Arbitration

Arbitrability – Delegation Provisions

***OptumRX Inc. v. Marinette-Menominee Prescription Ctr. LTD.*, 2025 WI App 70 (filed Nov. 4, 2025) (ordered published Dec. 17, 2025)**

HOLDING: Although a delegation provision in the parties' arbitration agreement clearly and unmistakably shows that the parties agreed that an arbitrator would decide threshold questions of arbitrability, the pleadings raised issues of enforceability necessitating a remand.

SUMMARY: OptumRX is a pharmacy benefits manager that provided services to the 71 pharmacies named in the lawsuit. OptumRX filed this petition to compel arbitration. The circuit court dismissed the petition. The court of appeals reversed in an opinion authored by Judge Hruz.

A "delegation provision in the parties' arbitration agreement, which was incorporated into a separate agreement between OptumRx and the Pharmacies, clearly and unmistakably shows that the parties agreed to arbitrate threshold questions of arbitrability, such as whether the parties agreed to arbitrate or whether the arbitration agreement covers particular claims" (¶¶ 1, 27).

Nonetheless, the pharmacies' pleadings sufficiently challenged the enforceability of the delegation provision. Thus, the circuit court must consider that challenge before enforcing the arbitration agreement or addressing a challenge to the entire arbitration agreement (*see* ¶¶ 2, 29). The pharmacies did not argue that the delegation provision was ambiguous or did not clearly show an agreement to arbitrate arbitrability; instead, they contended that there was a conflict between certain documents that must be resolved by a court, not an arbitrator (*see* ¶ 38). The court of appeals found no such conflict (*see* ¶ 41).

The pharmacies also challenged the delegation provision itself (*see* ¶ 44). Controlling case law holds "that a court itself may consider a specific challenge to a delegation provision within an arbitration agreement. It follows that if such a challenge is successful and a court finds the provision to be invalid or unenforceable, the court may then consider a challenge to the entire arbitration agreement, given that an invalid or unenforceable delegation provision would not delegate challenges to the entire arbitration agreement to the arbitrator. Although [case law] makes clear that a party must make specific arguments regarding the delegation provision in order to challenge it, it does not explain what constitutes a party's sufficient effort in that regard" (¶ 52).

The court exhaustively reviewed case law on this issue from federal circuit courts before summarizing the required showing: "First, a party must specifically challenge the delegation provision in its pleadings.... Second, a party may use the arguments challenging the arbitration agreement as a whole to challenge the delegation provision as long as those arguments are tailored to the delegation provision.... Third, it is insufficient for a party to simply state that it is challenging the delegation provision for the same reasons it is challenging the arbitration agreement as a whole without elaborating on the basis for the challenge to the delegation provision" (¶ 65).

The case was remanded to the circuit court for consideration under these criteria, which may include further discovery and an evidentiary hearing (*see* ¶ 71).

Criminal Law

Hemp – Wis. Stat. § 94.55 – Referral for Prosecution from Department of Agriculture, Trade and Consumer Protection

***State v. Syrrakos*, 2025 WI App 73 (filed Oct. 29, 2025) (ordered published Dec. 17, 2025)**

HOLDING: The circuit court had competency to adjudicate the criminal charges against the defendants relating to items with THC concentrations far in excess of the level that would make them hemp under Wisconsin law.

SUMMARY: This case involved several statutes and administrative rules that regulate hemp in Wisconsin. By way of background: "Hemp and marijuana are variants of the cannabis sativa L. plant species and are distinguished in the law by the level of delta-9-tetrahydrocannabinol (THC) they contain. Hemp, under Wisconsin law, includes cannabis sativa plants and derivatives thereof 'with a delta-9-tetrahydrocannibinol concentration of not more than 0.3 percent on a dry weight basis or the maximum concentration allowed under federal law up to 1 percent, whichever is greater.' Wis. Stat. § 94.55(1) (2023-24). Items with a higher concentration of THC are controlled substances under Wisconsin law. See Wis. Stat. § 961.14(4)(t)" (¶ 1).

