 2014. The state filed a second criminal complaint against the defendant in March 2016 charging him with repeated sexual assault of a child (referred to as Ashley) between 1994 and 1999, though the criminal complaint contained allegations that the defendant had been sexually assaulting Ashley between 1988 and 1999. These cases were later joined for trial.

The circuit court granted the state's pretrial motion to admit evidence of sexual assaults against Ashley that oc-

curred between 1988 and 1999 to show the defendant's "motive, intent, preparation, absence of mistake or accident, and plan." The court granted the defendant's motion to exclude evidence of other acts of sexual assault against Britney.

On the second day of trial and just before Britney testified, the prosecutor argued to the court that he should be allowed to introduce other acts of sexual assault against Britney and that the information could be amended to add additional charges if there were testimony about the other sexual assaults. The court reaffirmed its other-acts ruling excluding this evidence.

Britney took the stand and testified about additional acts of sexual assault. Defense counsel objected and moved for a mistrial, which the court granted. The court later found that "the prosecutor's actions were intentional" and "designed to create another chance to convict, and was an act done so as to allow the State another 'kick at the cat'" (¶ 15). The circuit court therefore concluded that the state is barred from retrial in this matter because of "prosecutorial overreaching," and it dismissed the case with prejudice. The state did not appeal the circuit court's decision, and it did not dispute the circuit court's finding of prosecutorial overreach.

The state subsequently filed a new criminal complaint against the defendant. It charged six counts of incest involving victim Ashley, three counts of first-degree sexual assault of a child (Ashley) between the years 1990 and 1993, and one count of repeated sexual assault of a child (Britney) "in or around June 2012, and no later than August 17, 2014." The defendant moved to dismiss the new charges, arguing that a retrial of this matter would violate the Double Jeopardy Clause. The circuit court agreed.

The state appealed, and in a published decision the court of appeals affirmed. *See* 2022 WI App 43. In a majority opinion authored by Chief Justice Ziegler, the supreme court reversed the court of appeals.

On appeal, the defendant, Killian, argued that the Fifth Amendment's Double Jeopardy Clause prohibits the state from prosecuting the present case. According to Killian, the state previously prosecuted him for the offenses charged in this case because "[t]he evidence the State intended to submit in the preceding trial was sufficient to convict [Killian] of all the charges in the current case," and "the State intended to amend the charges against [Killian] during the trial to include charges for which he is again placed in jeopardy here." Killian argued that because that case ended in a mistrial intentionally provoked by the prosecutor – a judicial determination the parties did not contest – double jeopardy bars the state's prosecuting the present case. Killian contended in the alternative that issue preclusion, under both the Double Jeopardy Clause and common law, bars the present case (*see* ¶ 2).

The majority concluded that Killian's previous trial does not bar the state from prosecuting the present case because the scope of Killian's jeopardy in his trial did not include the offenses with which he is now charged (*see* ¶ 3). It held that "where a trial ends in a mistrial, the defendant's scope of jeopardy consists of those offenses for which the defendant faced actual danger of conviction, meaning the defendant was exposed to the risk of a determination of guilt regarding those offenses. The inquiry should focus on the charging documents, but the entire record may be examined if necessary to confirm the scope of jeopardy as established by those charging documents" (¶ 38) (citations and internal quotations omitted).

The majority concluded that the scope of Killian's jeopardy in his trial included sexually assaulting Britney by grabbing her buttocks in 2014 and repeated sexual assault of Ashley from 1994 to 1999 (*see* ¶ 45). "[T]he prosecutor's stated intention to amend the Information and add more charges at the close of evidence did not expand the scope of Killian's jeopardy. The prosecutor's intent alone was insufficient to put Killian at risk of a determination of guilt. The jury would have had no ability [to] find Killian guilty of any additional offenses unless and until that amendment took place. No such amendment ever took place, so jeopardy never attached" (¶ 44). [*Note:* Wis. Stat. section 971.29(2) provides that "[a]t the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial."]

Having determined the scope of the defendant's jeopardy in the first prosecution, the majority then determined whether Killian's jeopardy in the second prosecution is identical in law and in fact to his jeopardy in the first prosecution. The majority concluded that it is not. "Because no count in the present prosecution is identical both in law and in fact with an offense charged in Killian's previous prosecution, the present case is not a prosecution for the same offense and does not violate Killian's right against double jeopardy" (¶ 50).

