Criminal Procedure

Sentencing – Sentence Adjustment – Mandatory Minimum Terms of Confinement

***State v. Joski*, 2025 WI App 67 (filed Oct. 29, 2025) (ordered published Nov. 20, 2025)**

HOLDING: An inmate sentenced to the mandatory minimum confinement time of three years for seventh-offense operating while intoxicated (OWI) is not eligible for sentence adjustment under Wis. Stat section 973.195 and must serve the full three-year term of initial confinement.

SUMMARY: Defendant Joski was convicted of a seventh-offense OWI following her arrest in May 2016. At that time, this was a Class G felony (though the Wisconsin Legislature has since changed it to Class F felony status – a change not affecting this decision). Wisconsin Statutes section 346.65(2)(am)6. provides that for a person so convicted, "[t]he court shall impose a bifurcated sentence under [Wis. Stat. section] 973.01 and the confinement portion of the bifurcated sentence *imposed* on the person shall be not less than 3 years. (Emphasis added.)" (¶ 2). At sentencing, the circuit court imposed on Joski the minimum term of confinement allowed by this statute, sentencing her to three years' initial confinement, followed by five years' extended supervision.

After serving approximately two years and three months in confinement, the defendant petitioned the circuit court for sentence adjustment under Wis. Stat. section 973.195. Under this statute a person convicted of a Class G felony can file such a petition after serving at least 75% of the confinement portion of the person's sentence. If the sentencing court reduces the term of confinement, it must also order a corresponding increase in the term of extended supervision. Over the state's objection, the circuit court granted Joski's petition for sentence adjustment and early release from confinement.

The state appealed. It argued that "the court erred in granting the petition because it resulted in Joski's release prior to her having served the full three years of initial confinement ordered at sentencing on her conviction for operating a motor vehicle while intoxicated (OWI) – seventh offense. The state insists that pursuant to *State v. Gramza*, 2020 WI App 81, ¶24, 395 Wis. 2d 215, 952 N.W.2d 836, Joski must fully serve the [mandatory minimum three-year] term of initial confinement prescribed by [Wis. Stat. section] 346.65 [for a conviction of seventh-offense OWI] regardless of the early release option under [Wis. Stat. section] 973.195" (¶ 1) (internal quotations omitted).

In an opinion authored by Judge Gundrum, the court of appeals agreed with the state and reversed the decision of the circuit court. It concluded that *Gramza* controls the outcome of this case. Like defendant Joski, Gramza was convicted of a seventh-offense OWI and was given a three-year term of confinement in prison. The sentencing judge made him eligible to participate in what is known as the Substance Abuse Program (SAP). Upon successful completion of the SAP, the inmate is to be released from confinement, and the sentence is modified such that the remaining portion of the confinement term is converted to additional time on extended supervision. *See* Wis. Stat. § 302.05.

Gramza completed the SAP after serving six months of confinement time, and the Department of Corrections requested the circuit court to authorize his release from confinement. The circuit court denied the request on the basis that Gramza would then not have served the full three years of confinement imposed at sentencing pursuant to the mandate of the OWI statute for seventh-offense offenders. The court of appeals agreed. It "read the legislature's requirement in Wis. Stat. § 346.65(2)(am)6. that a circuit court 'impose' on an OWI-seventh defendant a confinement portion of not less than three years as meaning that such a defendant must 'serve[]' no less than three years in confinement. *Gramza*, 395 Wis. 2d 215, ¶ 22" (¶ 11).

In the present case, Joski sought early release from confinement under the general sentence-adjustment statute (Wis. Stat. section 973.195). Nonetheless, the appellate court believed that the *Gramza* decision, which denied early release upon successful completion of the SAP program because of its conflict with the three-year minimum confinement term required of seventh-offense OWI


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.

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offenders, also applies to those like Joski seeking early release under the general sentence-adjustment statute.

The *Joski* court questioned the correctness of the *Gramza* decision (*see* ¶¶ 13-15), noting that nothing in Wis. Stat. section 346.659(2)(am)6. indicates that the full three years of confinement must be *served.* Nonetheless, it felt bound to follow *Gramza* because only the Wisconsin Supreme Court has the power to overrule it. The bottom line here: "Our interpretation of § 346.65(2)(am)6. in *Gramza* means an inmate sentenced to the mandatory minimum confinement time of three years for an OWI-seventh offense, such as Joski, must 'serv[e] the full three year term of initial confinement'" (¶ 16).

