



April 2002
Volume 10, Issue 2

The
WISCONSIN
DEFENDER

Inside This Issue:

PRACTICE POINTERS

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A Journal of Research and Education
Published by the Office of the Wisconsin State Public Defender

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The *Wisconsin Defender* welcomes all comments and suggestions for articles. Please submit your comments and article suggestions to Gina Pruski at the address below.

Office of the Wisconsin State Public Defender
315 North Henry Street
2nd Floor
Madison, WI 53703
Tel 608.266.0087
Fax 608.267.0584
E-mail: pruski@mail.opd.state.wi.us
Web: <http://www.wisspd.org/>

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From the Editor...

This issue of the *Wisconsin Defender* is filled with “practice pointers,” those valuable pieces of practical advice that assist lawyers in their daily practice.

The issue leads off with two practice pointers related to Chapter 980 cases. First, Margaret Maroney (Assistant State Public Defender, Madison Appellate) suggests how a jury in a Chapter 980 trial should be instructed in light of the U.S. Supreme Court’s recent decision in *Kansas v. Crane*. In addition, Nick Bokas (Assistant State Public Defender, Milwaukee Trial) explains why, in some instances, it may be better to file a petition for discharge rather than for supervised release.

Next, John Sobotik (Assistant General Counsel at the Department of Transportation) reminds us that OAR 1st offense becomes a criminal violation on May 1st. He also provides helpful sentencing arguments to use in certain OAR cases and information on reinstatement after bankruptcy.

Don Lang (Assistant State Public Defender, Madison Appellate) then provides compelling reasons why your client should not be ordered to pay a DNA surcharge in felony cases. Don also reminds us about the importance of making sure that our clients are sentenced for the proper crime and the proper time after probation, parole, or extended supervision has been revoked.

Finally, Mike Yovovich (Assistant State Public Defender, Madison Appellate) addresses several issues unique to juvenile clients, including children’s ability to form criminal intent, competency, and voluntariness of confessions.

Agency Mission

To enhance the quality of justice throughout Wisconsin by providing high quality, compassionate, and cost-effective legal representation; protecting the rights of the accused; and advocating as a criminal justice partner for effective defender services and a fair and rational criminal justice system

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PRACTICE POINTERS: CHAPTER 980

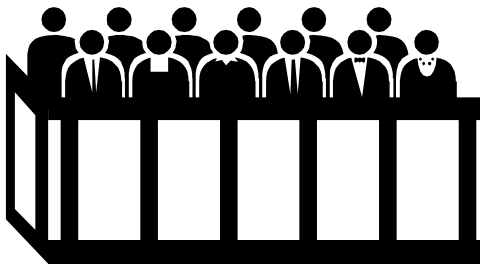
JURY INSTRUCTIONS IN LIGHT OF *KANSAS V. CRANE*

The following Practice Pointer was submitted by Margaret Maroney, Assistant State Public Defender in the Madison Appellate Office. Margaret is representing John Laxton in *State v. John Lee Laxton*, Case No. 99-3164, in which the Wisconsin Supreme Court is considering whether due process of law is violated when a person is committed as a sexually violent person without a jury finding that he has serious difficulty controlling his conduct. The Supreme Court will be considering the effect of the U.S. Supreme Court's decision in *Kansas v. Crane* on Wisconsin Chapter 980 commitment law.

In response to *Kansas v. Crane*, the Wisconsin Criminal Jury Instruction Committee issued a revised instruction for use in a Ch. 980 commitment trial. The instruction defines "mental disorder" as a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior." WIS JI-CRIMINAL 2502, p. 2 (footnotes omitted) (Special Release - 2/2002). The Committee concluded that "adding reference to 'serious difficulty in controlling behavior' to the definition of 'mental disorder' was an appropriate response to *Crane*."

Trial counsel should consider arguing that simply incorporating the "serious difficulty in controlling behavior" into the definition of mental disorder does not satisfy due process. A sexually violent person may not be committed "in the absence of a finding that he was unable to control his behavior." *Kansas v. Crane*, 122 U.S. at 870. This due process requirement of "serious difficulty in controlling behavior" is a separate element of proof, not merely a defining characteristic of the mental disorder.

A Ch. 980 case is a civil proceeding. Special verdicts may be used to address the material questions of fact. See e.g. WIS JI-CIVIL 145; *Kain v. Bluemound East Ind. Park, Inc.*, 2001 WI App. 230, 248 Wis. 2d 172, 188-89. They are used in civil commitment proceedings under Ch. 51. See WIS JI-CIVIL 7050.



The jury should be asked to make separate determinations. First, at the time the petition was filed, was the person within 90 days of release? *Second*, does the person have a mental disorder? *Third*, as a result of the mental disorder, did the person have a serious

difficulty in controlling dangerous behavior? Fourth, is the person dangerous because he has a mental disorder, which creates a substantial probability that he will engage in future acts of sexual violence?

Making the second and third determinations separately parallels the jury determination in commitments pursuant to Wis. Stat. sec. 971.17. See WIS JI-CRIMINAL 605. The Committee recommended separating the issue into "mental disorder" and "difficulty in conforming behavior." ■

PRACTICE POINTERS: CHAPTER 980 cont.

PETITION FOR DISCHARGE OR PETITION FOR SUPERVISED RELEASE: WHICH ONE SHOULD YOU PURSUE?

The following Practice Pointer was submitted by Nicholas Bokas, Assistant State Public Defender in the Milwaukee Trial Office. Nick specializes in the defense of Chapter 980 cases.



In handling petitions for discharge and supervised release, one important strategic decision to be made is whether to proceed with a petition for supervised release under 980.08 or to proceed with a petition for discharge under 980.09. One would think that the logical procedure is to seek supervised release first, and to pursue discharge after a period of successful community adjustment under supervised release. However, defense counsel should always keep in mind that with a petition for supervised release, the judge makes the

decision, whereas with a petition for discharge, if the respondent can establish probable cause that he is not a SVP, he is entitled to a jury trial (six jurors, five-sixths verdict).

Previously, when I was appointed on a “petition for discharge” case, I would advise my client to sign the waiver for the petition for discharge, and then I would proceed to file a petition for supervised release. My reasoning was that I had a better chance for supervised release than for discharge. While there are situations where this may be the case, I do not think this is always true, especially when the judge is resolutely against supervised release. So, if you are in a situation where you believe that you do not have a reasonable chance of getting supervised release with a judge, and you believe you can establish probable cause that your client is not a SVP, consider proceeding under a petition for discharge, and get the case before a jury.

In many of the Ch. 980 cases that resulted in commitment after trial, the respondent had at least one expert opine that the respondent was not a SVP. I would estimate that in perhaps 50% of the trials where the respondent was committed, there was a court-appointed and/or retained expert for the respondent who said the respondent was not a SVP. If you receive a “petition for discharge” case where there was an expert who opined at the original commitment trial that the respondent was not a SVP, then request that expert to be your court-appointed expert. You are entitled to an expert under *State v. Dennis Thiel*, 2001 WI App 32, 241 Wis. 2d 465.

In *Thiel*, the court ruled that under Wis. Stats. 980.07(1) (1999) a court must appoint an expert at county expense to conduct a separate examination, if requested by an indigent person who is re-examined. It is very likely that your court-appointed expert will again find that your client is not a SVP. When the court does the *Paulick* paper review (*State v. Paulick*, 213 Wis. 2d 432, 438-9 (Ct. App. 1997)), the court should conclude that there has been a probable cause showing that the respondent is not a SVP. We all know that the threshold for probable cause is very low, and under *State v. Dunn*, 117 Wis. 2d 487 (1984), the court would virtually be compelled to find that the respondent has established probable cause that he is not a SVP. Once this is shown, the respondent is entitled to a jury trial, as discussed in *State v. Post*, 197 Wis. 2d 279 (1995).

See “Petition” on Page 6

“Petition” continued from Page 5

I am posturing several cases for jury trial in this manner. Also, even if we lose at a trial on a petition for discharge under 980.09 (2), we can again follow the same procedure when it is time for the next annual re-examination. That is to say, we can again request the appointment of an expert, establish probable cause on the basis of that expert’s report, and proceed to jury trial again. You are not restricted by sec. 980.10. The Wisconsin Supreme Court in *Post* noted that the sec. 980.10 restriction “is clearly limited to ‘subsequent petition(s) under this section.’” The court declared: “in other words, this limitation does not apply to petitions for supervised release, petitions for discharge filed with the secretary’s approval, or those filed without approval following the yearly examination. Nor does this section in any way affect a committed person’s right to an annual hearing for discharge under 980.09(2).” See *Post*, 197 Wis. 2d at 327. ■

PRACTICE POINTER: OAR

The following Practice Pointer was submitted by John Sobotik, Assistant General Counsel at the Wisconsin Department of Transportation where he specializes in highway and traffic law. John’s opinions are not necessarily those of the Wisconsin DOT.

OAR-1st Offense is Criminal as of May 1, 2002

Any attorney who handles traffic cases knows that 1997 Wisconsin Act 84 overhauled the laws related to operating after revocation (OAR) and operating while suspended (OWS). Act 84 modified which offenses will result in a revocation and which offenses will result in a suspension. It also was intended to eventually make all OAR offenses criminal violations and all OWS offenses non-criminal violations.

Suspensions are used as the sanction for most driving or non-driving offenses that result in a license sanction. Revocation, in contrast, was reserved by the legislature for the most severe anti-social driving behaviors, such as drunk driving and eluding police. For a complete list of the offenses resulting in a revocation, see Barry Cohen’s article in the January 2002 issue of the *Wisconsin Defender* at: <http://165.189.194.26/html/publications/docs/wdefJan02.pdf>. Note that the reason repeat OWS results in revocation after 4 offenses is to provide courts with more options to sanction drivers who won’t stop driving while their license is invalid despite repeated traffic citations for doing so.

While most of the provisions of Act 84 have been in effect for a year or more, the provision of the act that makes OAR-1st offense a civil offense sunsets on April 30, 2002. See section 343.44(2)(am), Stats. Thus, as of May 1, 2002, OAR-1st offense becomes a criminal violation.

The sunset provision was inserted into the law specifically to provide time for non-dangerous drivers whose licenses were revoked under the old laws to reinstate their operating privileges. The legislature understood there were drivers who were in revoked status for things such as demerit points, or non-driving drug violations, and did not want to subject those drivers to criminal penalties for OAR. Thus, they let OAR 1st offense remain a civil offense for several years to “wash out” those drivers. The hope was that by this time the vast majority of revoked drivers would be those who had committed serious anti-social driving offenses.

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AGAINST ALL ODDS

TRYING A CHAPTER 980 CASE AFTER *CRANE*

By: John Wabaunsee

Assistant State Public Defender, LaCrosse Trial Office

In March 2002, I tried a Chapter 980 case to the court using the “volitional control” language of *Kansas v. Crane* and the revised WIS JI-CRIMINAL 2502 issued in February 2002. In a pretrial motion, I argued that *Kansas v. Crane* required the addition of an element to WI JI-CRIMINAL 2502 regarding a separate finding of lack of volitional control as Margaret Maroney suggests in her “Practice Pointer” ([see page 4 of the Wisconsin Defender](#)). The trial court did not accept my reasoning and used the language of the revised instruction. Using the revised instruction, the judge dismissed the state’s case after a 2 ½ day trial.

The major impact of *Kansas v. Crane* will be in those cases where the client does not have a diagnoses of a paraphilia such as pedophilia. Based on anecdotal evidence, it appears that most persons subject to 980 proceedings are diagnosed as having 1) pedophilia, 2) paraphilia not otherwise specified and 3) personality disorder. After *Kansas v. Crane* it will be harder for the state to demonstrate that a personality disorder or paraphilia NOS are mental conditions that predispose a person to engage in acts of sexual violence and cause serious difficulty in controlling behavior. If the previous sexual violence and other criminal behavior are used to make the diagnoses, then it becomes circular to say that this behavior in and of itself creates a risk for future criminal behavior. The Supreme Court in *Kansas v. Crane* seems to limiting the scope of mental disorder in sexual predator commitments just as Wisconsin law does not allow an insanity defense where the abnormality is manifested “...only by repeated criminal or otherwise antisocial conduct.” See sec. 971.15 (2), Wis. Stats.

The judge in my case was concerned about the mental disorder element of the case and was using the revised version of the jury instruction. He never reached the second major element of a Chapter 980 case, the risk to reoffend. At the close of the evidence he ruled that the state had not met its burden of proof to show that my client had the requisite mental disorder. One of the State’s experts opined that my client had a paraphilia not otherwise specified and a personality disorder with anti social features. The other State expert testified that my client had the personality disorder with anti social features. Both State experts stated that these disorders predisposed my client to engage in acts of sexual violence and caused him serious difficulty in controlling behavior. Our expert, Diane Lytton, Ph.D., testified that our client had a personality disorder not otherwise specified. However, she offered the opinion that this was not a mental disorder that predisposed him to acts of sexual violence and did not cause him serious difficulty in controlling his behavior. The judge seemed interested in our expert’s discussion of the relationship between defense inability to use this mental disorder for NGI purposes and the State’s claim it could use it for involuntary commitment under Chapter 980. The other defense expert was Lynn Maskel, M.D. who was prepared to testify about the lack of science in risk prediction, but wound up answering numerous questions from the judge about personality disorders.

Kansas v. Crane highlights the skepticism of the Supreme Court towards the use of personality disorders to civilly commit someone. Whether the case is tried to a judge or a jury, the volitional control language gives the fact-finder a basis to doubt the necessity of commitment. ■ ([Return to “In This Issue”](#))

NEWS BRIEFS

New Developments in the Illinois Death Penalty Debate

Two years ago, Illinois Governor George Ryan declared a moratorium on the death penalty in Illinois after several death row inmates were exonerated. This week, the commission he set up to study Illinois' death penalty system released its long awaited report. The commission concluded that "No system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death." The report includes 85 recommendations to reform the current capital punishment system in Illinois. Recommendations include reducing the number of crimes eligible for the death penalty from the current 20 down to 5, videotaping interrogations of all capital case suspects, and setting up an independent forensics lab. The commission also recommended eliminating the death penalty as an option when someone is convicted based on a single eyewitness's testimony, a jailhouse informer or an accomplice. Death penalty opponents hailed the commission's report as supporting their claim that it is more practical to abolish the death penalty than to institute the reforms needed to make sure that it is administered fairly.

For the full text of the Governor's Commission on Capital Punishment report go to: http://www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html ■

Racial Profiling Suit Settlement Talks Continue in New Jersey

Talks continue in an attempt to settle complaints against the state of New Jersey arising from accusations of racial profiling of motorists by the state patrol. Governor James McGreevey's administration appears interested in resolving this issue and ending the litigation. Several actions are currently pending against the state and officials involved. Talks seem aimed at reaching an overall settlement of all complaints of racial profiling. One complaint, handled by attorney William Buckman, was filed as a federal class action suit in 1998. (Buckman spoke about his work on racial profiling at the 1999 Wisconsin Public Defender Conference.) Reaching a settlement has been complicated by the number of potential complainants. Once a settlement is reached it would be advertised which could net hundreds of individual complaints going back several years. A procedure would need to be agreed upon to review the complaints, determine their veracity and set the amount of the individual settlements. ■

2001 Wisconsin Youth Risk Behavior Survey

Are you looking for information and statistics on risk related behaviors of 14-18 year olds?