Lastly, the court concluded that "issue preclusion under the Double Jeopardy Clause and common law issue preclusion do not bar the present prosecution. Issue preclusion under the Double Jeopardy Clause requires a valid judicial determination of ultimate fact, and none exists in this case because Killian's trial ended in a mistrial. Common law issue preclusion also does not bar this prosecution. The circuit court's order dismissing with prejudice the criminal complaint in the first case did not decide the scope of Killian's jeopardy. Therefore, that issue was never actually litigated, and issue preclusion does not bar the present prosecution" (¶ 4) (citations and internal quotations omitted).

Justice A.W. Bradley filed a dissenting opinion that was joined in by Justice R.G. Bradley.

Wrongful Convictions – Review of Compensation Awards

***Sanders v. Wisconsin Claims Bd.*, 2023 WI 60 (filed June 30, 2023)**

HOLDING: There was no majority opinion in this case. The positions of the various justices are summarized in the discussion below.

SUMMARY: After spending 26 years in prison for a crime he did not commit, Sanders petitioned the Wisconsin Claims Board (the board) for compensation, seeking more than $5.7 million. The board awarded $25,000, the maximum allowed by Wis. Stat. section 775.05(4). This statute also provides, in relevant part, that "[i]f the … [B]oard finds that" $25,000 "is not adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature." The board did not find $25,000 inadequate; therefore, it did not submit a report.

Sanders sought judicial review, arguing the board should have made a finding regarding the adequacy of $25,000. The circuit court rejected his argument and affirmed the board. In an unpublished decision, the court of appeals reversed.

The supreme court reversed the court of appeals. There was no majority opinion in the case. The lead opinion was authored by Justice R.G. Bradley and was joined in only by Chief Justice Ziegler and Justice Roggensack. They concluded that Sanders' argument was "incompatible with the plain meaning of Wis. Stat. § 775.05(4). Section 775.05(4) requires the Board to submit a report in the event that the Board finds $25,000 inadequate. The Board did not so find" (¶ 5). The statute "does not command the Board to

make a finding regarding the adequacy of $25,000" (¶ 19).

The lead opinion considered whether the board was required to explain why it did not make a finding regarding adequacy and whether its action or non-action in this regard is subject to judicial review. Section 775.05(5) provides in part that the "Board shall keep a complete record of its proceedings in each case and of all the evidence. The findings and the award of the ... Board shall be subject to review as provided in ch. 227." The lead opinion concluded that "the Board's decision not to make a non-required finding regarding adequacy is not a 'finding' in the legal sense of the word as used in [§ 775.05(5)].... Accordingly, the Board's exercise or non-exercise of its discretion in this regard is not subject to judicial review" (¶ 32).

Justice Hagedorn filed a concurring opinion but did not join the lead opinion. Quoting the concurrence: "Sanders maintains the Board erred because it did not explain why the award to Sanders was adequate. The statute is only triggered, however, *if* the Board finds the amount of the award inadequate. If the Board does not find the amount inadequate, there is no statutory mandate to explain why it decided against making a finding that § 775.05 does not require the Board to make. I agree with the lead opinion's statutory analysis explaining why this is so..." (¶ 49). Justice Hagedorn further stated that the lead opinion reached issues regarding the reviewability of the board's findings that were not necessary to resolve the dispute before the court (*see* ¶ 50).

Justice Karofsky filed a dissenting opinion contending that the lead opinion "absolve[s] the Board of its duty to follow the legislature's directive to: (1) determine whether or not the statutory maximum is adequate; and (2) explain its reasoning such that a court can review – and Sanders can understand – the rationale behind its determination" (¶ 85). Justice A.W. Bradley and Justice Dallet joined this dissent.

Jury Trials – Mistrials – Grounds

***State v. Debrow*, 2023 WI 54 (filed June 23, 2023)**

HOLDING: The trial judge properly denied the defendant's request for a mistrial.

SUMMARY: The defendant was on trial for the sexual assault of several underage children. Before trial, the prosecution and the defense agreed that there should be no reference to the defendant's 2004 child-sexual-assault conviction. One of the state's key witnesses was the victims' brother, who had harbored suspicions about the defendant and had learned of the 2004 conviction sometime before the assault through the Consolidated Court Automation Programs (CCAP). The prosecutor instructed the witness not to mention the 2004 conviction or CCAP when explaining why he was suspicious of the defendant's actions on the night of the assault. During trial, when asked to explain his vigilance, the boy blurted out that he had "looked on CCAP."

