Administrative Law

Petition for Judicial Review in Wis. Stat. chapter 227 Proceeding – Service of Process

***Laughing Cow LP v. Wisconsin Dep't of Revenue*, 2024 WI App 15 (filed Feb. 29, 2024) (ordered published March 27, 2024)**

HOLDING: Petitioners seeking judicial review of a decision of the Tax Appeals Commission failed to properly serve the Department of Revenue (DOR) and therefore the circuit court lacked competency to proceed.

SUMMARY: Laughing Cow LP challenged several tax assessments in administrative proceedings before the Tax Appeals Commission. The commission issued a written decision, which rejected the challenges and affirmed the DOR's tax assessments. The decision notified Laughing Cow of its right to seek judicial review, as well as the filing and service requirements for initiating a petition for judicial review. To initiate judicial review, Laughing Cow was required to timely file any petition with the clerk of the circuit court and to timely serve the petition on both the Tax Appeals Commission and the DOR. The petition had to be filed and served no later than Aug. 24, 2022.

Laughing Cow filed its petition with the clerk of circuit court on Aug. 22, 2022. On Aug. 23, 2022, it properly served the petition on the Tax Appeals Commission. In an attempt to serve the DOR, the office manager of the law firm representing Laughing Cow, at the request of another employee of the law firm, went to the DOR's headquarters in Madison on Aug. 23, 2022, with three envelopes containing copies of the petition. The envelopes were addressed to Department Secretary Peter Barca and two attorneys in the DOR's Office of General Counsel.

At the DOR, the office manager encountered a security guard and a tax specialist who was staffing a reception desk. Neither of these individuals was authorized to accept service of process on behalf of the DOR. The manager did not mention that she was attempting to serve the DOR or the secretary. Ultimately, she left the papers with the tax specialist, who subsequently forwarded them to a DOR attorney (Traxler) who was authorized to accept service of process on the DOR's behalf. Traxler picked up the papers on the morning of Aug. 24, 2022.

The DOR moved to dismiss Laughing Cow's petition for judicial review on the ground that Laughing Cow failed to serve the DOR in the manner specified in Wis. Stat. section 227.53(1)(a)1. The circuit court agreed and dismissed the petition.

In an opinion authored by Judge Graham, the court of appeals affirmed. As relevant here, to institute a proceeding for judicial review of an agency's final decision, a petitioner must file the petition with the clerk of the circuit court for the county in which the judicial review proceedings are to be held and "'serv[e] a petition … personally or by certified mail upon the agency or one of its officials.' *See* Wis. Stat. § 227.53(1)(a)1., (a)2., (c)" (¶ 16). Strict compliance with Wis. Stat. section 227.53(1) is required, and if a petitioner fails to properly effectuate service, the circuit court lacks competency to proceed (*see id.*).

In this case Laughing Cow elected to personally serve its petition. Therefore, it had to personally serve its petition upon an official of the DOR or an express designee. Personal service requires that the papers effecting service of process be physically placed in the hands of the party to be served (*see* ¶ 22).

In this case, the office manager did not physically place Laughing Cow's petition in Traxler's hands nor did the office manager inform Traxler or any other DOR employee that she was there to serve a petition for review. Instead, she placed the petition in the hands of the tax specialist, who was not authorized to accept service of papers on the DOR's behalf and who never represented herself to be authorized to accept service on the DOR's behalf. Although the tax specialist ultimately forwarded the petition to Traxler, this did not constitute personal service upon Traxler or the DOR (*see* ¶ 23).

Because Laughing Cow failed to serve its petition on the DOR and because Laughing Cow failed to convince the court of appeals that it should be granted an exception to the strict requirements for service of process, the court of appeals affirmed the circuit court's dismissal of Laughing Cow's petition for judicial review.

Civil Procedure

Certiorari Review – State Actor – Arbitrary or Oppressive Rule Enforcement

***Halter v. Wisconsin Interscholastic Athletic Ass'n*, 2024 WI App 12 (filed Feb. 28, 2024) (ordered published March 27, 2024)**

HOLDING: A student athlete was entitled to relief because of the Wisconsin Interscholastic Athletic Association's (WIAA's) "arbitrary, oppressive, or unreasonable" application of its rules.