Every two years the Wisconsin Department of Public Instruction conducts the Wisconsin Youth Risk Behavior Survey. The goal is to assess the risk factors that affect the health and safety of Wisconsin's ninth through twelfth graders. Questions and results are coordinated with similar studies done over the past 10 years in 42 states, four territories and 16 cities. The U.S. Centers for Disease Control and Prevention oversees this effort resulting in statistics and trends that can be compared nationally. The 2001 Wisconsin component of this study involved 2,120 students in 54 schools.

Risk related behavior topics include

See "YRBS" on page 53

POLICY CHANGES IN DUPLICATION, PRINTING, SERVICE AND POSTAGE COSTS IN APPELLATE CASES

Wisconsin's current fiscal crisis has affected nearly every state agency. The State Public Defender is no exception. While the SPD is making every effort to ensure that essential services remain intact despite dwindling resources, budget cuts and a hiring freeze have caused the SPD to curtail or modify some practices or procedures. To this end, the SPD Assigned Counsel and Appellate Divisions announce the following policy changes.

Brief Copying and Service of Appellate Briefs

Previous policy allowed SPD-appointed attorneys in appellate cases to submit briefs to the Madison Appellate Office for printing and service. While a relatively small percentage of attorneys utilized this option, the Appellate Division can no longer offer this service. Effective May 1, 2002, attorneys must duplicate, file and serve briefs, petitions for review, no-merit reports and other essential documents on their own in a manner consistent with SPD reimbursable-expense policy.

Appellate Case Reimbursable Expenses

A memorandum from the SPD Assigned Counsel Division on March 11, 2002, announced that the SPD would no longer reimburse for the cost of express mail or express delivery for last minute filings. That policy change has been reconsidered and modified. The new policy is as follows:

Mailing, filing, and service:

The Assigned Counsel Division will reimburse all reasonable expenses for mailing, serving and filing motions, briefs, petitions for review, no-merit reports or other documents required to discharge counsel's duties or obligations in the appointed case. Counsel must effectuate timely filing and service in the least expensive manner available. Counsel may utilize the United States mail or third party commercial carriers. However, express mail and express delivery charges are disfavored and are subject to disallowance by the Assigned Counsel Division if unreasonable. Include an invoice or a receipt if the expense totals \$10 or more.

Duplication:

The Assigned Counsel Division will reimburse all reasonable duplication expenses related to serving and filing appellate documents (e.g., motions, briefs, petitions for review, no-merit reports) that are reasonably required to discharge counsel's duties or obligations in the appointed case. The reimbursement rates are \$.05 per page for in-office copying and not more than \$.25 per page for out-of-office copying. Include an invoice or a receipt if the expense totals \$10 or more.

Expenses for duplication of the circuit court case record and transcript will not be reimbursed unless the attorney is required to forward copies to the client under Wis. Stat. Sec. 809.32(1)(d). Other copies made for the attorney's own file or records are not

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reimbursable.

Obtaining records for case evaluation or evidentiary purposes (e.g., medical records) does not fall within this duplication policy. Such expenses are reimbursable at statutory or reasonable rates, with an invoice or receipt if the expense totals \$10 or more, and require pre-approval by the Assigned Counsel Division if the expense totals \$50 or more.

The State Public Defender appreciates the extraordinary work private bar attorneys do on behalf of indigent persons and regrets any inconvenience these policy changes may cause. If you have any questions regarding SPD billing or filing procedures, you may contact Mary Gold in the Assigned Counsel Division at 608. 267.1771, Madison Appellate First Assistant Joseph Ehmann at 608.266.8388, or Milwaukee Appellate First Assistant Pat Flood at 414. 227.4808. ■

Website of the Month

<http://www.ncjrs.org/>

The federally sponsored National Criminal Justice Reference Service (NCJRS) manages this month’s featured website. The NCJRS is a clearinghouse for research, policy and practice information related to criminal and juvenile justice and drug control issues. Sponsors include a number of agencies within the U.S. Department of Justice’s Office of Justice Programs and the Office of National Drug Control Policy. The website’s services and resources are available without charge to criminal and juvenile law practitioners, policymakers, community leaders, and the general public.



One of the principal features of this website is the online library. The library contains more than 1,500 full-text, online publications. Articles are sorted by main topics (e.g., courts, juvenile justice, statistics) Under each main topic there are more specific sub-topics (e.g., juvenile court waiver, witnesses) You can also search all of the articles with a simple-to-use search option.

In addition, the website gives the user access to search the abstracts of more that 160,000 articles focusing on criminal justice issues. You can search the NCJRS Abstracts Database by title, subject, author and reference number. The search results include a 100-200 word summary of the article and information about when and where it appeared as well as the author’s name.

There are a number of other services available at this website. Two of these include JUSTINFO, a bimonthly newsletter with news and announcements from the federal sponsoring organizations and JUVJUST, an electronic mailing list specific to juvenile justice issues. You can also contact the NCJRS staff to ask specific questions. There is even a calendar of related meetings and conferences. Go to “What is NCJRS?” at the bottom of the site’s home page to find out more about the services they offer and links to the sponsoring organizations.

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PRACTICE POINTER: DNA SURCHARGE

THE IMPOSITION OF THE \$250.00 DNA SURCHARGE FOR REPEAT OFFENDERS WHO HAVE ALREADY PROVIDED A SAMPLE

The following Practice Pointer was submitted by Don Lang, Assistant State Public Defender in the Madison Appellate Office.

As most of you know, judges routinely order the taking of a DNA sample and the imposition of the DNA surcharge. While ordering the sample is mandatory, imposition of the DNA surcharge, at least in non-sexual assault cases, is not. Section 973.046(1g), Stats., provides that “the court may impose a deoxyribonucleic acid analysis surcharge of \$250.” How does one convince the court to forego the opportunity to impose the surcharge? In some cases, the judge may be sympathetic to the competing demands upon the client’s meager resources. In other cases, the defendant is a repeat offender who has already had a DNA sample taken and tested in a prior case.



Dr. Michael Camp, the Director of the State Crime Lab, reports that the Crime Lab only wants one DNA sample taken and tested. It is both redundant and costly to conduct a second test. As Dr. Camp recently indicated in a letter to my office: “The policy for collecting DNA samples that has been set by the Wisconsin Department of Justice is that only one sample needs to be taken from any particular individual. A person’s DNA does not change with time. Duplicate samples also represent an additional expense. Once a profile has been obtained, it is good until technology changes.”

According to Dr. Camp, when a DNA sample has been taken from a subject, a “flag” is set on the subject’s state criminal history record indicating that “DNA SAMPLE HAS BEEN TAKEN FOR SUBJECT.” Dr. Camp indicates that sheriffs and DOC staff who secure these samples are encouraged to consult the criminal history records before obtaining a DNA sample. “If a flag exists, they are instructed not to take an additional sample.”

Obviously, if a second sample is never taken, it is reasonable to suggest your client shouldn’t have to pay the surcharge. In most cases, whether a DNA sample has previously been secured from your client can and should be determined prior to sentencing. This information, which should be readily available to prosecutors, should be routinely secured as part of the discovery. If your client has been recently convicted of another felony offense, there is a substantial likelihood that there is a DNA sample already on file. ■

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The *Wisconsin Defender* needs your practice pointers. If you have a practice pointer, courtroom observation, or comment you’d like to share with your colleagues, please submit it to Gina Pruski, Editor-*Wisconsin Defender*, at pruskig@mail.opd.state.wi.us or 315 North Henry Street, 2nd Floor, Madison, WI 53703.

PRACTICE POINTER: SENTENCING AFTER REVOCATION

ENSURING THAT YOUR CLIENT IS SENTENCED FOR THE PROPER OFFENSE AND UNDER THE PROPER PENALTY SCHEME

The following Practice Pointer was submitted by Don Lang, Assistant State Public Defender in the Madison Appellate Office.

For the second time in a few weeks, I have reviewed a sentencing after revocation (SAR) case wherein the defendant was sentenced to more time than the penalty for the original conviction authorized. In one instance, the defendant was sentenced to ten years when the applicable maximum was five years. In another, the defendant was sentenced to four years when the applicable maximum was two years.

When you get an SAR case, do not assume that the probation agent's summary of the status of the case, particularly the agent's recitation of the crime of conviction and applicable penalties, is correct. In the first case cited above, the charged offense had been reduced as part of the prior plea agreement. The agent misstated the crime of conviction in her report. In both cases, the agent, and everyone else subsequently involved, overlooked the fact that the legislature's amendment of the penalty structure statute only applies to offenses committed on or after December 31, 1999. In SAR cases, there is an increased likelihood that the underlying offense was committed under a different penalty scheme.

To ensure that your SAR client is being sentenced for the proper offense and under the proper penalty scheme, you may wish to double check the court record (e.g., plea questionnaire, court minutes, original judgment) to confirm the date of the offense and the identity of the offense to which the defendant entered his or her plea. ■

Review Granted in the Wisconsin Supreme Court

(December 15, 2001 through March 29, 2002)



State v. R.G. Sorenson 98-3107

REVW 12/17/2001

District 4/Juneau County

Issues: Does the doctrine of issue preclusion prohibit the respondent in a ch. 980 proceeding from presenting evidence alleging innocence in the underlying sexual offense? If it does, are there any circumstances under which the respondent in a ch. 980 proceeding can challenge a judgment of conviction in the underlying sexual offense action?

State v. J. Laxton 99-3164

REVW 01/29/2002

District 1/Milwaukee County

Issues: Were the petitioner's due process rights violated because there was no jury determination regarding the petitioner's level of volitional control?

State v. T.L. Rachel 00-0467

CERT 12/17/2001

District 2/Kenosha County

Issues: Does Wis. Stat. Ch. 980 (1999-2000), as amended by 1999 Wis. Act 9, violate the Due

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EXPERT'S CORNER

How Much Time Do You Spend Preparing Your Experts for Trial?

By: Barry Hargan*

Some experts have testified hundreds of times and make quite a livelihood at the practice while others are relatively inexperienced and need more direction and preparation. I have noticed that the degree of expert preparation varies significantly from attorney to attorney. Some criminal defense lawyers will go to great lengths to prepare their experts while others will spend minimal time with their expert. Others fail to see the value in using experts at all.

The following has been useful to me in serving as an expert witness over the years:

- ◆ Don't wait until the last minute to prepare your expert unless you and your expert have worked together many times before and know what to expect from each other.
- ◆ Whenever possible, discuss with your expert what he or she can expect from the prosecutor.
- ◆ Your expert has the expertise you lack. Don't hesitate to ask your expert what questions you should ask him or her during his or her time on the stand.
- ◆ Ask your expert for suggested questions to ask the prosecutor's own expert witnesses.

An attorney and I recently worked out a series of questions he was able to effectively use with the State's expert witnesses in a drug case. Because prosecutors routinely ask me questions about my lack of training and experience in executing search warrants, conducting controlled buys, or other drug transactions, I suggested that the attorney question the police as to their knowledge about addiction, tolerance, the critical relationship between drug tolerance and purchase and consumption habits as well as their ability or inability to discern a trafficker from an addict purchasing in bulk for personal use. Not surprisingly, the police had no knowledge, training or experience in those areas; areas which can certainly be relevant to their investigations and the State's charging process. The attorney later told me that he had good results with that particular strategy.

From my perspective, there is little enjoyment or satisfaction in being an expert witness. However, effective, meaningful, timely and ample preparation with the case attorney will facilitate desired outcomes and even make the process tolerable for me and my colleagues! ■

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**Barry Hargan & Associates, 262.250.7655, is a leading provider of Alternative Presentence Investigation Reports, Alternative to Revocation Plans, Forensic Substance Abuse Evaluations and other forensic evaluations in Wisconsin and Illinois.*

The January 2002 issue of the Wisconsin Defender featured an article about Victim Impact Panel (VIP) Programs. The author of that article, Nina Emerson, Director of the Resource Center on Impaired Driving, has asked the Wisconsin Defender to publish an updated list (see below) of the VIP programs currently available in Wisconsin. Programs added to the list appear in **bold**. Please note that this list does not include programs currently in the planning stages (e.g., Dane County). If a VIP program is started in your area subsequent to publication of this issue of the Wisconsin Defender, please contact the Resource Center on Impaired Driving at 1.800.862.1048 so that the list can be updated.

- ◆ **Brown County, Contact: Paul Strand, 920.448.6251, Brown County Central Library, 7:00 p.m., Feb. 20, May 8, Aug. 14, Nov. 13, 2002**
- ◆ Door County, Contact: Helen Bacon, 920.743.7433
- ◆ Jefferson County, Contact: Terry Wescott, 920.674.7217
- ◆ Kenosha County, Contact: Carol Baker, Alcohol & Other Drugs Council of Kenosha County, Inc., 262.658.8166 or Laura, 262.658.8166. Panels are held the first Monday of every other month.
- ◆ La Crosse County, Contact: Jane Klekamp, 608.789.4895, La Crosse Justice Sanctions
- ◆ Marathon County, Contact: Michael Dvorak, Attic Correctional Services, Inc., 715.848.3202. Panels are held every three months.
- ◆ **Marinette County, Contact: Connie Winchell, 715.732.7294, Marinette County Courthouse, Jury Assembly Room, 7:00 p.m., Feb. 20, May 8, Aug. 14, Nov. 13, 2002**
- ◆ **Milwaukee County, Contact: Don Myles, 414.223.1906, MATC, Jan. 30, March 20, 2002**
- ◆ **Oneida County, Contact: Patricia Yungerman, 715.369.2215, Oneida County Law Enforcement Center, Rhinelander, 7:00 p.m., May 9, Aug. 1, Nov. 7, Feb. 8, 2003. (Run in conjunction with the Vilas County VIP under the direction of Judge James Mohr, Vilas County Circuit Court, 715.479.3638)**
- ◆ Outagamie County, Contact: Frank Schreiter, Outagamie County Volunteers in Offender Services, 920.832.5160, Outagamie County Highway Department Building.
- ◆ **Ozaukee County, Contact: Lynette Bauer, 262.284.8130, Ozaukee County Justice Center, Port Washington, held four times a year in collaboration with Washington County**
- ◆ Sauk County, Contact: Janet Priewe, Sauk County MADD Chapter, 608.985.8246, St. Claire Hospital, Baraboo. (This program was started by Judge Virginia Wolf, Circuit Court Branch 3, who retired on Aug. 1, 2000)
- ◆ **Vilas County, Contact: Patricia Yungerman, 715.369.2215, First Congregational United Church of Christ, Eagle River, 7:00 p.m., Feb. 12, June 4, Sept. 3, Jan. 7, 2003**
- ◆ Walworth County, Contact: Diane Messerschmidt, Rock/Walworth MADD Chapter 608.365.8100, held at Gateway Technical College in Elkhorn
- ◆ Washington County, Contact: Larry Smikowski, 262.335.6888, Washington County Courthouse, West Bend, held four times a year in collaboration with Ozaukee County
- ◆ Waukesha County, Contact: Bernie Mangers, Waukesha Council on Alcoholism & Other Drug Abuse, 414.524.7921, ext. 103
- ◆ Winnebago County, Contact: Judge Tom Gritton, Circuit Court Branch 1, 920.236.4808 or Diane Fremgen, Clerk of Circuit Court, 920.236.4848, Winnebago County Coughlin Building ■

PRACTICE POINTERS: JUVENILE LAW

CRIMINAL INTENT-COMPETENCY-VOLUNTARINESS

The following Practice Pointer was submitted by Michael Yovovich, Assistant State Public Defender in the Madison Appellate Office.

CRIMINAL INTENT

Two recent juvenile cases suggest there is much more which can be done regarding the mental capabilities of young offenders. Moreover, there are some old cases which can be revived to assist our practice.