The circuit court denied the defendant's motion for mistrial. He was convicted, and the circuit court denied his postconviction motion. In an unpublished decision, the court of appeals reversed the conviction, finding that the curative instruction was insufficient.

The supreme court reversed the court of appeals in an opinion authored by Justice Karofsky holding that the circuit court had properly exercised its discretion in denying a mistrial. It was not reasonable to assume that a reference to "CCAP," even assuming the jury heard the answer amid the courtroom ruckus that ensued, would lead the jury to find he had a prior sex-related conviction. The trial judge immediately struck the testimony, drew the jury's attention from it by focusing on a hearsay issue, and properly con-

sidered and rejected other alternatives, including inviting the defense to submit an "appropriate instruction" (¶¶ 16-17).

Justice Roggensack, joined by Justice R.G. Bradley, concurred but did not join the majority opinion on the ground that the majority opinion "lacks a full analysis of the entire proceeding" as required by the issue (¶ 23).

Jury Trials – Mistrials

***State v. Green*, 2023 WI 57 (filed June 29, 2023)**

HOLDING: The trial judge properly granted a mistrial, and double jeopardy did not bar the defendant's retrial for the same offense.

SUMMARY: The defendant was on trial for sexual trafficking of a child. It was alleged that the defendant had driven the child to a location where she was sexually abused by a man in exchange for money.

On the morning of trial, the case was transferred to another trial judge because of a crowded court calendar. After the state called its two witnesses (the victim and a police officer), the defense called the defendant's cousin, who testified that it was he, not the defendant, who drove the victim to the location where, unbeknownst to him, the assault occurred.

Following the noon recess, the state moved for a mistrial on grounds that the cousin's evidence amounted to a third-party defense, which required pretrial notice to the state and a pretrial ruling by the judge. *See State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

The judge granted the mistrial motion despite later reflection indicating that the evidence was admissible. The defense then moved to block any retrial on the ground of double jeopardy. The judge denied the motion. In an unpublished decision, the court of appeals reversed, ruling the mistrial had been unnecessary.

The supreme court reversed the court of appeals in an opinion authored by Justice R.G. Bradley. The majority opinion addressed the law governing appellate review of mistrial decisions and the varying degrees of deference accorded to trial judges (*see* ¶¶ 19-24). The trial judge "carefully considered" the options and granted the mistrial "only after hearing arguments of counsel and contemplating alternatives" (¶ 29). Moreover, "sound discretion" can be found even when it later appears, as here, that the reasons for a mistrial were in error (¶ 34). "Although a different judge may have handled the matter differently, the standard of appellate review compels upholding the trial court's sound exercise of discretion" (¶ 42).

Justice A.W. Bradley, joined by Justice Dallet, dissented on the ground that the majority opinion was a "headscratcher": "it upholds the circuit court's declaration of a mistrial after the jury heard *admissible* evidence" (¶ 45).

In a separate dissent, Justice Hagedorn, joined by Justice Dallet, underscored that the trial judge too readily jumped to granting the mistrial motion instead of more carefully considering that the offending evidence was admissible (*see* ¶ 75).

Family Law

Termination of Parental Rights – Grounds – Pleas – Withdrawals

***State v. A.G. (In re Termination of Parental Rts. to A.G.)*, 2023 WI 61 (filed June 30, 2023)**

HOLDING: A man knowingly, voluntarily, and intelligently pleaded no contest to the grounds used to terminate his parental rights.

SUMMARY: The state moved to terminate the parental rights of A.G. based on his substance use disorder and inability to care for his child. A.G. pleaded no contest to several grounds that supported termination. The trial judge terminated A.G.'s parental rights at the dispositional hearing.

A.G. later claimed that he did not properly waive his rights when pleading no contest. Following some convoluted proceedings, the circuit court rejected A.G.'s motion to withdraw the plea. In an unpublished decision, the court of appeals reversed based on flaws in the no-contest procedure and remanded the matter for further proceedings.