In 2018, defendant Syrrakos obtained a license from the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) to process hemp. He owned a retail store where he sold hemp products. Three years later, the state of Wisconsin charged Syrrakos and defendant Shattuck with violations of Wisconsin's controlled substances law, Wis. Stat. chapter 961, after developing evidence that items sold at Syrrakos's store, and items from the residence he and Shattuck shared, contained unlawfully high concentrations of THC. Syrrakos and Shattuck (who did not have a hemp license) moved to dismiss the charges under Wis. Stat. section 961.32(3)(c), which shields a person who violates Wisconsin's hemp statute, Wis. Stat. section 94.55, or a rule promulgated thereunder, from prosecution "unless the person is referred to the district attorney for the county in which the violation occurred ... by the [DATCP]."

Because no such referral had occurred, Syrrakos and Shattuck argued that the circuit court lacked subject-matter jurisdiction over the charges against them. The circuit court agreed and dismissed the case.

In an opinion authored by Judge Neubauer, the court of appeals reversed. It agreed with the state that "it has not charged Syrrakos and Shattuck with violating Wis. Stat. § 94.55 or any rule promulgated under that statute. Section 94.55 and Wis. Admin. Code § ATCP ch. 22 regulate certain activities related to hemp. The charges against Syrrakos and Shattuck do not arise out of their manufacture, possession, or sale of hemp. They

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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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relate, instead, to items with THC concentrations far in excess of the level that would make them hemp under Wisconsin law" (¶ 28). Accordingly, the circuit court erred in concluding that the absence of a referral from the DATCP deprived it of competency over these cases (*see* ¶ 34).

Self-defense – Provocation

***State v. Cross*, 2025 WI App 72 (filed Nov. 4, 2025) (ordered published Dec. 17, 2025)**

HOLDING: Reversible error occurred in this self-defense case because of an erroneous jury instruction on provocation.

SUMMARY: A jury convicted the defendant of reckless-injury-related offenses involving his vehicle, which he allegedly used in "defense" of another person. The issues in this case centered on the accuracy of the jury instructions on self-defense, defense of others, and provocation.

The court of appeals, in an opinion authored by Judge Gill, reversed with respect to one count because the jury instructions were inaccurate in light of the "particular facts." The court concluded "the erroneous jury instruction on provocation warrants reversal of Cross's conviction for Count 1. The evidence adduced at trial clearly demonstrates that Cross satisfied his burden of production warranting a defense of others instruction be provided on this particular count – even if the jury found that he provoked the attack – thereby placing the burden on the State to prove that Cross did not act within the confines of Wis. Stat. § 939.48.... The jury could have reasonably determined material factual issues in Cross's favor had it been properly instructed" (¶ 5).

Essentially, there were issues of both self-defense and defense of others, which turned on the defendant's alleged provocation (*see* ¶¶ 35-38). "We hold that a person is privileged, within the confines of Wis. Stat. § 939.48, to defend a third person under limited circumstances if he or she provoked an attack on that third person by unlawful conduct. This conclusion is evident from the text of the statute.... In other words, a person is privileged to defend a third person under those standards provided in § 939.48(1) and (2), provided that he or she 'reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person'" (¶ 43).

The court also rejected the state's contention that, to preserve the issue for appeal, defense counsel was required to object to the provocation instruction when it was read to the jury. The court held that defense counsel's objection at the instruction conference satisfied the plain meaning of Wis. Stat. section 805.13(3) (*see* ¶ 28).

Criminal Procedure

NGI Mental Health Commitments – Petition for Revocation of Conditional Release – Timeliness

***State v. Schaefer*, 2025 WI App 71 (filed Nov. 18, 2025) (ordered published Dec. 17, 2025)**

HOLDINGS: 1) The circuit court had competency to proceed with the Department of Health Services' (DHS) second petition to revoke the defendant's conditional release from institutional care after it had lost competency to decide the DHS's initial petition. 2) The circuit court had competency to reach the merits of the

DHS's second petition even though the second petition alleged the same facts for revocation that were contained in the first petition.