In *State v. Steven T.*, 2002 WI App 2, the court of appeals vacated a first degree sexual assault of a child adjudication, because the trial court refused to consider expert testimony that a prepubescent 10-year old does not experience sexual arousal or gratification in the same manner as an adult or adolescent. A 10-year-old boy playing capture the flag and then touching the breast of a 7-year-old girl is relatively normal behavior. Such an action also does not have the same sexual connotation to children under thirteen than those over that age. See "Normative Sexual Behavior in Children" William Friedrich et al., **Pediatrics**, Vol. 88, pps. 456-464 (Sept. 1991).

The breakthrough in this case is the recognition that acts which constitute crimes under the criminal law do not automatically translate into the criminal intent necessary for conviction in juvenile proceedings. I expect in future cases the state will raise *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980) (expert may not testify concerning defendant's capacity to form intent) as a bar to expert testimony regarding children's capacity to intend a particular result. However, the broader language of *State v. Flattum*, 122 Wis. 2d 282, 361 N.W.2d 705 (1985) (expert testimony on effects of alcohol on voluntary intoxication and intent allowable if relevant) can be used as support for expert testimony regarding effect of age on criminal intent.

COMPETENCY

In a somewhat different context, *State v. Eugene W.*, 2002 WI App 54, gives children with competency problems greater protections. When a child is found incompetent to assist counsel in a delinquency petition and the child is not likely to regain competency within a year, the court may order the district attorney to file a JIPS petition under Wis. Stat. § 938.13(14). However, if the child is placed under a JIPS order, the child cannot be sanctioned unless he or she understood the conditions of the order and the possible sanctions for a violation. See Wis. Stat. § 938.355(6)(a). The child's counsel should raise his client's inability to understand the conditions and sanctions (when appropriate). It is then the state's burden to prove the child's understanding prior to the imposition of sanctions. Interesting conundrum. The court of appeals recognizes that to do otherwise would implicate due process concerns.

An interesting problem which may occur is how do you get an incompetent child to admit to the JIPS petition? The answer may lie with a request for the appointment of a guardian ad litem for the child. The guardian ad litem may also be useful later in determining whether the child can understand the conditions of the court order and the possible sanctions.

See "Juvenile" on Page 16

“Juvenile” continued from Page 15

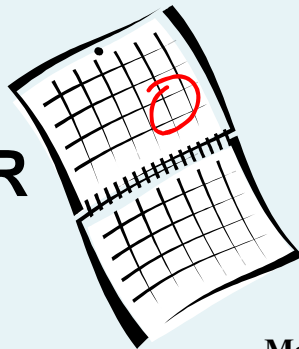
VOLUNTARINESS

It may be useful in the future to rely on some “old” cases for addressing *Miranda* and voluntariness issues when children are interrogated. In fighting crime so fiercely, the courts as well as attorneys have seemingly forgotten the previous teachings of the highest courts regarding children and confessions. When children confess, the presence of counsel, a parent or a concerned adult is extremely important. Special scrutiny should be placed on such confessions, because children are easily susceptible to coercion, suggestion, despair, fright and fantasy. *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 52, 54 (1962); *In re Gault*, 387 U.S. 1, 55 (1967); *Therriault v. State*, 66 Wis. 2d 33, 48, 233 N.W.2d 850 (1974). In fact, *Therriault* goes so far as to state, “[i]f the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements.” 66 Wis. 2d at 48.

In the appropriate case, an expert could be useful regarding the child’s ability to understand *Miranda* warnings. As stated by Dr. Thomas Grisso: “The vast majority of these juveniles [under 15 years of age] misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights.” Grisso, “Juveniles’ capacity to waive *Miranda* Rights: An Empirical Analysis,” 68 Calif. L. Rev. 1134, 1160 (1980).

Yes, there are more weapons in your arsenal when litigating in juvenile court; some are old and some are new. ■

TRAINING CALENDAR



For more information on these and other upcoming training events, please contact the SPD’s Office of Training & Development at:

training@mail.opd.state.wi.us

Death Investigation Seminar

August 22, 2002
Best Western Hotel
Hwy 100, 251 North Mayfair Road
Milwaukee, Wisconsin

Eyewitness Identification Seminar

August 23, 2002
Best Western Hotel
Hwy 100, 251 North Mayfair Road
Milwaukee, Wisconsin

Madness and Mayhem: Crimes of Passion, Addiction and Greed

WACDL and State Bar of Wisconsin
June 20 & 21, 2002
State Bar Center
Madison, Wisconsin

2002 Annual Criminal Defense Conference

Office of the Wisconsin State Public Defender
September 26 & 27, 2002
Hilton City Center Hotel
Milwaukee, Wisconsin

Juvenile Competence in Wisconsin: Culpability, Testimony and Defense Assistance

A Training for Attorneys and Judges

June 28, 2002

9:00 a.m. to 4:00 p.m.

Country Inn Hotel, Pewaukee

Cost: \$75

CLE Credits Applied For



Co-sponsored by Wisconsin Council on Children & Families, Wisconsin Office of State Public Defender, Mental Health Association in Milwaukee County, American Bar Association, MacArthur Foundation, Wisconsin Office of Justice Assistance

Program:

The training will include a combination of psychological and legal topics intended to assist attorneys and judges in evaluating and advocating with respect to the competence of juveniles in relevant juvenile justice settings. The core material will be drawn from Understanding Adolescents: A Juvenile Court Training Curriculum, developed by the American Bar Association, and research materials developed by the Wisconsin Council on Children & Families.

The full text of the ABA materials is online at:

<http://www.abanet.org/crimjust/juvjus/macarthur.html>

Presenters:

Antoinette Kavanaugh, Ph.D., is a forensic psychologist at the Children and Family Justice Center at Northwestern University Law School and Clinical Co-Director of the Clinical Evaluations and Services Initiative (CESI). Dr. Kavanaugh is also the Chicago Site Principal Investigator for the national Understanding Court Trials study.

Nan Brien, M.S., is Associate Director of Wisconsin Council on Children & Families and Director of the Wisconsin Early Childhood Brain Development Project. Brien has conducted more than 300 train-the-trainer programs on childhood brain development for agency personnel from throughout Wisconsin and in Alaska, Texas, Minnesota, and Missouri.

A panel of a juvenile court judge, district attorney, public defender, and juvenile court director on the policy/legislative implications of the current research and legal developments.

To register, go on-line at <http://www.wccf.org/projects/competence.html>

Contact:

Mark Wehrly

Wisconsin Council on Children and Families

16 N. Carroll, Suite 600

Madison, WI 53703

Tel. 608.284.0580 ext. 308

Fax 608.284.0583

E-mail: mwehrly@wccf.org

CASE DIGEST

By: Bill Tyroler

The following Case Digest includes Wisconsin Supreme Court and Court of Appeals cases released/published December 1, 2001 to April 1, 2002.

UNITED STATES SUPREME COURT OPINIONS

CIVIL COMMITMENTS

SEXUALLY VIOLENT PERSONS — JURY INSTRUCTIONS — TOTAL INABILITY TO CONTROL BEHAVIOR NOT NECESSARY, BUT “THERE MUST BE PROOF OF SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR”

Kansas v. Crane <http://a257.g.akamaitech.net/7/257/2422/22jan20021205/www.supremecourtus.gov/opinions/01pdf/00-957.pdf> (00-957), vacating and remanding *In the Matter of the Care and Treatment of Michael T. Crane* <http://www.kscourts.org/kscases/supct/2000/20000714/82080.htm>, 269 Kan. 578, 7 P.3d 285 (2000)

CONSTITUTION

FIRST AMENDMENT — PERMIT

Thomas v. Chicago Park District <http://a257.g.akamaitech.net/7/257/2422/15jan20021055/www.supremecourtus.gov/opinions/01pdf/00-1249.pdf>, 00-1249, 1/15/02, affirming *Thomas v. Chicago Park District* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=7th&no=99-1811>, 227 F.3d 921 (7th Cir. 2000)

Content-neutral permit requirements need not be attended by exacting procedural requirements, though there must be adequate safeguards to guide the decision and to allow for judicial review.

GUILTY PLEAS

PROCEDURE — INADEQUATE COLLOQUY SUBJECT TO HARMLESS ERROR — REVIEW RECORD AS WHOLE

United States v. Vonn <http://a257.g.akamaitech.net/7/257/2422/04mar20021030/www.supremecourtus.gov/opinions/01pdf/00-973.pdf> (00-973), vacating and remanding, *United States v. Vonn* <http://www.ce9.uscourts.gov/web/newopinions.nsf/4bc2cbe0ce5be94e88256927007a37b9/6d4c31c1c6ccb37c8825695a005e95ec?OpenDocument>, 224 F.3d 1152 (9th Cir. 2000)

JURY

INSTRUCTIONS — DEATH PENALTY — JURY MUST BE INSTRUCTED ON OPTION OF LIFE WITHOUT PAROLE

Kelly v. South Carolina <http://a257.g.akamaitech.net/7/257/2422/09jan20021030/www.supremecourtus.gov/opinions/01pdf/00-9280.pdf> (00-9280), reversing and remanding, *State*

v. *Kelly* <http://www.law.sc.edu/opinions/25226.htm>, 540 S.E.2d 851 (S.C. 2001)

SEARCH AND SEIZURE

ADMINISTRATIVE SEARCH — WARRANTLESS ENTRY OF PROBATIONER'S HOME ON REASONABLE SUSPICION

United States v. Knights <http://a257.g.akamaitech.net/7/257/2422/10dec20011115/www.supremecourtus.gov/opinions/01pdf/00-1260.pdf> (00-1260), reversing and remanding, *United States v. Knights* <http://www.ce9.uscourts.gov/web/newopinions.nsf/4bc2cbe0ce5be94e88256927007a37b9/79dfc5a409aef4c688256930005f1fe8?OpenDocument>, 219 F.3d 1138 (9th Cir. 2000)

“Totality of the circumstances” approach applied to analysis of warrantless search of probationer’s residence. Search upheld where condition of probation required submission to search regardless of existence of warrant or cause (thereby significantly reducing probationer’s reasonable expectation of privacy), and reasonable suspicion existed.

FORFEITURE — WRITTEN NOTICE SENT BY CERTIFIED MAIL TO PRISON

Dusenbery v. United States <http://a257.g.akamaitech.net/7/257/2422/08jan20021100/www.supremecourtus.gov/opinions/01pdf/00-6567.pdf> (00-6567), affirming, *United States v. Dusenbery* <http://laws.findlaw.com/6th/00a0269p.html>, 223 F.3d 422 (6th Cir. 2000)

Due process doesn’t require actual notice of forfeiture proceeding; government need only make effort reasonably certain to inform — satisfied here by testimony about prison’s practice of delivering certified mail to inmates.

STOP/FRISK — TOTALITY OF CIRCUMSTANCES TEST

United States v. Arvizu <http://a257.g.akamaitech.net/7/257/2422/15jan20021055/www.supremecourtus.gov/opinions/01pdf/00-1519.pdf> (00-1519), reversing and remanding, *United States v. Arvizu* <http://www.ce9.uscourts.gov/web/newopinions.nsf/4bc2cbe0ce5be94e88256927007a37b9/d229b96f4c284cf9882569a80069c7ca?OpenDocument>, 232 F.3d 1241 (9th Cir. 2000)

Factors going to reasonable suspicion to support a stop must be viewed in their totality, not weighed one-by-one. Moreover, reasonable suspicion “need not rule the possibility of innocent conduct.”

WRITS

FEDERAL HABEAS — VIOLATION OF STATE PROCEDURAL RULE INADEQUATE TO BAR REVIEW WHERE RULE’S ESSENTIAL REQUIREMENTS SUBSTANTIALLY MET

Lee v. Kemna <http://a257.g.akamaitech.net/7/257/2422/22jan20021205/www.supremecourtus.gov/opinions/01pdf/00-6933.pdf> (00-6933), vacating and remanding, *Lee v. Kemna* <http://www.ca8.uscourts.gov/opndir/00/05/992406P.pdf>, 213 F.3d 1037 (8th Cir. 2000)

WISCONSIN SUPREME COURT AND COURT OF APPEALS OPINIONS

APPELLATE PROCEDURE

JUDICIAL ESTOPPEL — ACCEPTANCE OF CURATIVE INSTRUCTION BARS APPELLATE CHALLENGE TO ITS EFFICACY

State v. Jonathan J. English-Lancaster <http://www.courts.state.wi.us/html/ca/01/01-1455.htm>, 2002 WI App 74, PFR filed 3/22/02

For English-Lancaster: Steven D. Phillips, SPD, Madison Appellate

“(C)lassic judicial estoppel” found: “English-Lancaster cannot advocate a certain position in the trial court (requesting a cautionary instruction) and a contrary position on appeal (that the cautionary instruction was inadequate and a mistrial was necessary).” ¶22.

MOOTNESS — DELINQUENCY — EXPIRED DISPOSITIONAL ORDER

State v. Stephen T. <http://www.courts.state.wi.us/html/ca/00/00-3045.htm>, 2002 WI App 3

For Stephen T.: Raymond M. Dall’Osto

For State: Diane M. Resch

Appeal of juvenile delinquency adjudication not rendered moot by expiration of its dispositional order. Certain facets of the order (DNA sample; sex offender registration) survive, and appellate review will therefore have a practical effect. ¶11. Moreover, the case presents an issue of great public importance likely to recur (namely, “whether a ten-year-old may be inferred to possess the same specific intent to become sexually aroused or gratified as an adolescent or adult”), an exception to the mootness doctrine. *Id.*

PROCEDURE — UNSIGNED NOTICE OF APPEAL

State v. Marvin C. Seay <http://www.courts.state.wi.us/html/ca/00/00-3490.htm>, *State v. Christopher Tillman* <http://www.courts.state.wi.us/html/ca/00/00-3530.htm>, 2002 WI App 37
Failure to sign notice of appeal doesn’t deprive appellate court of jurisdiction, if corrected when called to appellant’s attention. *Becker v. Montgomery* <http://a257.g.akamaitech.net/7/257/2422/29may20011200/www.supremecourtus.gov/opinions/00pdf/00-6374.pdf>, 121 S. Ct. 1801 (2001), followed.

STANDARD OF REVIEW — DOCUMENTARY EVIDENCE — TRANSCRIPTS

State v. John D. Williams <http://www.courts.state.wi.us/html/sc/00/00-0535.htm>, 2002 WI 1, *affirming* 2001 WI App 7 <http://www.courts.state.wi.us/ca/opinions/00/pdf/00-0535.pdf>, 241 Wis. 2d 1, 624 N.W.2d 164

For Williams: John A. Pray

For State: Sandra L. Nowack

The trial court’s post-conviction ruling was based on reading of a transcript, not recollection, and appellate review of that ruling is therefore non-deferential. ¶35.

STANDARD OF REVIEW — PLEA BARGAIN BREACH

State v. John D. Williams (see link above), 2002 WI 1, *affirming* 2001 WI App 7 (see link above), 241 Wis. 2d 1, 624 N.W.2d 164

For Williams: John A. Pray

For State: Sandra L. Nowack

Review of alleged plea bargain breach: “¶20. For the reasons set forth, we review the circuit court’s determination of historical facts, such as the terms of the plea agreement and the State’s conduct that allegedly constitutes a breach, under the clearly erroneous standard of review and then determine whether the State’s conduct constitutes a substantial and material breach of the plea agreement as a question of law. Consequently, we reject the clear and convincing evidence rule and the close case rule.”

The court thus clarifies that the burden of persuasion is directed to the fact-finder, not the appellate court. ¶12; “we do not graft the clear and convincing evidence burden of persuasion to the standard of review applied to questions of law in breach of plea agreement cases.” ¶15. Nor is “close case” rule — the defendant must prevail in the event of uncertainty as to a breach — applicable. ¶¶17-19.