The supreme court reversed the court of appeals but produced no majority opinion. The lead opinion by Justice R.G. Bradley (joined by Chief Justice Ziegler) upheld the termination-of-parental-rights (TPR) finding. Case law establishes a "burden-shifting scheme" for TPR withdrawals. The burden rests with the state to show by clear and convincing evidence that the plea was properly taken. The record is viewed as a whole (*see* ¶¶ 21-22).

The lead opinion doubted that "the plea colloquy was defective for not explicitly explaining the two potential dispositions [terminate or not terminate]. We need not, however, make that call. The procedural posture of this case allows for a narrower holding. The circuit court held an evidentiary hearing and found A.G. understood potential dispositions based on his testimony at the dispositional hearing, which was conducted the day after the plea colloquy. The court's finding is not clearly erroneous; therefore, we accept it as true" (¶ 30). Assuming that the trial judge erred by imposing a burden on the state to prove that termination was appropriate, any such error was an "insubstantial defect" on these facts (¶ 34).

Justice Hagedorn, joined by Justice Karofsky, filed a concurring opinion that portrayed the case as "something of a unicorn" (¶ 42). Although the court of appeals found that A.G. met his prima facie burden (a finding never appealed), the supreme court was free to come to a different conclusion when looking at the same evidence (*see* ¶ 43). The judge "could have been a bit more precise" in her colloquy, but the state met its burden to show that the plea was proper (¶ 47).

Justice Dallet, joined by Justice A.W. Bradley, dissented on the ground that the lead opinion failed to focus on what A.G. knew when he entered his plea, as opposed to what happened before or after, an approach that could "upset our well-settled approach to plea-withdrawal claims" (¶ 50).

Justice Roggensack did not participate in this decision.

Insurance

Property Damage – Commercial General Liability Coverage – *Pharmacal* Overruled

***5 Walworth LLC v. Engerman Contracting*, 2023 WI 51 (filed June 20, 2023)**

HOLDING: The supreme court overruled *Wisconsin Pharmacal Co. v. Nebraska Cultures of California Inc.* as a wrongly decided "departure" from well-established law on the topic of determining what constitutes a covered "occurrence" when assessing property damage.

SUMMARY: This appeal involved commercial general liability (CGL) coverage for damages incurred when a badly constructed swimming pool had to be replaced because of water leakage, cracks to the pool, and damage to the surrounding soil. Three insurers had issued CGL policies, two to the general contractor and one to the supplier of the "shotcrete pump mix" used to construct the pool.

The circuit court granted the insurers' motions for summary judgment, declaring that the policies did not cover their insureds. In a published decision, the court of appeals reversed. *See* 2021 WI App 51. All three insurers filed petitions for review.

The supreme court affirmed the court of appeals in a majority opinion authored by Justice Hagedorn. The "threshold question" was how to "analyze whether there has been 'property damage' caused by an 'occurrence' under the three CGL policies," which in turn implicated the supreme court's 2016 opinion in *Wisconsin Pharmacal Co. v. Nebraska Cultures of California, Inc.,* 2016 WI 14, 367 Wis. 2d 221, 876 N.W.2d 72 (¶ 2). *Pharmacal* posited an "integrated systems" analysis that sought to distinguish the "product itself" from "other property."

With the "benefit of hindsight," the supreme court held that *Pharmacal* wrongly instructed courts to look to whether "other property" had been damaged in determining an initial grant of coverage under the CGL policy. "Accordingly, we overrule these portions of *Pharmacal*, and affirm, as we have repeatedly said, that our task in insurance coverage disputes is to read the policy and give effect to the parties' agreement. Therefore, we return to that contract-focused analysis here" (¶ 3). The case law and *Pharmacal*'s errors are addressed in paragraphs 15-32.

On the facts, the court also held that "a trier of fact could conclude that the water leakage and consequent cracks in the pool and damage to the surrounding soil constituted property damage caused by an occurrence" (¶ 4). Thus, the insurers were not entitled to summary judgment.

One insurer also unsuccessfully argued that the damage predated the policy's starting period. A third insurer, Acuity, failed in its summary-judgment bid for similar reasons. "Moreover, a trier of fact could conclude based on this record that the 'your product' exclusion in Acuity's policy does not apply here when the property damage is to the surrounding soil and pool complex – more than just Otto Jacobs' product [the shotcrete mix] or arising from the product" (¶ 6). The supreme court addressed each CGL policy in turn.