SUMMARY: Halter, a student athlete on his high school's wrestling team, received two unsportsmanlike-conduct calls during a wrestling match at the conference meet in 2019. Under WIAA rules, he was ejected from the conference meet and was suspended from the "next competitive event." To avoid being suspended at the regional meet, Halter registered for and then sat out a junior varsity event scheduled shortly before the regional meet. The WIAA notified Halter that his attempt to circumvent the suspension was improper and that he was declared ineligible for the regional meet, its decision being "final and unappealable" (¶ 6).

This lawsuit followed. A temporary injunction allowed Halter to compete; he won the regional and state meets. After a hearing, the circuit court ruled in favor of the WIAA, effectively stripping Halter of the 2019 regional and state meet wins.

The court of appeals reversed the circuit court in an opinion authored by Judge Lazar. The case presented an issue of first impression: whether Halter had a right to certiorari review and declaratory relief and an equitable right to a permanent injunction (*see* ¶ 10).

The threshold issue was whether the WIAA was subject to judicial review


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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.

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regarding Halter's eligibility. Case law has established that the WIAA is a state actor, which limits its actions as pertains to members and student athletes (*see* ¶ 17). Although "voluntary associations" such as the WIAA are entitled to deference in the interpretation and application of their rules, their discretion is not unfettered (¶ 22).

The court held that Halter was entitled to certiorari relief because the WIAA's decision was "arbitrary, oppressive, or unreasonable" with respect to its suspension and appeal rules (¶ 26). "While [the] WIAA is entitled to create its own rules and regulations, it must apply them fairly and treat member schools' students reasonably" (¶ 29). The WIAA's decision "represented WIAA's will, not its judgment" (¶ 35).

Halter was also entitled to declaratory relief that reinstated his 2019 titles and points (*see* ¶ 36). Finally, the court also held that a permanent injunction granting Halter's relief was necessary and appropriate (¶ 41).

Judge Neubauer dissented. "The only question we should answer to resolve this appeal is whether [the] WIAA's decision was reasonable. It surely was" (¶ 49).

Criminal Procedure

Guilty Pleas – Erroneous Information About Maximum Penalty for the Crime

***State v. Gomolla*, 2024 WI App 13 (filed Feb. 6, 2024) (ordered published March 27, 2024)**

HOLDING: Because the defendant understood the potential punishment she was facing, as required by Wis. Stat. section 971.08 and case law, and her plea was knowing, intelligent, and voluntary, she was not entitled to withdraw her no-contest plea.

SUMMARY: Kasey Ann Gomolla (the defendant) was convicted on a no-contest plea of conspiracy to deliver more than 50 grams of methamphetamine. As part of the plea agreement in the case, the state agreed to remove a second-or-subsequent-offense enhancer from the charged crime, which reduced the potential punishment to 40 years (from 46 years). However, defense counsel overlooked this fact in preparing the guilty plea questionnaire and in discussions with the defendant before entry of her plea. Counsel informed the defendant that she was subject to a potential punishment of 46 years.

During the plea colloquy, the court did not correct the error; the court failed to address the potential punishment at all beyond confirming that the defendant reviewed the plea questionnaire. The court sentenced the defendant to 12 years' initial confinement followed by 15 years' extended supervision. In postconviction proceedings that included an evidentiary hearing, the court denied the defendant's motion for resentencing or plea withdrawal.

On appeal, the defendant argued that she was entitled to withdraw her no-contest plea because the circuit court failed to advise her of the maximum statutory penalty that she faced during the plea colloquy, which constitutes a plea-colloquy defect. *See* Wis. Stat. § 971.08. She further claimed that because defense counsel misinformed her of the potential punishment, she was unaware of the true penalty she faced; therefore, her plea was not knowing, intelligent, and voluntary.

In an opinion authored by Judge Stark, the court of appeals assumed without deciding that the circuit court's plea colloquy was defective because the circuit court failed to establish that the defendant understood her potential punishment.

The court of appeals concluded, however, "that despite the defective plea colloquy, the State presented clear and convincing evidence that Gomolla nevertheless understood the potential punishment she faced if convicted. While Gomolla was informed that she faced a higher maximum statutory penalty than authorized by law, pursuant to our supreme court's decision in *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, 'a defendant can be said to understand the range of punishments as required by [Wis. Stat.] § 971.08 and [*State v.*] *Bangert* [131 Wis. 2d 246, 389 N.W.2d 12 (1986)] when the maximum sentence communicated to the defendant is higher, but not substantially higher, than the actual allowable sentence.' *See Cross*, 326 Wis. 2d 492, ¶ 38. Although it was counsel who provided the incorrect information to Gomolla, rather than the circuit court as in *Cross*, the forty-six-year sentence communicated to Gomolla was higher, but not substantially higher, than the forty-year maximum statutory penalty she actually faced" (¶ 4).