WAIVER OF ISSUE — FUTILITY OF OBJECTION

State v. Phonesavanh Vanmanivong <http://www.courts.state.wi.us/html/ca/00/00-3257.htm>, 2001 WI App 299, *PFR granted 1/29/02*

For Vanmanivong: John J. Grau

For State: Christian R. Larsen

“¶18. The State also argues that Vanmanivong waived his right to appeal this issue because he failed to object to the use of the unsworn materials. We disagree. The trial court’s ruling indicates that a defense objection to the use of the unsworn material would have failed. (‘My review of this affidavit, this statement, although not under oath, I’m satisfied provides the necessary trustworthiness. With that information it appears that the informants do not have any additional information as to the identity of the defendant.’) In addition, Vanmanivong has no burden to insure that the trial court follows the law in exercising its discretion, and the trial court cannot exercise its discretion contrary to a clearly stated legal procedure.”

WAIVER OF ISSUE — PLAIN ERROR — POLYGRAPH EVIDENCE

State v. Ronald J. Frank <http://www.courts.state.wi.us/html/ca/01/01-1252.htm>, 2002 WI App 31

For Frank: Jane K. Smith

For State: David J. Becker

Testimonial references to an accepted offer to take a polygraph didn’t amount to plain error, § 901.03(4), which requires “obvious” error, and is reserved for likely violations of basic constitutional right. ¶25.

STANDARD OF REVIEW — PROBABLE CAUSE, COMPLAINT

State v. Joseph M. Espinoza <http://www.courts.state.wi.us/html/ca/01/01-1473.htm>, 2002 WI App 51, *PFR filed 2/21/02*

For Espinoza: Steven P. Weiss, SPD, Madison Appellate

Whether a complaint establishes probable cause is a legal determination, reviewed de novo. ¶9.

STANDARD OF REVIEW — (RE)INSTRUCTING JURY

State v. Gary L. Gordon <http://www.courts.state.wi.us/html/ca/01/01-1679.htm>, 2002 WI App 53, *PFR filed 2/13/02*

For Gordon: Steven P. Weiss, SPD, Madison Appellate

The trial court’s re-instruction of the jury is reviewed as an exercise of discretion, same as an initial

instruction. ¶9.

WAIVER OF ISSUE — STANDING OBJECTION TO PRESERVE “HASELTINE” ERROR

State v. Carlos R. Delgado <http://www.courts.state.wi.us/html/ca/01/01-0347.htm>, 2002 WI App 38

For Delgado: Richard D. Martin, Diana M. Felsmann, SPD, Milwaukee Appellate

On-line Brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/001403.pdf>

A standing objection is insufficient to preserve a *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984) objection. ¶11.

WAIVER — SUBSTITUTION OF JUDGE

Barbara R.K. v. James G. <http://www.courts.state.wi.us/html/ca/01/01-1219.htm>, 2002 WI App 47

Review of denial of request for substitution of judge must be sought from chief judge of administrative district, else issue is waived, Wis. Stat. § 801.58(2). ¶¶14-15.

WAIVER OF ISSUE — “WALLERMAN” STIPULATION

State v. Ronald J. Frank (see link to *State v. Ronald J. Frank* on page 21), 2002 WI App 31

For Frank: Jane K. Smith

For State: David J. Becker

A stipulation under *State v. Wallerman* <http://www.courts.state.wi.us/html/ca/95/95-1950.htm>, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996) (an element is conceded and the other-act isn't admitted) waives the issue of admissibility of the stipulated evidence.

CIVIL COMMITMENTS

MENTAL COMMITMENT — TIME LIMIT FOR PROBABLE CAUSE HEARING — COMPUTATION

Dodge County v. Ryan E.M. <http://www.courts.state.wi.us/html/ca/01/01-1175.htm>, 2002 WI App 71

For Ryan E.M.: Eileen A. Hirsch, SPD, Madison Appellate

“We conclude that by expressing the time requirement in terms of hours rather than days, the legislature has manifested its intent that the clock start running immediately ‘after the individual arrives at the facility,’ rather than the next day.” And, because the probable cause hearing was held 74 1/2 hours after detention, ¶3, the circuit court lost competency to proceed, ¶12. (Wis. Stat. § 990.001(4) construed and applied.)

PROTECTIVE SERVICES — COMPETENCE OF COURT FOLLOWING UNTIMELY PROBABLE CAUSE HEARING

Kindcare, Inc. v. Judith G. <http://www.courts.state.wi.us/ca/opinions/00/pdf/00-3450.pdf>, 2002 WI App 36

Probable cause hearing must be held within 72 hours of detention, otherwise court loses competence to proceed with protective-placement petition; mere filing of new petition doesn't begin clock running again. ¶3.

SEXUALLY VIOLENT PERSONS — ASSISTANCE OF COUNSEL — APPEAL

State ex rel. Ruven Seibert v. Macht <http://www.courts.state.wi.us/html/sc/99/99-3354A.htm>, 2002 WI 12, *on reconsideration of* 2001 WI 67 <http://www.courts.state.wi.us/html/sc/99/99-3354.htm>

For Seibert: Gregory P. Seibold

For State: Stephen W. Kleinmaier

The court strengthens its original opinion's conclusion as to the constitutional basis for right to counsel on a sexually violent person commitment direct appeal:

“(A)n individual committed under Chapter 980 has a constitutional right of counsel in bringing his or her first appeal as of right, emanating from both the Fourteenth Amendment’s Equal Protection Clause and the Due Process Clause as well as the Sixth Amendment’s right of counsel.” ¶2

SEXUALLY VIOLENT PERSONS — VENUE — HABEAS CHALLENGE TO COMMITMENT

State ex rel Edwin C. West v. Bartow <http://www.courts.state.wi.us/html/ca/01/01-0962.htm>, 2002 WI App 42

For West: Leonard D. Kachinsky

Venue, on habeas challenge to Wis. Stat. ch. 980 commitment, properly laid in county of current confinement, ¶¶5-6, but court has discretion to transfer venue, in interest of convenience, to county of commitment, ¶¶9-10.

COMPETENCY**EVIDENCE — DEFENDANT’S Demeanor IN PRIOR CASE**

State v. Jeffrey J. Meeks <http://www.courts.state.wi.us/html/ca/01/01-0263.htm>, 2002 WI App 65, PFR filed 3/1/02

For Meeks: Howard B. Eisenberg, Dean, Marquette Law School

Trial court’s consideration of transcript of proceeding in prior case held proper. ¶27.

EVIDENCE — PERCEPTIONS OF PRESENT COUNSEL

State v. Jeffrey J. Meeks (see link above), 2002 WI App 65, PFR filed 3/1/02

For Meeks: Howard B. Eisenberg, Dean, Marquette Law School

“¶23. We agree with Meeks’s unstated premise—in almost all cases where competency is at issue, defense counsel is in a uniquely advantageous position to advise the court whether the defendant understands the proceedings and is able to assist in the defense....

“¶24. Thus, a careful court will recognize the singular value of counsel’s opinion and carefully consider it, in light of all the evidence at a competency hearing....”

EVIDENCE — PERCEPTIONS OF PRIOR COUNSEL

State v. Jeffrey J. Meeks (see link above), 2002 WI App 65, PFR filed 3/1/02

For Meeks: Howard B. Eisenberg, Dean, Marquette Law School

Trial court, in ruling on present competency, entitled to rely on fact that Meeks’ counsel in prior case didn’t challenge Meeks’ competency. ¶¶19-20.

(Note: The opinion stresses that neither the attorney’s testimony nor her credibility was disputed; where credibility is at stake, and the trial court has a preformed notion of that credibility, then recusal is warranted. ¶21 n. 7.)

SUFFICIENCY OF EVIDENCE

State v. Jeffrey J. Meeks (see link to *State v. Jeffrey J. Meeks* on page 23), 2002 WI App 65, PFR filed 3/1/02

For Meeks: Howard B. Eisenberg, Dean, Marquette Law School

The evidence supports the trial court's conclusion of the defendant's competency, which relied largely on lay testimony (including the defendant's attorney in an earlier case), as opposed to the experts who thought the defendant incompetent.

CONFESSIONS

MIRANDA ISSUES — CUSTODY — DETENTION DURING EXECUTION OF SEARCH WARRANT — EFFECT OF HANDCUFFING AFTER QUESTIONING

State v. Susan M. Goetz <http://www.courts.state.wi.us/html/ca/01/01-0954.htm>, 2001 WI App 294

For Goetz: Nila J. Robinson

For State: David J. Becker

A suspect detained during execution of a search warrant is held not to be in custody under *Miranda*: She was told she was neither under arrest nor would be arrested unless she interfered with the search. A reasonable person in this circumstance wouldn't have felt restrained to the degree associated with formal arrest (and, therefore, in custody under *Miranda*). ¶13. Although she was handcuffed *after* questioning terminated, the "retroactive" effect of this act is nil, "because a reasonable person's perception at the time of questioning cannot be affected by later police activity." ¶15.

(Note: The dissent would reject federal authorities "that hold that a person who is 'detained' during the execution of a search warrant is not in custody for purposes of *Miranda*," ¶22, in preference to a more expansive view of state constitutional protection, ¶25. The majority doesn't reject that view; indeed, the majority finds it "compelling," ¶18. However, Goetz hasn't made a state constitutional argument, and the majority therefore declines to reach the issue. *Id.*)

CONSTITUTION

DOUBLE JEOPARDY — MULTIPLICITY — CARJACKING (§ 943.23(1)(g)) AND OPERATING WITHOUT OWNERS CONSENT (§ 943.23(3))

State v. Prentiss M. McKinnie <http://www.courts.state.wi.us/html/ca/01/01-2764.htm>, 2002 WI App 82, PFR filed 3/14/02

For McKinnie: Bryan J. Borman, SPD, Waukesha Trial

Separate charges of carjacking and operating the same motor vehicle without owner's consent, are permissible where, after allegedly taking the car, the defendant continued to drive it the next day. Although the offenses are the same in law, they are factually distinct, because driving the car the day after stealing it represented a new volitional departure in the course of conduct. ¶11.

DUE PROCESS — RIGHT TO PRESENT EVIDENCE

State v. Davon R. Malcom <http://www.courts.state.wi.us/html/ca/01/01-0506.htm>, 2001 WI App 291

For Malcom: John D. Lubarsky, SPD, Madison Appellate

For State: Karla Z. Keckhaver

The trial court properly excluded an affidavit in which the affiant purported to take “full responsibility” for evidence attributed to Malcom. The affiant was unavailable, and admissibility is therefore governed by § 908.045(4), which allows admissibility of a statement against penal interest to exonerate the defendant if “corroborated.” Corroboration, however, must be more than “merely debatable.” In this case, sufficient corroboration is lacking, given undisputed evidence of Malcom’s involvement in possessing the drugs. Therefore, corroboration of the claimed acceptance of “full responsibility” was “merely debatable” and inadmissible. ¶18.

DUE PROCESS — RIGHT TO NOTICE OF CHARGE — AMENDMENT OF INFORMATION AT CLOSE OF CASE

State v. Davon R. Malcom (see link to *State v. Davon R. Malcom* on page 24), 2001 WI App 291

For Malcom: John D. Lubarsky, SPD, Madison Appellate

For State: Karla Z. Keckhaver

The trial court properly amended the information, after close of evidence, to add a charge of keeping a place “which is resorted to by persons using controlled substances” to the charge of using the same place to manufacture, keep or deliver controlled substances (both charges being alternatives under § 961.41(2)). An amendment to the charge must satisfy two tests: it must not be “wholly unrelated” to the facts at the preliminary hearing; and it must not violate right to notice of the charge. ¶26. Both tests are satisfied here: the added charge was covered by the same statute; Malcom’s statement to the police supported the new charge; the evidence relied on by the state to prove the original charge was the same evidence that supported the added charge; both charges covered the same witnesses, same location, and same physical evidence; Malcom made no showing that he would have presented different witnesses to the added charge. ¶28.

COUNSEL

INEFFECTIVE ASSISTANCE — CLOSING ARGUMENT — CONCEDING GUILT

State v. Gary L. Gordon (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

Counsel’s closing argument concession, without the defendant’s consent, of guilt on one count would amount to ineffective assistance. “(W)e conclude that a defense attorney may not admit his client’s guilt, which is contrary to his client’s plea of not guilty, unless the defendant unequivocally understands and consents to the admission.... Logically, we also hold that an attorney may not stipulate to facts which amount to the ‘functional equivalent’ of a guilty plea without the defendant’s consent.” ¶27. “Because such a plea may not be entered without a client’s consent, a hearing is necessary to determine whether consent was given. Accordingly, we remand the matter to the trial court so that it may conduct a *Machner* evidentiary hearing.” ¶31.

INEFFECTIVE ASSISTANCE — JURY INSTRUCTION — DEFINITION OF ELEMENT

State v. Gary L. Gordon (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

Because the instructions, including a written copy provided the jury, repeatedly contained an accurate description of the element, a subsequent misstatement during re-instruction did not mislead the jury, hence any failure to object wasn’t prejudicial. ¶¶21-22.

 INEFFECTIVE ASSISTANCE — JURY INSTRUCTION — OMITTED ELEMENT —
 PREJUDICE PER SE

State v. Gary L. Gordon (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

Counsel's failure to object to an instruction that omits an element is necessarily prejudicial. ¶ 38, citing, *State v. Krueger* <http://www.courts.state.wi.us/ca/opinions/00/pdf/00-1136.pdf>, 2001 WI App 14, 240 Wis. 2d 644, 623 N.W.2d 211.

INEFFECTIVE ASSISTANCE — JURY SELECTION

State v. Howard C. Carter <http://www.courts.state.wi.us/html/ca/01/01-2303.htm>, 2002 WI App 55

For Howard: Charles B. Vetzner, SPD, Madison Appellate

“(C)ounsel’s failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his client.” ¶15.

CRIMES

 AGAINST LIFE AND BODILY SECURITY — KIDNAPPING, § 940.31(1)(B) — SUFFICIENCY
 OF EVIDENCE — “CONFINEMENT”

State v. Charles J. Burroughs <http://www.courts.state.wi.us/html/ca/01/01-0738.htm>, 2002 WI App 18

For Burroughs: William Mross

For State: Susan M. Crawford

The definition of “confine” in Wis. Stat. § 940.30 (false imprisonment) — compelled deprivation of free movement — applies to kidnapping. ¶19. Applying that definition: physical force isn’t essential; nor is the victim required to undertake the risk presented by an opportunity to escape. The jury was entitled to find confinement based on evidence that defendant raised his fists at and threatened to shoot the victim. ¶22.

 AGAINST GOVERNMENT — OBSTRUCTING, § 946.41(1) — MERE DENIAL OF
 CULPABILITY OF CRIME UNDER INVESTIGATION

State v. Joseph M. Espinoza (see link to *State v. Joseph M. Espinoza* on page 21), 2002 WI App 51, PFR filed 2/21/02

For Espinoza: Steven P. Weiss, SPD, Madison Appellate

“¶20. ... (T)he legislature did not intend such a broad result as to include within the statute all false answers or false statements which a defendant utters intending to exculpate himself or herself against a charge of a crime and to prevent his or her prosecution....”

“¶22. It seems that the intent of the legislature in Wis. Stat. § 946.41 was to prevent the waste of time, energy and expense involved in having law enforcement officers running down false leads concerning criminal conduct. Doubtless the legislature intended to circumscribe conduct which would frustrate or thwart the police function. The State makes no claim that Espinoza’s mere denial of wrongdoing thwarted the police function. And though truth and morality may have required Espinoza to answer in the affirmative when he was questioned regarding the tire incident, we cannot say that the law required him to do so.”