Chief Justice Ziegler joined part of the majority opinion but also authored a separate opinion concurring in part and dissenting in part that was joined in by Justice R.G. Bradley.

Justice Roggensack also filed a concurring opinion.

Mental Health Law

Mental Health Commitments – Extensions – Jury Demands

***Walworth Cnty. v. M.R.M. (In re Mental Commitment of M.R.M.),* 2023 WI 59 (filed June 29, 2023)**

HOLDING: Denial of a jury demand was erroneous, and remand was inappropriate.

SUMMARY: M.R.M. was involuntarily committed under Wis. Stat. chapter 51 and forcibly medicated for six months in early 2021. In July 2021, the county petitioned to extend M.R.M.'s commitment by 12 months. The hearing date was adjourned so that M.R.M. could retain counsel. M.R.M. filed a jury demand, which the trial judge ruled was untimely based on then-controlling case law. A bench trial was held and the trial court extended M.R.M.'s commitment by 12 months.

Later in 2021, the Wisconsin Supreme Court decided *Waukesha County v. E.J.W. (In re Mental Commitment of E.J.W.),* 2021 WI 85, 399 Wis. 2d 471, 966 N.W.2d 590, which overruled the earlier case the trial judge in *M.R.M.* relied on and held "that a jury demand is timely if it is made at least 48 hours before a rescheduled final hearing" (¶ 11) (citing *E.J.W.*).

On certification, the supreme court reversed the circuit court in a majority opinion authored by Justice Dallet. First, the court held that the *E.J.W.* opinion applied retroactively; thus, the trial judge erred by denying M.R.M.'s jury demand (*see* ¶ 10). The opinion weighed the factors on both sides of the retroactivity issue, ultimately concluding that retroactive application was appropriate in this civil case.

The court next addressed the proper remedy. M.R.M. argued for a straight reversal. The supreme court agreed because both the initial six-month commitment order and the later extension order had expired. Thus, the circuit court lacked "competency" to conduct further proceedings (*see* ¶ 22). Nonetheless, the court relied on M.R.M.'s "different argument," namely "that it is the expiration of the preceding commitment order that determines whether the circuit has competency on remand" (¶ 23). "The expiration of the 'unlawful extension order' was 'irrelevant'" (¶ 24).

In a final section of the opinion, the supreme court clarified that its decision was consistent with another case, *Portage County v. J.W.K. (In re Mental Commitment of J.W.K.),* 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509, which distinguished between the validity of a commitment order (*J.W.K.*) and the "competency" of the circuit court (this case) (*see* ¶ 26).

Concurring, Justice R.G. Bradley agreed with the outcome but criticized the majority for engaging in "prospective decisionmaking" (¶ 29).

Chief Justice Ziegler and Justice Roggensack filed separate dissents.

Taxation

Special Assessments – Appeals – Service of Notice of Appeal on Municipal Clerk

***Greenwald Fam. Limited P'ship v. Village of Mukwonago*, 2023 WI 53 (filed June 21, 2023)**

HOLDING: The circuit court correctly dismissed this special-assessment appeal because the plaintiff never served the municipal clerk as required by Wis. Stat. section 66.0703(12)(a).

SUMMARY: Greenwald Family Limited Partnership (hereinafter Greenwald) owns properties in the village of Mukwonago. In 2019, the village created a special-assessment district and levied special assessments against properties within the district, including one owned by Greenwald. Greenwald filed an action in the circuit court challenging the special assessment pursuant to Wis. Stat. section 66.0703. Greenwald served the summons and complaint only on the village attorney.

The village moved to dismiss, arguing that because Greenwald did not serve a written notice of appeal on the village clerk, the circuit court lacked subject-matter jurisdiction or competency to proceed. The circuit court granted the motion and dismissed the action. In an unpublished order, the court of appeals summarily affirmed the circuit court, concluding that Wis. Stat. section 66.0703(12)(a) unambiguously requires service on the clerk of written notice of appeal and that Greenwald's failure to comply with this statute required dismissal of the complaint (*see* ¶ 12).