SUMMARY: In 2016, defendant Schaefer was committed to institutional care for 45 years after he was found not guilty by reason of mental disease or defect (NGI) of attempted first-degree intentional homicide and first-degree recklessly endangering safety (with penalty enhancers). In 2021, he was granted conditional release from institutional care upon a finding by the circuit court that such release would not pose a significant risk of harm to Schaefer or others.

In 2022, the DHS detained Schaefer for failing to comply with the conditions of his release, and it filed with the circuit court both a statement showing probable cause for his detention and a petition to revoke his conditional release. However, the DHS failed to timely submit the probable-cause statement and the petition to "the regional office of the state public defender" (SPD) within 72 hours as required by Wis. Stat. section 971.17(3)(e).

Relying on *State v. Olson*, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178, which held that the 72-hour requirement is mandatory and that the DHS's failure to comply with it deprived the circuit court of competency to proceed with the DHS's petition to revoke Olson's conditional release (*see* ¶ 22), the circuit court in the present case found that it lacked competency to consider the DHS's petition, so it dismissed the petition.

Within one hour after the circuit court's dismissal, and while Schaefer remained in custody, the DHS filed a second petition to revoke Schaefer's conditional release, and Schaefer filed another motion to dismiss. Citing *Olson*, Schaefer argued that the court again lacked competency to proceed on the DHS's petition because he had remained in custody for longer than 72 hours without the DHS submitting a statement of probable cause or the petition to revoke his conditional release to the SPD, in violation of Wis. Stat. section 971.17(3)(e).

Schaefer further argued that the DHS could not avoid the 72-hour requirement by filing the second petition because that petition was based on the same allegations made to revoke his conditional release under the first petition. The court denied Schaefer's second motion to dismiss, and, following a hearing, it revoked his conditional release (*see* ¶ 2).

In an opinion authored by Judge Gill, the court of appeals affirmed. It held that "the circuit court's dismissal of the DHS's first petition to revoke Schaefer's conditional release ended the proceeding resulting from the first petition and functioned as a break in Schaefer's detention for purposes of the statutory requirements. Based upon that break in Schaefer's detention, we conclude that the DHS complied with the 72-hour requirement in all respects upon its filing of the second petition to revoke Schaefer's conditional release, and the circuit court therefore had competency to proceed on the petition's merits" (¶ 3).

The appellate court further concluded that "a circuit court's dismissal for loss of competency due to the DHS's failure to comply with the 72-hour requirement is not a decision on the merits of the DHS's first petition to revoke. Rather, the court's dismissal is a recognition that the DHS engaged in a procedural violation, not a substantive violation that would result in dismissal with prejudice. Thus, the DHS is not prohibited from 'showing probable cause of the detention' in the second petition using the same allegations and facts as the first petition" (¶ 34).

Joinder of Crimes – Prejudice

***State v. Bell*, 2025 WI App 75 (filed Nov. 13, 2025) (ordered published Dec. 17, 2025)**

HOLDINGS: 1) A circuit court can consider the issue of prejudice when deciding the state's motion to join charges against the defendant. 2) The circuit court did not erroneously exercise its discretion in determining that the defendant would not be prejudiced by joinder of the separate cases that had been filed against him.

SUMMARY: A jury found defendant Bell guilty of multiple charges in three separate criminal cases that had been joined for purposes of a single trial. The charges arose out of three distinct incidents – in February 2018, September 2019, and July 2020 – involving three different victims at three different locations in Verona and Madison. It was alleged that in each incident, Bell arranged to meet with and then met a female sex worker, ostensibly for the purpose of engaging in consensual sex, and then violently assaulted the victim. In two cases, Bell allegedly also violently sexually assaulted the victim, and in the third, Bell allegedly fled from the screaming victim without committing a sexual assault.

On appeal, Bell argued that the circuit court erred by finding that the statutory circumstances permitting joinder were present and that joinder would not cause substantial prejudice to him. In an opinion authored by Judge Kloppenburg, the court of appeals affirmed.