AGAINST LIFE AND BODILY SECURITY — SECOND-DEGREE INTENTIONAL MURDER, § 940.02 (1969) — SUFFICIENCY OF EVIDENCE (BATTERED CHILD)

State v. Arden C. Hirsch <http://www.courts.state.wi.us/html/ca/01/01-0023.htm>, 2002 WI App 8

For Hirsch: Paul G. LaZotte

For State: David J. Becker

Persuasive medical evidence that the child died as result of severe injury, along with evidence that defendant was alone with the victim at the time she suffered trauma, supports the verdict for second-degree murder, § 940.02 (1969). ¶¶36-41. (*Seidler v. State*, 64 Wis. 2d 456, 219 N.W.2d 320 (1974) distinguished.)

AGAINST PUBLIC HEALTH AND SAFETY — FELON IN POSSESSION OF FIREARM — FOREIGN CONVICTION AS FELONY

State v. Alan C. Campbell <http://www.courts.state.wi.us/html/ca/01/01-0758.htm>, 2002 WI App 20, PFR filed 1/16/02

For Campbell: Alexander D. Cossi

For State: Daniel J. O'Brien

In determining whether a foreign conviction is a “felony” for purposes of felon in possession, § 941.29, the court isn’t limited to the language of the statute, but is entitled to look at the underlying conduct of the conviction. ¶7. (And, the facts as set forth in the Ohio charge showed that the conduct would have been a felony if committed in Wisconsin, ¶¶8-9.) *Taylor v. United States* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=495&page=575>, 495 U.S. 575 (1990), distinguished. ¶¶10-11.

CONTROLLED SUBSTANCES — MANDATORY LOSS OF DRIVING PRIVILEGES

State v. Jacob E. Herman <http://www.courts.state.wi.us/html/ca/01/01-1118.htm>, 2002 WI App 28

For Herman: Jack E. Schairer, Jefren E. Olsen, SPD, Madison Appellate

For State: David J. Becker

“This appeal presents a single issue: whether §961.50 prescribes a ‘minimum sentence’ as that term is used in Wis. Stat. § 961.438, which provides that minimum sentences for violations of ch. 961 are presumptive, rather than mandatory. We conclude that a suspension imposed pursuant to § 961.50 is not a ‘minimum sentence’ as that term is used in §961.438 and that it is a mandatory penalty.” ¶1.

TRAFFIC OFFENSES — OWI — IMPLIED CONSENT — THREAT TO USE FORCE TO TAKE BLOOD

State v. Donald Marshall <http://www.courts.state.wi.us/html/ca/01/01-1403.htm>, 2002 WI App 73, PFR filed 2/28/02

For Marshall: Richard L. Zaffiro

Forcible warrantless blood draw permissible. ¶12.

TRAFFIC OFFENSES — OWI — SENTENCING — MANDATORY MINIMUM CONFINEMENT AS CONDITION OF PROBATION

State v. William P. Eckola <http://www.courts.state.wi.us/html/ca/01/01-1044.htm>, 2001 WI App 295

For Eckola: Gregory A. Parker

For State: Susan M. Crawford

The trial court erroneously exercised discretion by placing Eckola on probation for OWI-6th without

requiring confinement for at least the presumptive minimum mandated by §346.65(2)(e): “¶15. When the circuit court, in its discretion, determines that a defendant will be placed on probation, Wis. Stat. § 973.09(1)(d) requires that the person be confined for at least the mandatory minimum period. Here Wis. Stat. § 346.65(2)(e) requires that a defendant be imprisoned for at least six months for fifth or greater offense PAC. Eckola was convicted of sixth offense PAC. Therefore, the court was required to confine Eckola for at least six months as a condition of probation.”

TRAFFIC OFFENSES — OWI — SPECIAL PROSECUTOR

State v. Michael J. Carlson <http://www.courts.state.wi.us/html/ca/01/01-1088.htm>, 2002 WI App 44, PFR filed 1/17/02

For Carlson: Christopher A. Mutschler

Improper revocation of a driver’s license, for a period of 19 days, doesn’t warrant dismissal with prejudice of refusal charge. ¶¶20-27.

TRAFFIC OFFENSES — OWI — SPECIAL PROSECUTOR

State v. Michael J. Carlson (see link above), 2002 WI App 44, PFR filed 1/17/02

For Carlson: Christopher A. Mutschler

“¶9 ... In short, if a court makes a special prosecutor appointment on its own motion, it is constrained only in that it must enter an order in the record stating the cause for the appointment. Here, the court fulfilled its duty by stating on the record that it was appointing a special prosecutor and giving its reasons why....”

DEFENSES

SELF-DEFENSE APPLIED TO CARRYING CONCEALED WEAPON

State v. Tony Nollie <http://www.courts.state.wi.us/html/sc/00/00-0744.htm>, 2002 WI 4, *on certification* <http://www.courts.state.wi.us/html/ca/00/00-0744.htm>.

For Nollie: Erich Straub

For State: Lara M. Herman

A general and potential threat isn’t enough to support self-defense on a charge of carrying concealed weapon; the threat must be imminent and specific. Nollie doesn’t satisfy this test, though he was in a high-crime area, because there was no indication that he had been threatened or accosted by the four men in view that he feared. Moreover, when the police showed up, the four men were gone and Nollie remained armed. ¶¶24-26.

EVIDENCE

DOOR-OPENING — PROSECUTORIAL — PRIOR SEXUAL CONDUCT OF COMPLAINANT

State v. Charles A. Dunlap <http://www.courts.state.wi.us/sc/opinions/99/PDF/99-2189.PDF>, 2002 WI 19, reversing 2000 WI App 251 <http://www.courts.state.wi.us/ca/opinions/99/PDF/99-2189.PDF>, 239 Wis. 2d 423, 620 N.W.2d 398

On-line Brief (COA): <http://www.wisspd.org/html/appellate/briefbank/briefs/992189.pdf>

For Dunlap: Jack E. Schairer, SPD, Madison Appellate

Door-opening, known as “the curative admissibility doctrine,” is approached in three steps: 1) whether the excluded evidence was in fact inadmissible (here, by the rape shield law); 2) if so, whether any exception to inadmissibility applies; 3) whether the state opened the door, to make this

otherwise inadmissible evidence admissible. ¶15. Applying these steps:

1) The rape shield law applies (the excluded behavior included allegations of masturbation and touching men's genitals). ¶16. 2) The judicial exception to the rape shield law, *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), isn't satisfied, because the excluded acts don't closely resemble those on trial. 3) Expert testimony that the complainant's behavior was consistent with sexual assault victims doesn't alone open the door to evidence otherwise barred under the rape shield law. ¶33. Nor did this testimony cross a line and amount to comments by the expert on the credibility of the complainant. ¶¶39-40.

HEARSAY AND ITS EXCEPTIONS — AUTHENTICATION OF DOCUMENT

State v. Gary L. Gordon (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

“¶43. ... However, these documents were not made under oath or attested to in any way; thus, they were not affidavits. Further, because the State did not enter these documents into evidence through a witness, such as the officer who allegedly served the defendant or the records custodian from the Milwaukee County Sheriff's Department, these documents were never properly authenticated. See *State v. Garner*, 54 Wis. 2d 100, 107, 194 N.W.2d 649 (1972) (stating that under the public records exception to the hearsay rule, custodianship is important, and a competent witness must provide the required identification of official records). Given the absence of proper authentication combined with the trial court's mistaken belief that these documents were affidavits, we conclude that the trial court erroneously exercised its discretion in admitting these documents into evidence pursuant to Wis. Stat. § 908.03(8).”

HEARSAY AND ITS EXCEPTIONS — RESIDUAL EXCEPTION — CHILD SEXUAL ASSAULT VICTIM — ADMISSIBILITY AT REVOCATION HEARING

State ex rel. Willie C. Simpson v. Schwarz <http://www.courts.state.wi.us/html/ca/01/01-0008.htm>, 2002 WI App 7

Simpson pro se

For State: Kathleen M. Ptacek

The child-sexual-assault-victim's hearsay statement in this case satisfies the test for admissibility under the residual exception, *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988). ¶¶23-30.

OPINION TESTIMONY — “HASELTINE” TESTIMONY — COMMENT ON CREDIBILITY OF ANOTHER WITNESS

State v. Carlos R. Delgado (see link to *State v. Carlos R. Delgado* on page 22), 2002 WI App 38

For Delgado: Richard D. Martin, Diana M. Felsmann, SPD, Milwaukee Appellate

On-line Brief: (see link to *Delgado* SPD brief on page 22)

“¶8. After reviewing these cases, we can discern some general rules: (1) an expert witness can offer opinion testimony only if it complies with Wis. Stat. §907.02; (2) the testimony can include opinions regarding symptomatology common to child sexual assault victims; (3) the testimony can include a description of the symptoms exhibited by the victims; and (4) the testimony can include the expert's opinion as to whether or not the victims' behavior is consistent with behavior of sexual assault victims. Our supreme court has concluded that such testimony is not tantamount to vouching for the credibility of the victims and does not establish that an assault actually occurred.

“¶9. We can also conclude from this case law assessment what an expert witness may not do: (1) he or she may not testify that the victim is “being totally truthful,” *State v. Romero*, 147 Wis. 2d 264,

277, 432 N.W.2d 899 (1988) (citation omitted); (2) he or she may not testify that there is “no doubt whatsoever” that the accuser was a victim of moral turpitude, *Haseltine*, 120 Wis. 2d at 96 (citation omitted); and (3) if he or she is hired to determine whether or not an assault has occurred, the testimony may be limited.”

OPINION TESTIMONY — “JENSEN” TESTIMONY — COMPLAINANT’S BEHAVIOR CONSISTENT WITH THAT OF SEXUAL ASSAULT VICTIMS

State v. Joseph F. Rizzo <http://www.courts.state.wi.us/sc/opinions/99/pdf/99-3266.pdf>, 2002 WI 20, reversing and remanding 2001 WI App 57 <http://www.courts.state.wi.us/ca/opinions/99/pdf/99-3266.pdf>, 241 Wis. 2d 241, 624 N.W.2d 854

For Rizzo: Franklyn M. Gimbel

Court declines to adopt “mechanistic approach” that would “magic words such as ‘D.F.’s behaviors are consistent with that of persons known to be sexual assault victims,” in order to establish *Jensen* evidence (expert opinion that sexual assault complainant’s behavior consistent with that of sexual assault victims in general). “Instead, we determine that a jury would interpret the prosecutor’s questions along with Dr. Pucci’s answer to provide the comparison that is the essence of *Jensen* evidence.” ¶1.

PRIVILEGED COMMUNICATIONS — ATTORNEY-CLIENT — ATTORNEY BILLING RECORDS

Harold C. Lane, Jr., v. Sharp Packaging <http://www.courts.state.wi.us/html/sc/00/00-1797.htm>, 2002 WI 28, on certification <http://www.courts.state.wi.us/ca/opinions/00/pdf/00-1797.pdf>

Attorney-client privilege shields statements from attorney to client only to extent that disclosure would “reveal[] the substance of lawyer-client communications.” ¶40. The undisputed record here shows that the sought billing records “contain detailed descriptions of the nature of the legal services rendered to [the client]. Producing the attorney billing records would, therefore, reveal the substance of lawyer-client communications between [client] and [counsel]. Accordingly, we conclude that the attorney billing records are protected by the lawyer-client privilege.” ¶41. (Court specifically “declines(s) to establish a broad rule that all attorney billing records are protected by the lawyer-client privilege.” *Id.*)

PRIVILEGED COMMUNICATIONS — ATTORNEY-CLIENT — COMPETENCY

State v. Jeffrey J. Meeks (see link to *State v. Jeffrey J. Meeks* on page 23), 2002 WI App 65, PFR filed 3/1/02

For Meeks: Howard B. Eisenberg, Dean, Marquette Law School

Testimony of prior attorney, with respect to defendant’s competency, held admissible, where attorney neither described any conversations she had with defendant nor otherwise testified about substance of privileged communications. ¶¶33-41.

PRIVILEGED COMMUNICATIONS — ATTORNEY-CLIENT — CORPORATE ENTITY RULE
Harold C. Lane, Jr., v. Sharp Packaging (see link above), 2002 WI 28, on certification (see link above)

Former officer and director of corporation not entitled to waive the corporation’s attorney-client privilege, even with regard to information generated during the person’s corporate tenure. Under the “entity rule,” the privilege belongs solely to the corporation, and only the corporation may waive it. ¶¶33-35.

PRIVILEGED COMMUNICATIONS — ATTORNEY-CLIENT — CRIME-FRAUD EXCEPTION,
§ 905.04(3) — IN CAMERA INSPECTION

Harold C. Lane, Jr., v. Sharp Packaging (see link above), 2002 WI 28, on certification (see link on page 30)

Although mere allegation is insufficient, burden for establishing prima facie case of attorney-client crime-fraud exception is low — reasonable cause (i.e., more than suspicion but less than preponderance-of-evidence) to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme. ¶50, quoting *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996). “Once the circuit court determines the prima facie case has been established, an in camera review is the proper procedure to determine if the crime-fraud exception to the lawyer-client privilege applies.” ¶55. The decision to hold an in camera review is discretionary, as informed by the factors outlined in *United States v. Zolin*, 491 U.S. 554, 572 (9189). ¶56. (The court requires an in camera inspection in this case but doesn’t really say why, except: ““Only by reviewing the documents at issue is the circuit court able to determine whether [counsel’s] legal services were rendered in furtherance of fraud.” Id.)

PRIVILEGED COMMUNICATIONS — ATTORNEY-CLIENT —WORK-PRODUCT

Harold C. Lane, Jr., v. Sharp Packaging (see link on page 30), 2002 WI 28, on certification (see link on page 30)

Work-product is a “qualified privilege” to refuse disclosure of materials generated by counsel in anticipation of litigation that only gives way upon showing of substantial need along with undue hardship in obtaining the substantial equivalent through other means. ¶61. The trial court erroneously exercised discretion in simply rebuffing the claim of privilege without finding the existence of substantial need preparation in anticipation of litigation. An in camera inspection is ordered on remand. ¶62.

PRIVILEGES — CONFIDENTIAL INFORMANT

State v. Phonesavanh Vanmanivong (see *State v. Phonesavanh Vanmanivong* link on page 21), 2001 WI App 299, *PFR granted 1/29/02*

For Vanmanivong: John J. Grau

For State: Christian R. Larsen

The trial court erroneously exercised discretion in refusing to disclose identities of confidential informants after reviewing unsworn statements: “¶17. Again, Wis. Stat. §905.10(3)(b) states, ‘the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit.’ The trial court had no authority under § 905.10(3)(b) to seek, ex parte, additional clarification from law enforcement. When the trial court found that the affidavits were unsatisfactory or insufficient to resolve the issue at hand, the next step under §905.10(3)(b) would have been to conduct an in camera hearing to take testimony from the confidential informants to determine the competency, relevancy and admissibility of these witnesses’ testimony. *Outlaw*, 108 Wis. 2d at 137-38. We reject the State’s contention that the trial court’s failure to follow the strictures of §905.10(3)(b) constitutes harmless error.”