In a majority opinion authored by Justice A.W. Bradley, the supreme court affirmed the court of appeals. It agreed with the court of appeals that Wis. Stat. section 66.0703(12)(a) is unambiguous. "The statute's plain meaning mandates service of written notice on the Village clerk, which Greenwald did not accomplish. Therefore, Greenwald's failure to comply with § 66.0703(12)(a) requires dismissal of the action" (¶ 47).

The supreme court also concluded that Wis. Stat. section 801.14(2), which provides for service on the attorney of a party to the proceeding, did not apply in this case because the village clerk was not a "party" (¶ 47). The legislature's designation of the clerk as the official on whom a notice of appeal must be served "does not transform the clerk into a party to the lawsuit" (¶ 33). Serving the village attorney "does not constitute serving the clerk" (¶ 43). The village attorney accepted service of the summons and complaint on behalf of the defendant village only. He never told Greenwald's attorney that he was accepting such service on behalf of the clerk as well (*see* ¶ 45).

Chief Justice Ziegler filed a dissenting opinion that was joined in by Justice Roggensack and Justice R.G. Bradley.

Property Taxes – Levy Limits – Transportation Utility Fees

***Wisconsin Prop. Taxpayers Inc. v. Town of Buchanan*, 2023 WI 58 (filed June 29, 2023)**

HOLDING: Funds raised for utility districts under Wis. Stat. section 66.0827 are property taxes subject to municipal levy limits.

SUMMARY: The rising costs of maintaining public roads within the town of Buchanan have become a long-term concern for the town's board. The board anticipated needing to reconstruct as much as 44% of the town's roads over the next 10 years. Consequently, the board decided it needed to raise money in excess of its current property tax levy limit. The board submitted a referendum to town residents, giving them a choice of raising the property tax levy, imposing a special assessment on all property, or imposing a transportation utility fee (TUF). (Wis. Stat. section 66.0827 authorizes municipalities to establish utility districts to fund highways, sewers, and other "public improvement[s] in the district." The funding for a utility district must be provided through "taxation of the property in the district" (¶ 1).)

After voters chose a TUF, the board adopted an ordinance to fund future road construction projects through a TUF. Under the town's funding scheme, all residential properties pay the same TUF amount annually; however, commercial properties must pay a variable fee based on the size and type of business and the number of estimated "trips" on municipal roads the business is expected to generate (*see* ¶ 4). This resulted in a net increase in municipal tax revenue of approximately 34% above the property tax levy limit.

Wisconsin Property Taxpayers Inc. (WPT) brought this action against the town seeking declaratory and injunctive relief. It alleged that the TUF is a property tax subject to municipal levy limits under Wis. Stat. section 66.0602; therefore, any revenue raised through the TUF must be offset by a reduction in the town's general property tax levy. The circuit court agreed and granted summary judgment in favor of WPT. It also permanently enjoined the town from levying, enforcing, or collecting the TUF in any amount above its levy limit.

The town appealed and both parties filed a joint petition for bypass of the court of appeals, which the supreme court granted. In a majority opinion authored by Justice R.G. Bradley for a unanimous court, the supreme court affirmed the circuit court.

Despite being labeled a "fee," the parties did not dispute that the TUF is in fact a tax on town residents (*see* ¶ 10). Utility districts must be funded via "taxation of the property" and as a property tax, such taxation must comport with the statutes governing property taxes, including the levy limit mandated under Wis. Stat. section 66.0602 (¶ 16). Wis. Stat. chapter 70 outlines a procedure for calculating an ad valorem property tax, meaning one based on the market value of the property.

"In calculating estimated use of roads, the Town bases the TUF on the class of the property and its commercial characteristics, not the value of the property. Because Wis. Stat. § 66.0827 does not authorize 'taxation of property' to be based on anything other than property value, the TUF's assessment methodology is unlawful" (¶ 18).

The court also concluded that "the taxation of property funding a utility district under Wis. Stat. § 66.0827 is subject to municipal levy limits. Because the Town's referendum did not ask the voters to authorize an increase of the levy limit to fund the utility district, the Town unlawfully exceeded its levy limit" (¶ 31). "The imposition of property taxes over and above the Town's levy limits requires the consent of the voters within the municipality. Nothing in the statutes permits the Town to bypass levy limits for the purpose of imposing a TUF on property owners in the municipality" (¶ 32).

Justice R.G. Bradley, who authored the majority opinion, filed a separate concurrence that was joined in by Justice Roggensack. **WL**