Guilty Plea – Newly Discovered Evidence – Guilty Plea Withdrawal

***State v. Shallcross*, 2025 WI App 66 (filed Oct. 7, 2025) (ordered published Nov. 20, 2025)**

HOLDINGS: 1) The defendant was not judicially estopped from arguing that newly discovered evidence (a DNA report) showed that he was not driving the vehicle at the time of the fatal accident, and 2) this evidence justifies the withdrawal of his guilty pleas. However, 3) the DNA report was not exculpatory, and 4) it is not reasonably probable that a jury would have a reasonable doubt as to the defendant's guilt in a trial that included the DNA report.

SUMMARY: The defendant pled guilty to two counts of homicide by intoxicated use of a motor vehicle. He later moved to withdraw his guilty plea based on DNA evidence recovered from the steering wheel that he claimed showed that he was not driving the vehicle. The circuit court denied his motion.

The court of appeals affirmed in an opinion authored by Judge Geenen that addressed a series of related issues. First, the defendant was not judicially estopped from arguing that he was not driving at the time of the crash merely because he had pled guilty. "The State's argument that the circuit court erroneously exercised its discretion by not applying judicial estoppel in this case leads to the conclusion that defendants may *never* seek to contradict a fact admitted to as a consequence of pleading guilty, a conclusion that" conflicts with the case law (¶ 23).

Second, although another person's DNA was found on the steering wheel, only the defendant's blood was found on all the airbags, showing conclusively that the defendant was the driver. In short, the new DNA report was not exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963) (*see* ¶ 29).

Third, from this it followed that "there is no reasonable probability that a jury would have a reasonable doubt as to Shallcross's guilt in a trial that included the DNA report" (¶ 30). Although the trial judge worded the standard incorrectly, the court of appeals agreed that the evidence was "overwhelming" (¶ 43). The court discussed in some depth the correct wording of the standard to be applied to determine whether the defendant is entitled to a new trial based on newly discovered evidence (namely, was there a reasonable probability that a jury would have a reasonable doubt had it examined the DNA report).

Election Law

Complaints Filed with Wisconsin Elections Commission – Commission Decisions Not Subject to Wis. Stat. chapter 227 Judicial Review – Due Process Protections Against Imposition of Forfeitures for Frivolous Complaints

***Stone v. Wisconsin Elections Comm'n*, 2025 WI App 68 (filed Oct. 14, 2025) (ordered published Nov. 20, 2025)**

HOLDINGS: 1) The Wisconsin Elections Commission's (WEC) decision not to investigate or otherwise pursue a complaint under Wis. Stat. section 5.05(2m) is solely vested in its discretion and is not amenable to judicial review under Wis. Stat. chapter 227. 2) Before the WEC can find a complaint frivolous and impose a forfeiture under Wis. Stat. section 5.05(2m)(c)2.am., the WEC must provide the complainant with notice and an opportunity to be heard on the issue of frivolousness.

SUMMARY: Wisconsin Statutes section 5.05(2m) outlines the procedure for filing and resolving complaints alleging election law violations with the WEC. Under this subsection, any person may file a complaint with the WEC alleging a violation of Wis. Stat. chapters 5-10 or 12. Once a complaint is filed, the respondent has an opportunity to demonstrate to the WEC, in writing and within 15 days after receiving the notice, that the WEC should take no action against the person on the basis of the complaint.

If the WEC finds no "reasonable suspicion that a violation" occurred, then it *shall* dismiss the complaint. If the WEC does find reasonable suspicion that a violation "has occurred or is occurring," then it "may" – but is not required to – authorize an investigation by resolution, which it retains authority to terminate at any time. *See* Wis. Stat. § 5.05(2m)(c)4.-5. The WEC may also impose a forfeiture of "not more than the greater of $500 or the expenses incurred by the commission in investigating the complaint" if it determines that a complaint is frivolous. *See* Wis. Stat. § 5.05(2m)(c)2.am. (¶ 6).

In this case, plaintiff Stone challenged three administrative decisions of the WEC, which dismissed complaints that he had filed against several respondents alleging that certain people and entities violated various election laws. The WEC dismissed the complaints after concluding that none of Stone's allegations demonstrated reasonable suspicion that any election laws had been violated. The WEC further exercised its discretion under Wis. Stat. section 5.05(2m)(c)2.am. to impose a $500 forfeiture after finding one of Stone's complaints frivolous.