The appellate court first determined that the joinder of the three cases was proper in the first instance because the crimes charged in each one of them involved acts that constitute "parts of a common scheme or plan" to meet and violently assault a female sex worker (in two cases also violently sexually assaulting the victims) (¶ 4). *See* Wis. Stat. § 971.12(1). Because the charges in the three cases here are based on facts and transactions exhibiting the same modus operandi, the charges involve facts or transactions that constitute a common scheme or plan under Wis. Stat. section 971.12(1), and, therefore, the charges were properly joined (*see* ¶ 36).

The next issue was whether the circuit court properly considered the matter of prejudice in its initial decision on the state's motion to join the three cases for trial (as opposed to the typical situation in which prejudice is evaluated when the defense moves for severance of crimes or defendants that have already been joined). The appellate court concluded that in deciding a motion for joinder, the circuit court can consider whether such joinder would prejudice the defendant (*see* ¶ 31).

Said the court: "When joinder of criminal charges is appropriate under at least one of the four circumstances identified in § 971.12(1), joinder is presumptively non-prejudicial. In order to rebut that presumption, a defendant must show substantial prejudice to the defendant's defense; some prejudice is insufficient.... [C]ourts have analogized the substantial prejudice that a defendant must show to be entitled to relief from proper joinder to the unfair prejudice that a defendant must show from the admission of other acts evidence under the third part of the *Sullivan* test. Under that part of the test, for evidence of other acts to be admitted, the probative value of the evidence must not be substantially outweighed by the risk of unfair prejudice under Wis. Stat. § 904.03" (¶ 40) (citations and quotations omitted). *See State v. Sullivan,* 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Here, the circuit court determined that the evidence in all three cases would be

admissible if each case were tried separately for the permissible purposes of proving motive, opportunity, intent, plan, and identity (*see* ¶ 42). The appellate court concluded that the defendant did not show that the circuit court erroneously exercised its discretion in determining, as part of the joinder analysis, that joinder would not result in prejudice to him (*see* ¶ 43).

Search and Seizure – Warrants to Search Smartphones – Probable Cause and Particularity Requirements

***State v. Melssen*, 2025 WI App 76 (filed Nov. 20, 2025) (ordered published Dec. 17, 2025)**

HOLDINGS: 1) A warrant to search the defendant's smartphone did not satisfy the Fourth Amendment's probable-cause and particularity requirements. 2) Sufficient evidence was presented at trial to sustain the defendant's convictions on multiple controlled-substances counts.

SUMMARY: During an investigation of a physical altercation between defendant Melssen and another individual, police officers obtained a warrant to search the defendant's smartphone. That search revealed messages that could support the reasonable inference that Melssen was involved in the distribution of controlled substances. Police officers then applied for and obtained a second warrant, which authorized a search of the premises where Melssen lived. When the residential warrant was executed, police officers found methamphetamine, drug paraphernalia, and other items consistent with drug distribution.

The defendant was charged with multiple controlled-substances violations and moved to suppress the evidence recovered during the execution of the two search warrants. The circuit court denied the motions, and a jury convicted the defendant of the drug offenses. This appeal followed.

In an opinion authored by Judge Graham, the court of appeals vacated the circuit court's pretrial order on the suppression motion and remanded the matter to the circuit court.

The appellate court concluded that there was sufficient evidence to sustain the drug charges but that the circuit court erred regarding the pretrial order denying the motion to suppress.

More specifically, it held that "the warrant to search Melssen's smartphone – which authorized officers to search virtually all of the messages, images, search terms, passwords, correspondence, credit card bills, telephone bills, digital artifacts, and incoming and outgoing telephone numbers and call details stored on the smartphone – violated the Fourth Amendment because it was overbroad and not carefully tailored to its justifications. The warrant application did not establish probable cause that Melssen was involved in the trafficking or distribution of controlled substances. At most, it established probable cause that Melssen had committed a battery on a specific date, and also established probable cause that evidence related to the battery would be found in a limited search of the call logs and communications on the smartphone over a limited period of time. The warrant application did not establish probable cause for the broad search of the smartphone's contents that the warrant authorized" (¶ 3).