RIGHT TO PRESENT — COMPLAINANT’S PSYCHOLOGICAL CONDITION — REMEDY
FOR DENIAL OF RIGHT

State v. Joseph F. Rizzo (see *State v. Joseph F. Rizzo* link on page 30), 2002 WI 20, reversing and remanding 2001 WI App 57 (see *State v. Joseph F. Rizzo* link on page 30), 241 Wis. 2d 241, 624

N.W.2d 854

For Rizzo: Franklyn M. Gimbel

The defendant's right to a psychological examination of the complainant, *State v. Maday*, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), once the prosecution introduces *Jensen* testimony, isn't limited to instances where the *Jensen* witness has actually been retained by the prosecution. In this instance, *Maday* was triggered where the clinical psychologist "had an extensive, ongoing relationship with the complainant," including treatment for the alleged sexual assault. ¶¶32-35. Court cautions that "the defendant must show a 'compelling need' for the examination under *Maday*," ¶38; and that "it is only when the State seeks to admit *Jensen* evidence through a *Maday* expert that a complainant will face the possibility of a defense psychological examination. In many cases, the experts involved will not fall within the confines of *Maday*," ¶39."

Remedy for denial of a *Maday* expert is remand for the proper exercise of trial court discretion on the issue. ¶¶43-47.

RIGHT TO PRESENT — "SHIFFRA" MATERIAL (ACCESS TO COMPLAINANT'S TREATMENT RECORDS)

State v. Joseph F. Rizzo (see *State v. Joseph F. Rizzo* link on page 30), 2002 WI 20, reversing and remanding 2001 WI App 57 (see *State v. Joseph F. Rizzo* link on page 30), 241 Wis. 2d 241, 624 N.W.2d 854

For Rizzo: Franklyn M. Gimbel

Defendant not entitled to *Shiffra* material, even though expert gave *Jensen* testimony: "The argument that Rizzo could somehow impeach Dr. Pucci's expert knowledge of the common behaviors of sexual assault victims by accessing the treatment records of one of her patients is not persuasive. ¶51." Thus, "a defendant is not entitled to the records of a victim's treating therapist simply to impeach the therapist's credibility." ¶54.

GUILTY PLEAS

PLEA BARGAINS — BREACH: NEGATIVE PROSECUTORIAL ALLOCUTION

State v. John D. Williams (see *State v. John D. Williams* link on page 20), 2002 WI 1, *affirming* 2001 WI App 7 (see *State v. John D. Williams* link on page 20), 241 Wis. 2d 1, 624 N.W.2d 164

For Williams: John A. Pray

For State: Sandra L. Nowack

¶48. The State adopted the information acquired from the presentence investigation report after the plea agreement had been reached as its own opinion of the defendant. The prosecutor's declaration of her personal opinion created the impression that the prosecutor was arguing against the negotiated terms of the plea agreement. We agree with the court of appeals that 'what the prosecutor may not do is personalize the information, adopt the same negative impressions as [the author of the presentence investigation report] and then remind the court that the [author] had recommended a harsher sentence than recommended. That is what happened here.'"

PLEA BARGAINS — REMEDY FOR MULTIPLICITOUS COUNTS

State v. Robert S. Robinson <http://www.courts.state.wi.us/html/sc/00/00-2435.htm>, 2002 WI 9, *on certification*

For Robertson: Leonard D. Kachinsky

For State: Michael R. Klos

“¶3. We conclude that when an accused successfully challenges a plea to and conviction on one count of a two-count information on grounds of double jeopardy and the information has been amended pursuant to a negotiated plea agreement by which the State made charging concessions, ordinarily the remedy is to reverse the convictions and sentences, vacate the plea agreement, and reinstate the original information so that the parties are restored to their positions prior to the negotiated plea agreement. We further conclude, however, that under some circumstances this remedy might not be appropriate. A court should, therefore, examine the remedies available and adopt one that fits the circumstances of the case after considering both the defendant’s and the State’s interests. Under the circumstances of the present case, we reverse the judgment of conviction and the order of the circuit court and remand the cause to the circuit court with directions to reinstate the original information against the defendant and to conduct further proceedings not inconsistent with this decision.”

VOLUNTARY/KNOWING & INTELLIGENT — KNOWLEDGE OF MAXIMUM PENALTY
State v. Paul Delao Quiroz <http://www.courts.state.wi.us/ca/opinions/01/pdf/01-1549.pdf>, 2002 WI App 52

For Quiroz: Chad G. Kerkman

Even if Quiroz were correct in his assertion that he thought the maximum penalty was 13 years when in fact it was 14, he isn’t entitled to relief because his sentence was 12 years. ¶16.

VOLUNTARY/KNOWING & INTELLIGENT — KNOWLEDGE OF PRESUMPTIVE MINIMUM
State v. Paul Delao Quiroz (see link above), 2002 WI App 52

For Quiroz: Chad G. Kerkman

The record as a whole — including recitations in complaint and information and statements at sentencing — demonstrate Quiroz’s awareness of the presumptive minimum penalty, hence his guilty plea was knowing, voluntary and intelligent. ¶25.

JUDGES

WAIVER — SUBSTITUTION OF JUDGE

Barbara R.K. v. James G. (see link to *Barbara R.K. v. James G.* on page 22), 2002 WI App 47
Review of denial of request for substitution of judge must be sought from chief judge of administrative district, else issue is waived, Wis. Stat. § 801.58(2). ¶¶14-15.

JURISDICTION

STATUTE OF LIMITATIONS — WARRANT OR SUMMONS REQUIRED TO COMMENCE PROSECUTION

State v. Kevin D. Jennings <http://www.courts.state.wi.us/html/ca/01/01-0507.htm>, 2002 WI App 16, *petition for review granted 3/19/02*

For Jennings: Steven M. Compton

For State: Sandra L. Tarver

Issuance of complaint and order to produce defendant (from a state correctional facility) failed to satisfy the §939.74(1) limitation requirement that a prosecution be timely commenced within six years. ¶¶23-26.

JURY

IMPARTIALITY/BIAS — REVIEW

State v. Howard C. Carter (see link to *State v. Howard C. Carter* on page 26), 2002 WI App 55

For Howard: Charles B. Vetzner, SPD, Madison Appellate

Although review of a trial court's determination of subjective (non-)bias of a prospective juror is generally deferential, here review is independent "because this is one of those rare situations where the prospective juror's unambiguous response, rather than his demeanor, is the basis of his subjective bias." ¶10. And, because the juror openly admitted his bias, which was never questioned by the parties, he was subjectively biased as a matter of law.

INSTRUCTIONS — CONCLUSIVE PROOF OF FACTUAL ISSUE

State v. Gary L. Gordon, (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

Because the defendant has a right to jury determination of all elements, trial court erred, on charge of violating domestic injunction, in "directing the jury to accept as conclusively proven that Gordon was served with the order," a necessary element. ¶¶44-45.

INSTRUCTIONS — UNCHARGED GREATER OFFENSE, AS EXPLICATION OF CHARGED LESSER

State v. Gary L. Gordon, (see link to *State v. Gary L. Gordon* on page 21) 2002 WI App 53, PFR filed 2/13/02

For Gordon: Steven P. Weiss, SPD, Madison Appellate

The trial court didn't erroneously exercise discretion in responding to jury's specific request, by explaining that an uncharged greater offense contains an element not required of the charged, lesser offense, coupled with a clear admonition that Gordon was not charged with the greater offense and the jury must not speculate or deliberate on that offense. ¶¶14-15. (Court "cautions that instructing on an uncharged offense is appropriate only under very rare circumstances." ¶15 n. 4.)

SELECTION — LANGUAGE COMPREHENSION

State v. Michael W. Carlson <http://www.courts.state.wi.us/html/ca/01/01-1136.htm>, 2001 WI App 296, PFR granted 1/29/02

For Carlson: Steven L. Miller

For State: Eileen W. Pray

“¶13. Carlson argues that the trial court must accept Vera's subjective opinion (and that of another juror) that he did not understand English well enough to fairly and competently hear the case. Carlson also argues that the court did not identify a standard for comprehension or, alternatively, that it did not apply a standard consistent with due process. We disagree. Allowing a juror's subjective opinion as to his or her ability to comprehend testimony at trial would be an open invitation to mischievous attacks on verdicts. We conclude that the trial court properly considered all the evidence that informed on Vera's ability to comprehend English, and found that he understood English well enough to fairly and impartially hear the case, regardless of Vera's opinion. It applied the correct statutory standard. Because credible evidence supports the trial court's finding, it was not clearly erroneous.”

WAIVER — APPROVAL BY COURT, CONSENT BY STATE — NECESSITY FOR PERSONAL COLLOQUY — REMEDY FOR INSUFFICIENT RECORD

State v. Tyrann N. Anderson <http://www.courts.state.wi.us/html/sc/00/00-1563.htm>, 2002 WI 7, *reversing and remanding* unpublished decision below <http://www.courts.state.wi.us/html/ca/00/00-1563.htm>

On-line brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/001563.pdf>

For Anderson: Michael K. Gould

For State: Gregory M. Weber

Though §972.02 requires both court approval and state consent for jury waiver, it doesn't specify how these aims must be accomplished. Acquiescence to a bench trial allows an inference of approval and consent. ¶¶15-18. See also ¶28: "The court approved Anderson's jury trial waiver by accepting the waiver on the record, scheduling a bench trial, and subsequently conducting a bench trial in this case. The State also consented to Anderson's jury trial waiver by participating in a bench trial without voicing any objection."

Nonetheless, Anderson's written jury waiver was invalid because the trial court failed to conduct a personal colloquy: "¶24. To prove a valid jury trial waiver, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney. See *Wisconsin Judicial Benchbook*, Vol. 1, CR 22-3 through 22-6 (2d ed. 2001). As with other constitutional rights, 'If the circuit court fails to conduct a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver' *Klessig* <http://www.courts.state.wi.us/html/sc/95/95-1938.htm>, 211 Wis. 2d at 206 (involving waiver of right to counsel)."

But where the trial court fails to conduct such a colloquy the remedy is an evidentiary hearing, rather than outright grant of new trial, at which the state is required to prove voluntary jury trial waiver by clear and convincing evidence. ¶26. (The court seems to say, but does not distinctly hold, that a challenge to jury waiver requires that the defendant allege that s/he didn't understand the right being waived; such a requirement, if one exists, is satisfied in this case by Anderson's demonstrable difficulties communicating with counsel and trial court. ¶27.)

JUVENILE PROCEEDINGS

DELINQUENCY — DISPOSITION — POST-JUDGMENT SERIOUS JUVENILE OFFENDER PROGRAM PLACEMENT

State v. Terry T. <http://www.courts.state.wi.us/html/ca/01/01-2226.htm>, 2002 WI App 81

For Terry T.: Gregory Bates

“¶17 In conclusion, we determine that the five-year SJOP is a placement that must occur at an original disposition; it is not a tool to extend, revise or change a placement already in effect. To do so would violate the clear statutory mandate that all extensions not exceed one year and that no revision or change of placement extend the expiration of the original dispositional order. Therefore, we reverse the order for extension of the dispositional order and change of placement. The terms of any further extensions shall be limited to one year and Terry shall not be subject to the provisions of the

SJOP in the absence of new charges being filed.”

DELINQUENCY — EVIDENCE OF “SEXUAL IMMATURITY”

State v. Stephen T. (see link to *State v. Stephen T.* on page 20), 2002 WI App 3

For Stephen T.: Raymond M. Dall’Osto

For State: Diane M. Resch

“(E)vidence of sexual immaturity is relevant as a matter of law to a preadolescent’s affirmative defense that he or she is not capable of having sexual contact with the purpose of becoming sexually aroused or gratified.” ¶1.

PROCEDURE — DETERMINATION OF JUVENILE’S ABILITY TO COMPREHEND DISPOSITIONAL CONDITIONS AND POSSIBLE SANCTIONS

State v. Eugene W. <http://www.courts.state.wi.us/ca/opinions/01/pdf/01-2274.pdf>, 2002 WI App 54

For Eugene W.: Michael Yovovich, SPD, Madison Appellate

“¶3 We conclude that Wis. Stat. §938.355(6)(a) requires that a juvenile court assure that the juvenile has the ability to comprehend the conditions of the dispositional order and potential sanctions whether informed of them at the dispositional hearing or at a later time. Since we decide this case on this statutory ground, we do not reach Eugene’s constitutional challenge. We further conclude that once the juvenile raises this issue, the State has the burden to establish by clear and convincing evidence that the juvenile has such ability. Because the State did not make such a showing and because the juvenile court did not make a finding as to Eugene’s ability to comprehend the conditions and possible sanctions at the time of the dispositional order, we reverse the sanctions order.”

PROCEDURE — DETERMINATION OF JUVENILE’S ABILITY TO COMPREHEND DISPOSITIONAL CONDITIONS AND POSSIBLE SANCTIONS

State v. Eugene W. (see link above), 2002 WI App 54

For Eugene W.: Michael Yovovich, SPD, Madison Appellate

“¶23 A juvenile’s incompetence to proceed in a juvenile proceeding is the equivalent of an adult defendant’s incompetence to proceed in a criminal proceeding. When the criminal law has a counterpart in juvenile law, we sometimes look to the criminal law for assistance in interpreting the juvenile counterpart. See *In Interest of Jermaine T.J.*, 181 Wis. 2d 82, 90-91, 510 N.W.2d 735 (Ct. App. 1993), and *State v. Tawanna H.* <http://www.courts.state.wi.us/ca/opinions/98/PDF/98-1404.PDF>, 223 Wis. 2d 572, 576-78, 590 N.W.2d 276 (Ct. App. 1998). Since the criminal code obligates the State to establish a defendant’s competence to proceed when that issue is raised, we see no reason why the same burden should not be assigned to the State in a JIPS proceeding where the juvenile asserts an inability to understand the conditions and sanctions warnings required by Wis. Stat. §938.355(6)(a). This is especially so in a case such as this where the juvenile has already been adjudged incompetent to proceed in an underlying proceeding.”

PROBATION, PAROLE

REVOCATION — HEARING: RIGHT TO CROSS-EXAMINATION — HARMLESS ERROR

State ex rel. Willie C. Simpson v. Schwarz (see link to *State ex rel. Willie C. Simpson v. Schwarz* on page 29), 2002 WI App 7

Simpson pro se

For State: Kathleen M. Ptacek

The administrative law judge erred in failing to make a specific finding of good cause for not allowing the revocation subject to cross-examine the complainant. ¶15 The error, however, is harmless: “we conclude that the failure to make a specific finding of good cause is harmless where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ’s ruling.” ¶16. “(T)he test is always met when the evidence offered in lieu of an adverse witness’s live testimony would be admissible under the Wisconsin Rules of Evidence.” ¶22. The child-sexual-assault-victim’s hearsay statement in this case satisfies the test for admissibility under the residual exception, *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), and the failure to find good cause was therefore harmless. ¶¶23-30.

PROSECUTORIAL MISCONDUCT

State v. Carlos R. Delgado (see link to *State v. Carlos R. Delgado* on page 22), 2002 WI App 38

For Delgado: Richard D. Martin, Diana M. Felsmann, SPD, Milwaukee Appellate

On-line Brief: (see link to SPD on-line brief on page 22)

“Isolated comments” by the prosecutor during closing argument, suggesting that a witness vouched for the complainants’ credibility and therefore amounting to *Haseltine* error, were harmless in light of instructions that the jurors were sole judges of credibility and also that the witness “cannot testify as matter of law that these particular people were in fact sexual assault victims.” ¶¶16-18.