Stone then sought judicial review in the circuit court, which dismissed his petitions. The circuit court ruled that the decision whether to investigate or proceed with a Wis. Stat. section 5.05(2m) complaint is a wholly discretionary decision of the WEC that is not subject to judicial review under Wis. Stat. chapter 227. It also found that the WEC acted within its authority by deeming one of the complaints frivolous (*see* ¶ 12). In an opinion authored by Judge Stark, the court of appeals affirmed in part and reversed in part.

The threshold issue before the court of appeals was whether the WEC's decisions under Wis. Stat. section 5.05(2m) to dismiss Stone's complaints based on a lack of reasonable suspicion are subject to judicial review under Wis. Stat. chapter 227. It concluded that they are not (*see* ¶ 13). "The plain language of the statute gives the Commission broad prosecutorial authority to decide whether to dismiss the complaint, investigate, file a civil complaint, or refer a matter to a district attorney" (¶ 17). "[I]t is the nature of the Commission's decisions under Wis. Stat. § 5.05(2m) – which lack any statutory constraints on the Commission's discretion and are comparable to a district attorney's prosecution decisions – that render the decisions to dismiss the complaints in this case unreviewable under ch. 227" (¶ 22).

The appellate court also concluded that the WEC's decision to find one of the complaints frivolous and impose a $500 forfeiture *is* subject to judicial review under Wis. Stat. chapter 227. "We further conclude that prior to any judicial review, Stone was entitled under the tenets of procedural due process to notice and an opportunity to be heard before the Commission found [one of the complaints] frivolous and imposed a forfeiture. Under the circumstances here, where there is no record to review related to the Commission's finding that Stone's complaint is frivolous or the rationale behind the $500 forfeiture, any judicial review under ch. 227 would be speculative and illusory or, at best, perfunctory and would not provide adequate safeguards against an erroneous deprivation" (¶ 54).

Accordingly, the appellate court reversed the circuit court's decision in part and remanded this matter to the circuit court with directions to remand to the WEC to provide Stone with an opportunity to be heard on the frivolousness issue. If, after Stone is heard on that issue, the WEC still finds one of Stone's complaints to be frivolous, it must provide

specific findings of fact and conclusions of law underlying that decision and any resultant decision to impose a forfeiture (*see* ¶ 55).

Family Law

Termination of Parental Rights – Abandonment – Plain Error – Verdict Form – Instructions

***S.S. v. A.S.-P. (In re Termination of Parental Rts. to L.L. S.-P.)*, 2025 WI App 69 (filed Sept. 23, 2025) (ordered published Nov. 20, 2025)**

HOLDING: Reversible plain error occurred in this termination-of-parental-rights (TPR) trial because the jury was not separately instructed to consider various periods of abandonment independently and should have been provided separate verdict forms.

SUMMARY: Based on a jury's verdict, the circuit court terminated a mother's parental rights to her child. The plaintiff alleged that the mother, Amanda, abandoned her daughter, Lauren, during two specific six-month periods.

The court of appeals reversed, based on plain error, in an opinion authored by Judge Stark. Although the jury found that Amanda had abandoned Lauren, the verdict did not specify the period of abandonment.

The court of appeals initially considered several other issues. First, the circuit court did not err in denying Amanda's motion for a directed verdict as to the second abandonment period. Amanda's basis for this motion was that she had no "reasonable opportunity" to visit Lauren (¶ 27). Second, Amanda was not denied the effective assistance of counsel based on her trial attorney's failure to object to the verdict form and the instructions. "We conclude that the law is unsettled as to whether separate instructions and verdict forms are required when more than one period of abandonment is alleged in a TPR action" (¶ 34).

Third, nonetheless, both the instructions and the verdict form were flawed and constituted plain error. "Here, the circuit court's failure to instruct the jury to consider a singular period for each set of verdict questions and its failure to provide the jury with separate verdict forms for each alleged period of abandonment resulted in the jury failing to consider each alleged abandonment period separately and deprived Amanda of her right to a five-sixths verdict on each separate time period. Based upon the jury instructions and verdict form, we cannot determine if the same five-sixths of the jurors found that Amanda abandoned Lauren during one of the alleged periods, both of the alleged periods, or some combination of the two" (¶ 44).

"[I]n order to find abandonment when multiple time periods are alleged, we interpret Wis. Stat. § 48.415(1)(a)3. as requiring that five-sixths of the jury agree both on *a period* of abandonment and that the parent did not have good cause for failing to visit or communicate with the child or his or her custodian during that specific abandonment period in order for there to be grounds for TPR. The circuit court's failure to provide the jury with instructions and verdict forms that complied with these statutory requirements, thereby depriving Amanda of her right to a five-sixths verdict, constituted plain error" (¶ 56). **WL**