The warrant thus violated both the probable-cause and particularity require-

ments of the Fourth Amendment.

The court agreed with several other state and federal jurisdictions in emphasizing that, like other warrants, a warrant to search a smartphone must be "carefully tailored to its justifications" (¶ 42). "[T]o comply with the Warrant Clause's requirements, 'the warrant must specify the particular items of evidence to be searched for and seized from the [smart] phone,' and its authorization must be 'limited to the time period and information or other data for which probable cause has been properly established through the facts and circumstances set forth under oath in the warrant's supporting affidavit'" (¶ 43) (citations omitted).

Although the appellate court concluded that the warrant permitted an unconstitutional search of the defendant's smartphone, it did not determine whether any of the evidence found in the searches of his smartphone and residence should be suppressed. This is because the circuit court denied the motion to suppress without allowing the parties to present evidence, and the existing record did not allow the appellate court to determine the potential applicability of any exceptions to the exclusionary rule. Accordingly, the case was remanded to the circuit court to address whether any evidence found on the defendant's smartphone or at his residence must be suppressed and whether the defendant is entitled to a new trial (*see* ¶ 4).

Incompetency – Involuntary Medication – Important State Interest – *Sell* Criteria

***State v. B.M.T.*, 2025 WI App 77 (filed Nov. 21, 2025) (ordered published Dec. 17, 2025)**

HOLDING: In reviewing an involuntary medication order, a court may consider the "totality of the alleged criminal conduct" when assessing the state's interest in bringing the defendant to trial; the possibility of not guilty by reason of mental disease or defect (NGI) verdicts did not diminish the state's interest.

SUMMARY: The defendant has a long history of mental illness dating from the 1990s. On multiple occasions, he underwent "restoration-to-competency" in both inpatient and outpatient settings. In the last 10 years, he was charged with numerous criminal offenses, including nine felonies, some involving violence. He was found incompetent to stand trial and refused voluntary treatment. The court conducted a hearing as required by *Sell v. United States*, 539 U.S. 166 (2003), and ordered that he be involuntarily medicated, consistent with *Sell* (*see* ¶ 19). The defendant appealed.

Applying the *Sell* criteria, the court of appeals, in an opinion authored by Judge Lazar, held that, even under the most favorable standard of review to the defendant, the state had satisfied its burden of proof. The state had a compelling reason for taking the defendant to trial in light of his criminal history, especially given the number and seriousness of the offenses (*see* ¶ 34). Potential Wis. Stat. chapter 51 civil commitments or NGI outcomes did not diminish the state's interest in taking him to trial (*see* ¶ 42).

The treatment order was also sufficiently individualized under the *Sell* criteria to satisfy due process (*see* ¶ 44). It was not a "generic plan" that lacked a nexus to the defendant (¶ 47).

Extended Supervision – "No Social Media" Condition

***State v. Petersen*, 2025 WI App 74 (filed Nov. 19, 2025) (ordered published Dec. 17, 2025)**

HOLDING: The circuit court's order that a defendant have no "social media" as a condition of extended supervision was appropriate.

SUMMARY: The defendant was convicted of stalking, making "terrorist" threats, and false imprisonment. The offenses involved a woman who had rebuffed the defendant's "romantic advances" (¶ 2). He was sentenced to prison time to be followed by extended supervision with the condition that he have "no social media." The defendant appealed that condition.

The court of appeals, in an opinion authored by Judge Gundrum, upheld the "no social media" condition on the extended supervision. The victim had reported the defendant's tampering with her social media. The condition appropriately protected the victim involved in this case as well as other potential victims in the future in a way that a simple "no contact" order could not. Defense counsel concurred that the condition was "appropriate" (¶ 4). The court recounted the defendant's use of the victim's social media accounts as part of his harassment campaign (*see* ¶ 17). In short, the "no social media" condition was lawful. **WL**