SEARCH & SEIZURE

APPLICABILITY OF EXCLUSIONARY RULE - STATUTORY VIOLATION — § 968.255

State v. Charles A. Wallace <http://www.courts.state.wi.us/html/ca/00/00-3524.htm>, 2002 WI App 61

For Wallace: Martha K. Askins, SPD, Madison Appellate

On-line brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/003524.pdf>

“¶25. We conclude, however, that we need not address whether police may conduct a consensual strip search free of the statutory restrictions. Absent a constitutional violation, a court may not suppress evidence obtained in violation of a statute except where the statute ‘specifically requires suppression of wrongfully or illegally obtained evidence as a sanction.’ *State ex. rel. Peckham v. Krenke* <http://www.courts.state.wi.us/ca/opinions/97/pdf/97-3359.pdf>, 229 Wis. 2d 778, 787, 601 N.W.2d 287 (Ct. App. 1999). Wisconsin Stat. §968.255 does not require suppression of evidence obtained in violation of its provisions.”

ARREST — SEARCH INCIDENT TO — WHERE PROBABLE CAUSE EXISTS, BUT OFFICER EXERCISES DISCRETION NOT TO ARREST

State v. Robert F. Hart <http://www.courts.state.wi.us/html/ca/00/00-1444.htm>, 2001 WI App 283

For Hart: John Deitrich

For State: Kathleen M. Ptacek

Where the officer neither intends to make an arrest (despite having probable cause), a search may not be sustained on a search-incident-to-arrest rationale. ¶¶11-12.

ARREST — TRAFFIC STOP — DURATION — EFFECT ON CONSENT TO SEARCH

State v. Charles A. Wallace (see link to *State v. Charles Wallace* on page 37), 2002 WI App 61

For Wallace: Martha K. Askins, SPD, Madison Appellate

On-line brief: (see link to SPD on-line brief above)

(Following **State v. Gaulrapp**, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996:)) A request for consent to conduct a strip search at the police search, within 30 minutes of a traffic arrest, didn't unreasonably prolong the detention. ¶12 (court stressing that request was made before bond was posted, therefore "the officer's request for consent did not prolong his detention at all." The holding, then, is fairly narrow.). Nor does it matter that the officers were subjectively motivated by an intent to ferret out drugs, rather than investigate the minor traffic offense, ¶13; or that the police didn't inform Wallace that he'd be free to go after bond had been posted, ¶14.

ATTENUATION OF TAINT — PROPERTY THROWN TO GROUND DURING ILLEGAL PAT-DOWN

State v. Robert F. Hart (see link to *State v. Robert F. Hart* on page 37), 2001 WI App 283

For Hart: John Deitrich

For State: Kathleen M. Ptacek

Property thrown to the ground during an illegal pat-down isn't admissible because the act was compelled by the illegal police activity rather than being a voluntary abandonment. ¶¶24-25 (citing with approval, *Swanson v. State* <http://www.state.in.us/judiciary/opinions/wpd/06130022.nhv.doc>, 730 N.E.2d 205, 210 (Ind. Ct. App. 2000), transfer denied by 741 N.E. 2d 1253 (Ind. Sept. 5, 2000); *State v. Pease*, 531 N.E.2d 1207, 1210-12 (Ind. Ct. App. 1988); and *In re Welfare of M.D.B.* <http://www.lawlibrary.state.mn.us/archive/ctappub/9910/c299207.htm>, 601 N.W.2d 214, 218 (Minn. Ct. App. 1999) (where during course of illegal frisk defendant's gun fell to the ground, such evidence was suppressed), review denied (Jan. 18, 2000). (However, a chemical test for blood is upheld, even though conducted after the illegal pat-down, because the police already had probable cause to believe the person was drunk; the test, that is, was based on evidence not connected to the pat-down. ¶27.)

CONSENT — ENTRY OF RESIDENCE — REASONABLE SUSPICION AS PRECONDITION

State v. Jeffrey Stout <http://www.courts.state.wi.us/html/ca/01/01-0904.htm>, 2002 WI App 41, PFR filed 2/21/02

For Stout: James L. Fullin, Jr., SPD, Madison Appellate

Reasonable suspicion isn't required for the police to seek consent to enter a residence. ¶17.

CONSENT — SCOPE — BODY CAVITY SEARCH

State v. Charles A. Wallace (see link to *State v. Charles A. Wallace* on page 37), 2002 WI App 61

For Wallace: Martha K. Askins, SPD, Madison Appellate

On-line brief: (see link to SPD on-line brief on page 37)

Consent to a strip search doesn't extend to the more intrusive visual body cavity inspection, which requires its own specific consent. ¶¶29, 34. Because the trial court's findings are ambiguous on this point, the matter is remanded for further fact-finding as to whether Wallace indeed consented to a body cavity search or merely acquiesced to it. ¶¶35-37.

CONSENT — VOLUNTARINESS — MERE ACQUIESCENCE

State v. Charles A. Wallace (see link to *State v. Charles A. Wallace* on page 37), 2002 WI App 61

For Wallace: Martha K. Askins, SPD, Madison Appellate

On-line brief: (see link to SPD on-line brief on page 37)

“¶19. The police made their request during the booking process and before Wallace’s bond had been posted. We concur with the circuit court’s conclusion that thirty minutes, devoted as it was to legitimate custodial activities, does not represent an unreasonably lengthy period of custodial detention so as to vitiate the voluntariness of Wallace’s consent. The record before us contains no evidence that police created a coercive atmosphere in order to obtain Wallace’s consent, nor is there any evidence that they misrepresented their purpose or authority in making the request to search. See, e.g., *Bumper v. North Carolina* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=391&page=543>, 391 U.S. 543, 548-49 (1968) (where consent to search a home was obtained as a result of a police officer’s false claim of lawful authority, that consent is invalid). Furthermore, there is no evidence, nor does Wallace contend, that the officers used force, threats or coercion to obtain Wallace’s consent to the search.

EXIGENCY — BLOOD ALCOHOL — REASONABLENESS OF PROCEDURE

State v. Dennis L. Daggett <http://www.courts.state.wi.us/html/ca/01/01-1417.htm>, 2002 WI App 32, PFR filed 1/10/02

For Daggett: Julie A. Smith

For State: Russell E. Berg

There is no bright-line rule that a blood draw following OWI arrest must be made in a hospital setting to be constitutionally reasonable. Instead, there is “a spectrum of reasonableness”: blood withdrawn by a medical professional in a medical setting is generally reasonable; blood withdrawn by a non-professional in a non-medical setting is problematic. ¶¶14-15. Here, the procedure was performed by a doctor and there was no evidence that the procedure fell outside norms: “In the absence of any evidence to the contrary, it is unreasonable to conclude that a medical professional authorized to draw blood under Wis. Stat. §343.305(5)(b) would perform his or her duties in a manner that would endanger the health of the blood donor.” ¶17. Nor is there any evidence that the jail, though non-sterile, posed any risk. ¶18. The blood test result is therefore admissible.

FORFEITURE — REFUSAL TO RETURN GUN, AS “EXCESSIVE FINE”

State v. Kirk J. Bergquist <http://www.courts.state.wi.us/html/ca/01/01-0814.htm>, 2002 WI App 39

For Berhquist: Steven H. Gibbs

Refusal to return guns, valued at over \$5,000, following DC conviction, violated Excessive Fines Clause. ¶¶10-11. (*Austin v. United States* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=509&page=602>, 509 U.S. 602, 609-10 (1993) followed.)

STOP/FRISK — REASONABLE SUSPICION TO FRISK — PLACING IN POLICE SQUAD

State v. Robert F. Hart (see link to *State v. Robert F. Hart* on page 37), 2001 WI App 283

For Hart: John Deitrich

For State: Kathleen M. Ptacek

Merely transporting in a police vehicle a person not in custody isn’t an exigency justifying a pat-down search for weapons: “¶17 ... With five members of the court declining to adopt a per se rule, the law in Wisconsin is that the need to transport a person in a police vehicle is not, in and of itself, an exigency which justifies a search for weapons.

“¶18. In light of the supreme court’s rejection in *Kelsey C.R.* <http://www.courts.state.wi.us/html/sc/99/99-3095.htm> of a ‘search incident to a squad car ride’ exception, more specific and articulable facts must be shown to support a Terry frisk. *Morgan*, 197 Wis. 2d at 209. The record in this case offers no specific or articulable facts that would make a police officer reasonably fear for his or her

safety. This was a routine traffic stop; it is not like those cases where an officer has confronted a person who is acting nervous or uncooperative, who is in a high-crime area late at night, or who has companions in the car. We conclude that the marijuana pipe may not be admissible as the result of a *Terry* search.

“¶19. Before continuing this opinion, we must note that a routine pat-down of a person before a police officer places the person in a squad car is wholly reasonable. We recognize that police policy mandates pat-downs for the general safety of the officer. Nevertheless, evidence gleaned from such a search will only be admissible in court if there are particularized issues of safety concerns about the defendant.”

STOP/FRISK — REASONABLE SUSPICION TO FRISK — INSIDE RESIDENCE

State v. Jeffrey Stout (see link to *State v. Jeffrey Stout* on page 38), 2002 WI App 41, PFR filed 2/21/02

For Stout: James L. Fullin, Jr., SPD, Madison Appellate

Although investigative stops must be made in public (and not in a residence), the police may frisk occupants after gaining lawful entry to a residence, based on the distinct concern of safety. ¶24. “¶30. In this case, as in *Williams II* <http://www.courts.state.wi.us/sc/opinions/96/pdf/96-1821B.pdf>, we have the personal observation of a concerned citizen caller that criminal activity was taking place. Although the tip was not recorded, there is no evidence disputing the fact that the call was made to the COP House, which citizens frequently called because they knew detectives worked there. In addition, Birkholz corroborated significant, if innocent, details of the tip: a person wearing the clothes described was in fact located at the address given by the tipster. Additionally, Millhollen corroborated that a person known as ‘Jeff’ was in her apartment. Finally, and most significantly, Birkholz corroborated a fact independent of the tip, giving him reason to believe Stout was attempting to arm himself—Stout reached toward his pocket upon seeing the officers enter the apartment.

“¶31. We hold that this collective information entitled Birkholz to conduct a pat-down search for weapons. Although there may have been an innocent reason for Stout’s movement, it was also reasonable for Birkholz to suspect that Stout was attempting to reach for a weapon. This belief was objectively reasonable in light of the tip suggesting that Stout was engaged in selling cocaine, coupled with the officer’s knowledge that persons engaged in selling narcotics frequently carry firearms. *Guy*, 172 Wis. 2d at 96. We conclude that the content of the tip, Birkholz’s corroboration of the facts in the tip, and his independent observation of suspicious behavior were sufficient to justify the frisk of Stout.”

STOP/FRISK — REASONABLE SUSPICION TO FRISK — VISITOR TO RESIDENCE DURING EXECUTION OF DRUG SEARCH WARRANT

State v. Justin Kolp <http://www.courts.state.wi.us/html/ca/01/01-0549.htm>, 2002 WI App 17

For Kolp: Jennifer L. Abbott

For State: Michael R. Klos

Given case law recognition that execution of a search warrant for drugs may give rise to sudden violence (citing *State v. Guy*, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992); and an officer’s testimony that “people involved in drugs often carry weapons, the police “had a reasonable suspicion that a party knocking on the door of a house being searched for drugs could be carrying a weapon.” ¶7. Moreover, executing a warrant at a private residence can be more dangerous than doing so in a

public place. ¶¶8-9 (citing *Guy*, and distinguishing *Ybarra v. Illinois* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=444&page=85>, 444 U.S. 85 (1979). Finally, it doesn't matter that the warrant was for simple possession, not intent to deliver: "we do not distinguish between major and insignificant drug dealers or users in determining whether a frisk is reasonable." ¶10.

STOP/FRISK — REASONABLE SUSPICION TO STOP — TRAFFIC STOP

State v. Alisha M. Olson <http://www.courts.state.wi.us/html/ca/00/00-3383.htm>, 2001 WI App 284

For Olson: Daniel P. Fay

For State: James M. Freimuth

The police had reasonable suspicion to make a traffic stop to investigate the driver for a burglary committed two days earlier, based on an anonymous tip, the suspect's known opportunity to have committed the crime, and her "stonewalling [which] made any attempt at voluntary conversation impossible." ¶¶8,15. (Though the opinion factors "police avoidance" behavior into the result, may be the first Wisconsin decision to acknowledge that such behavior will not alone support reasonable suspicion. ¶8, citing *Florida v. Bostick* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=501&page=429>, 501 U.S. 429, 437 (1991), and *Illinois v. Wardlow* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=98-1036>, 528 U.S. 119, 124 (2000) for the idea that "avoidance of the police and refusal to cooperate ... without more do not create reasonable suspicion."

STOP/FRISK — SEIZURE — OCCURRENCE

State v. Jeffrey Stout (see link to *State v. Jeffrey Stout* on page 38), 2002 WI App 41, PFR filed 2/21/02

For Stout: James L. Fullin, Jr., SPD, Madison Appellate

¶21. ... (W)e are left with the presence of three officers in the room and whether their presence, absent the display of a weapon, physical contact or use of language, was sufficient to establish a seizure. Under these circumstances, we conclude that a reasonable person in Stout's position would have no reason to believe he or she was not free to leave. Assuming the officers were present under the cloak of valid consent, their initial brief encounter at the door to the apartment was nothing more than an inoffensive encounter between a citizen and police that intruded upon no constitutionally protected interest."

STOP/FRISK — WARRANTLESS ENTRY OF HOME BASED ON REASONABLE SUSPICION

State v. Jeffrey Stout (see link to *State v. Jeffrey Stout* on page 38), 2002 WI App 41, PFR filed 2/21/02

For Stout: James L. Fullin, Jr., SPD, Madison Appellate

¶15. Based upon *Rodriguez, Munroe*, and the explicit language in Wis. Stat. §968.24 that a 'law enforcement officer may stop a person in a public place,' we conclude that under Wisconsin law, *Terry* applies to confrontations between the police and citizens in public places only. For private residences and hotels, in the absence of a warrant, the police must have probable cause and exigent circumstances or consent to justify an entry. *State v. Rodgers*, 119 Wis. 2d 102, 107, 349 N.W.2d 453 (1984)."

WARRANTS — "FRANKS"

State v. Jeffrey L. Loranger <http://www.courts.state.wi.us/html/ca/00/00-3364.htm>, 2002 WI App

5

For Loranger: Richard B. Jacobson, James C. Murray

For State: Christian R. Larsen

Omissions from a search warrant application with respect to electrical-usage data didn't amount to intentionally or recklessly false averments, *Franks v. Delaware* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=438&page=154>, 438 U.S. 154 (1978). ¶¶19-21.

Therefore, the issue becomes whether the search warrant was supported by probable cause; it was: the targeted house consumed about twice the monthly electricity of comparable residences; a thermal scan confirmed abnormally high usage; and a confidential informant reported having seen marijuana growing in the basement, albeit 18 months before. ¶¶23-24.

WARRANTS — GOOD-FAITH EXCEPTION — RELIANCE ON JUDICIAL DECISION SEARCH & SEIZURE — WARRANTS — “FRANKS”

For Loranger: Richard B. Jacobson, James C. Murray

For State: Christian R. Larsen

Evidence illegally obtained through warrantless use of a thermal imaging device, in reliance on then-valid Wisconsin appellate court decision subsequently invalidated by a Supreme Court decision, isn't suppressible, under a good-faith rationale. Warrantless use of a thermal imaging device against Loranger must now clearly be regarded as a fourth amendment violation. *Kyllo v. United States* <http://supct.law.cornell.edu/supct/html/99-8508.ZS.html>, 533 U.S. 27 (2001). However, at the time of this search, this sort of practice had been sanctioned under *State v. McKee*, 181 Wis. 2d 354, 510 N.W.2d 807 (Ct. App. 1993); therefore, the results of the search may not be suppressed under the reasoning of *State v. Ward* <http://www.courts.state.wi.us/sc/opinions/97/PDF/97-2008.PDF>, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517 — because the police relied in good faith on *McKee*, suppression would serve no remedial purpose. ¶14.