The court therefore held that Gomolla understood the potential punishment, as required by Wis. Stat. section 971.08 and *Bangert*, and that her plea was knowing, intelligent, and voluntary (*see* ¶ 5). Accordingly, Gomolla was not entitled to withdraw her plea.

Juvenile Law

Restitution – Marsy's Law

***State v. M.L.J.N.L. (In Int. of M.L.J.N.L.)*, 2024 WI App 11 (filed Feb. 28, 2024) (ordered published March 27, 2024)**

HOLDING: The limitation on restitution codified in Wis. Stat. section 938.34(5)(a) is consistent with Marsy's Law and therefore is constitutional.

SUMMARY: M.L.J.N.L. (hereinafter "M") was adjudicated delinquent in March 2020 after pleading no contest to one count of burglary. Wis. Stat. section 938.34(5)(a) provides that, in a delinquency case, a circuit court is limited to ordering monetary restitution in an amount that the "the juvenile alone is financially able to pay." However, a recent amendment to the Wisconsin Constitution, commonly known as Marsy's Law, provides that crime victims have the right to "full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution." Wis. Const. art I, § 9m(2)(m). In this case, the circuit court held that Marsy's Law renders the statutory limitation on restitution unconstitutional. On that basis, the court ordered M to pay restitution in an amount that undisputedly exceeds what M can pay.

In an opinion authored by Judge Graham, the court of appeals reversed. It concluded that "the only reasonable reading of Wis. Const. art. I, § 9m(2)(m) is that victims have the right to recoup the total amount of money that a circuit court orders as restitution, consistent with the statutes that define and govern the restitution that a court may order. The limitation in Wis. Stat. § 938.34(5)(a) is therefore consistent with Marsy's Law, and constitutional" (¶ 27).

Accordingly, the appellate court reversed the restitution order, which undisputedly violates Wis. Stat. section 938.34(5)(a) (*see* ¶ 28).

Prisoners

Writs of Certiorari – Untimeliness

***Mitchell v. Buesgen*, 2024 WI App 14 (filed Feb. 22, 2024) (ordered published March 27, 2024)**

HOLDING: An incarcerated individual's petition for a writ of certiorari was properly dismissed as untimely.

SUMMARY: Mitchell, who is incarcerated at Stanley Correctional Institution, was disciplined for misconduct. He pursued his remedies through the inmate complaint review system, losing at each step. Mitchell's civil action accrued on March 16, when the Department of Corrections secretary agreed that his complaint was properly denied. Under Wis. Stat. section 893.735(2), Mitchell had until May 2 (45 days) to commence the action, assuming no equitable tolling (*see* ¶ 8).

Mitchell then filed this petition for a writ of certiorari, which the circuit court later dismissed as untimely. "More specifically, the court dismissed the action because Mitchell failed to submit to the court, within the 45-day limitation period, copies of all of the written materials that had been generated by Mitchell's exhaustion of potential administrative remedies, as required by Wis. Stat. § 801.02(7)(c)" (¶ 1).

The court of appeals affirmed in an opinion authored by Judge Blanchard. The court of appeals rejected Mitchell's arguments that the 45-day period was tolled because of delays he purportedly encountered.

Mitchell had control over all pertinent administrative-process documents that were required by statute that had not been timely filed. That he lacked control over documents related to his request for waiver of prepayment of costs and fees was irrelevant.

Nor did it matter what the clerk did or did not do because Mitchell did not allege that he had been misled or otherwise hindered from timely filing by the clerk.

Finally, dismissal was the appropriate remedy based on precedent and the court's interpretation of pertinent statutes "as interpreted in proper context" (¶ 37). The court conceded that Mitchell proffered a "plausible" argument and that the statutes were "not models of clarity," but the law left "no room for Mitchell's position" (¶ 40). More specifically, Mitchell was subject to a "three strikes" barrier that "affects only those prisoners who seek waivers of prepayment and does not affect prisoners who prepay the filing fee" (¶ 45). **WL**