SENTENCING

COSTS — TRAVEL EXPENSE OF STATE'S WITNESS

State v. Gary L. Gordon (see link to *State v. Gary L. Gordon* on page 21), 2002 WI App 53, PFR filed 2/13/02

The trial court erroneously exercised discretion in imposing costs for the travel expense of an officer, in that this expense was necessitated by a change in trial date attributable primarily to the prosecution, not the defendant. ¶¶49-51.

ENHANCED PENALTIES — BIFURCATED SENTENCE

State v. Joeval M. Jones <http://www.courts.state.wi.us/html/ca/01/01-1155.htm>, 2002 WI App 29

For Jones: Paul G. Lazotte

For State: Edwin J. Hughes

“¶13 ... (W)e conclude that §973.01(2) does not authorize a sentencing court to impose any portion of a penalty enhancer as extended supervision rather than confinement in prison.”

ENHANCED PENALTIES — COLLATERAL ATTACK ON PRIOR CONVICTION

State v. Charles J. Burroughs (see link to *State v. Charles J. Burroughs* on page 26), 2002 WI App 18

For Burroughs: William Mross

For State: Susan M. Crawford

Because Burroughs doesn't contest the fact that he was represented by counsel when he entered the plea to the prior offense, his right to challenge the plea is barred under *State v. Hahn* <http://www.courts.state.wi.us/sc/opinions/99/PDF/99-0554.PDF>, 2001 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528. ¶¶29-30.

ENHANCED PENALTIES — PERSISTENT OFFENDER — COMPARABLE CRIME, FOREIGN CONVICTION

State v. Charles J. Burroughs (see link to *State v. Charles J. Burroughs* on page 26), 2002 WI App 18

For Burroughs: William Mross

For State: Susan M. Crawford

Burroughs' prior conviction in Alabama for assault with intent to murder is sufficiently comparable to attempted first degree intentional homicide so as to support exposure to persistent offender sentencing, §939.62(2m)(c). ¶¶23-27.

ENHANCED PENALTIES — MULTIPLE ENHANCERS

State v. Paul Delao Quiroz <http://www.courts.state.wi.us/ca/opinions/01/pdf/01-1549.pdf>, 2002 WI App 52

For Quiroz: Chad G. Kerkman

“¶14 Here, the maximum for Quiroz's Class D felony crime was five years. With the dangerous weapon penalty enhancer, this five-year penalty could be increased by no more than four years, Wis. Stat. §939.63(1)(a)3, for a new maximum penalty of nine years. We now add the gang-related penalty enhancer to the nine-year maximum penalty. Because the maximum term of imprisonment is more than five years, it can be increased by up to five years, Wis. Stat. §939.625(1)(b)2, for a maximum penalty of fourteen years.”

ENHANCED PENALTIES — PLEADING AND AMENDMENT

State v. Vernon D. Fields <http://www.courts.state.wi.us/html/ca/01/01-1177.htm>, 2001 WI App 297

For Fields: Martha K. Askins, SPD, Madison Appellate

For State: Susan M. Crawford

Though the original pleadings insufficiently alleged a §973.12(1) repeater enhancer, “the State's pre-plea submission of a certified copy of prior convictions constituted an amendment to the information, thereby curing its defects and providing Fields with the requisite notice of his repeater status before he pled to the charges.” ¶1. Although a repeater charge may not be *added* after arraignment, it is proper to amend such a charge “by providing details of the date and nature of the prior offenses.” ¶¶9-13.

ENHANCED PENALTIES — WAIVER OF OBJECTION TO SUFFICIENCY OF REPEATER PROOF

Failure to object to documentation that facially establishes repeater status waives the issue of sufficiency of proof; *State v. Flowers* <http://www.courts.state.wi.us/html/ca/97/97-3682.htm>, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), distinguished. However, the holding is expressly limited, “to instances where the State submits a document that, on its face, is sufficient to prove that the defendant was a repeater.” ¶13. The documents here — faxed uncertified judgment of conviction and faxed DOC document containing dates of incarceration — satisfy this test. *Id.*

EVIDENCE — FIRST AMENDMENT

State v. Aaron O. Schreiber <http://www.courts.state.wi.us/html/ca/01/01-1511.htm>, 2002 WI App 75, PFR filed 3/12/02

For Schreiber: William J. Donarski

“A sentencing court may consider writings and statements otherwise protected so long as there is a sufficient nexus to the defendant’s conduct and where the writings are relevant to the issues involved.” ¶16, citing *Dawson v. Delaware* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=503&page=159>, 503 U.S. 159, 164 (1992). Applying this test, it was proper to take into account Schreiber’s continued gang activity while on probation, despite express prohibition; and poetry he’d written extolling “the joy of inflicting violence on others.” ¶¶16-18.

EXCESSIVE SENTENCE — GENERAL

State v. Aaron O. Schreiber (see link to *State v. Aaron O. Schreiber* on page 43), 2002 WI App 75, PFR filed 3/12/02

For Schreiber: William J. Donarski

Under particular facts, maximum sentence here doesn’t “shock public sentiment.” ¶¶14-15.

EXCESSIVE SENTENCE — REMEDY WHERE MAXIMUM EXCEEDED — BIFURCATED SENTENCE

State v. Joeval M. Jones (see link to *State v. Joeval M. Jones* on page 42), 2002 WI App 29

For Jones: Paul G. Lazotte

For State: Edwin J. Hughes

The bifurcated sentence exceeded the permissible maximum for the extended supervision portion: the excessive part of the ES sentence is therefore commuted under §973.13 to the maximum term authorized for that class of felony. ¶19. Nonetheless, remand for resentencing is necessary as to the confinement portion. ¶¶21-23.

MANDATORY PENALTY — CONTROLLED SUBSTANCES, SUSPENSION/REVOCAION OF OPERATING PRIVILEGES

State v. Jacob E. Herman (see link to *State v. Jacob E. Herman* on page 27), 2002 WI App 28

For Herman: Jack E. Schairer, Jefren E. Olsen, SPD, Madison Appellate

For State: David J. Becker

“This appeal presents a single issue: whether §961.50 prescribes a ‘minimum sentence’ as that term is used in Wis. Stat. §961.438, which provides that minimum sentences for violations of ch. 961 are presumptive, rather than mandatory. We conclude that a suspension imposed pursuant to §961.50 is not a ‘minimum sentence’ as that term is used in §961.438 and that it is a mandatory penalty.” ¶1. (§961.438 says that “minimum” sentences are merely “presumptive,” i.e., not mandatory. This limitation doesn’t control §961.50, because, even though “sentence” is ambiguous in the sense that it might be broad enough to cover all forms of punishment including loss of driving privileges, §961.50 is clear on its face. That provision expressly requires loss of driving “in addition to any other penalties that may apply.” In addition, this provision ties in with the federal scheme which made highway funds contingent on loss of driving for drug offenses.)

SENTENCE CREDIT — DELAYED REPORT DATE DUE TO JAIL OVERCROWDING

State v. Anthony J. Dentici, Jr. <http://www.courts.state.wi.us/html/ca/01/01-1703.htm>, 2002 WI

App 77, PFR filed 2/5/02

For Dentici: Joseph E. Redding

“¶1 ... Dentici claims that he is entitled to twenty-five days’ credit pursuant to *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), because, after being sentenced to sixty days at the House of Correction as a condition of probation, he was unable to serve his sentence due to overcrowding. Because of the holding in *Riske*, that a person who is absent from jail through no fault of his own is entitled to sentence credit, we are compelled to reverse the order denying Dentici’s motion for reconsideration, and remand the cause with directions to credit his sentence for the period of February 3, 1997, to February 28, 1997.”

SENTENCE CREDIT — ELECTRONIC MONITORING

State ex rel. Willie C. Simpson v. Schwarz (see link to *State ex rel. Willie C. Simpson v. Schwarz* on page 29), 2002 WI App 7

Simpson pro se

For State: Kathleen M. Ptacek

Revoked probationer not entitled to sentence credit for time spent on electronic monitoring while on probation, because he couldn’t have been charged with escape for leaving electronic monitoring.

¶¶31-33.

REVIEW — AFTER REVOCATION — SENTENCE IMPOSED BY DIFFERENT JUDGE

State v. Danny A. Reynolds <http://www.courts.state.wi.us/html/ca/01/01-0498.htm>, 2002 WI App 15

On-line brief: <http://www.wisspd.org/html/appellate/briefbank/briefs/010498.pdf>

For Reynolds: Peter M. Koneazny, SPD, Milwaukee Appellate

For State: Shunette T. Campbell

“¶2. We conclude that because the sentencing-after-revocation record does not reflect the sentencing judge’s awareness of the information in the presentence investigation report, and of the factors the trial judge found significant in deciding that Reynolds’ case was an exceptional one justifying the withholding of sentence, resentencing is appropriate. Accordingly, we reverse and remand for resentencing.”

(The court has previously, as it stresses here, regarded SAR as a continuation of the original sentencing, so that where the *same* judge presides as both he or she need not restate the reasons supporting the original disposition. *State v. Wegner* <http://www.courts.state.wi.us/ca/opinions/99/PDF/99-3079.PDF>, 2000 WI App 231 ¶7. However, where a *different* judge is involved, the reviewing court has no basis to assume that he or she has adopted or acknowledged the first judge’s reasoning. ¶8. In this case, the two judges articulated entirely different views of severity of the offense, leading to doubt as to whether the SAR was based on accurate information. ¶10. Though the SAR judge isn’t bound by the first judge’s “findings,” s/he “was required to be informed of the trial record and (first judge’s) assessment, based on the evidence, of the severity of ... the crime.” ¶14. The original judge is directed to conduct the resentencing on remand. ¶15.)

UNAUTHORIZED SENTENCE — REMAND FOR RESENTENCING

State v. William P. Eckola (see link to *State v. William P. Eckola* on page 27), 2001 WI App 295

For Eckola: Gregory A. Parker

For State: Susan M. Crawford

The trial court imposed an unauthorized sentence, by placing Eckola on probation for OWI-6th

without requiring confinement for at least the presumptive minimum of six months mandated by §346.65(2)(e). The remedy for this error is resentencing:

“¶16. When the circuit court has made an error that underlies the exercise of its discretion, we may not exercise the court’s discretion for it. Rather, we are to remand to permit the court to exercise its discretion. *Wisconsin Ass’n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 434-35, 293 N.W.2d 540 (1980). We therefore reverse and remand for resentencing.”

SPEEDY TRIAL

6+-YEAR DELAY IN CHARGING

State v. Walter Blanck, Sr. <http://www.courts.state.wi.us/html/ca/01/01-0282.htm>, 2001 WI App 288

For Blanck: Michael J. Backes

For State: William C. Wolford

Blanck wasn’t denied speedy trial by delay of more than six years in issuance of charge. The sixth amendment doesn’t apply prior to charge or arrest. Pre-charge arrest is governed by principles of due process, but Blanck neither alleges nor proves actual prejudice or improper motive in the delay. ¶28.

STATUTES

CONSTRUCTION — RESORT TO EXTRINSIC SOURCES

State v. Joeval M. Jones (see link to *State v. Joeval M. Jones* on page 42), 2002 WI App 29

For Jones: Paul G. Lazotte

For State: Edwin J. Hughes

“¶14. ‘The well[-]established tenets of the plain meaning rule preclude courts from resorting to legislative history to uncover ambiguities in a statute otherwise clear on its face.’ *State ex rel. Cramer v. Court of Appeals* <http://www.courts.state.wi.us/sc/opinions/99/PDF/99-1089.PDF>, 2000 WI 86, ¶37, 236 Wis. 2d 473, 613 N.W.2d 591. ‘While legislative history cannot be used to demonstrate that a statute unambiguous on its face is ambiguous, there is no converse rule that statutory history cannot be used to reinforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous.’ *State v. Martin*, 162 Wis. 2d 883, 897 n.5, 470 N.W.2d 900 (1991). Therefore, on occasion, this court consults legislative history and other sources ‘to show how that history supports our interpretation of a statute otherwise clear on its face.’ *Seider* <http://www.courts.state.wi.us/html/sc/98/98-1223.htm>, 2000 WI 76 at ¶52.

TERMINATION OF PARENTAL RIGHTS

EVIDENCE — PAST CONDUCT

La Crosse Co. DHS v. Tara P. <http://www.courts.state.wi.us/html/ca/01/01-3034.htm>, 2002 WI App 84, PFR filed 3/18/02

For Tara P.: Timothy A. Provis

Facts relating to a CHIPS dispositional proceeding, §48.13(10), are relevant and therefore admissible at a TPR trial. (Language potentially to contrary in *S.D.S. v. Rock Co. DSS*, 152 Wis. 2d 345, 358 n. 11, 448 N.W.2d 282 (Ct. App. 1989) dismissed as dicta.) ¶¶9-16. Nor is such evidence inadmissible

See “Case Digest” on page 53

“Review Granted” continued from Page 12

Process, Double Jeopardy or Ex Post Facto Clauses of the Wisconsin and United States Constitutions? Is the proper framework for the analysis of a double jeopardy claim in Wisconsin as set forth in *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995), or as set forth by the United States Supreme Court in *Hudson v. United States*, 522 U.S. 93 (1997)?

State v. L. Keding 00-1700

CERT 01/29/2002

District 4/Wood County

Issues: Whether the circuit court is required to consider alternatives to revocation when a proceeding is brought to revoke the supervised release of a person committed under Wis. Stat. Ch. 980, the sexual predator statute?

State v. P. Vanmanivong 00-3257-CR

REVW 01/29/2002

District 2/Sheboygan County

Issues: Were the correct legal standards applied in determining whether an informant’s identity could be disclosed, as set forth in *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145, and *State v. Dowe*, 120 Wis. 2d 192, 352 N.W.2d 660?

State v. S. Tucker 00-3354-CR

CERT 01/29/2002

District 2/Racine County

Issues: Does the practice of prohibiting the use of jurors’ names in open court in all drug cases violate *State v. Britt*, 203 Wis. 2d 25, 553 N.W.2d 528, which approves the use of anonymous juries under certain circumstances which may or may not be present in this case? Did the circuit court erroneously refuse to admit statements of a witness deemed unavailable because the witness invoked the privilege against self-incrimination?

A. Linzmeyer v. D.J. Forcey 01-0197

CERT 12/17/2001

District 2/Winnebago County

Issues: Whether application of the balancing test under the open records law allows disclosure of an investigative report that resulted in no arrest?

State v. L.A. Williams 01-0463-CR

REVW 12/17/2001

District 3/Eau Claire County

(Consolidated with 01-0464-CR)

Issues: Whether the conduct of police officers, that stopped a motor vehicle for speeding, communicated to a reasonable person that the driver was not free to decline permission to search the vehicle and to terminate the encounter?

State v. A.C. Mathews 01-0464-CR

REVW 12/17/2001

District 3/Eau Claire County

(Consolidated with 01-0463-CR)

Issues: Whether the conduct of police officers, that stopped a motor vehicle for speeding, communicated to a reasonable person that the driver was not free to decline permission to search the vehicle and to terminate the encounter?

State v. K. Jennings 01-0507-CR

REVW 03/19/2002

District 1/Milwaukee County

Issues: Whether the court of appeals erred in construing and applying the “warrant or summons” language of Wis. Stat. § 939.74(1), for commencing prosecution of a warrantless arrestee in custody?

State v. Vairin M. 01-0656

CERT 01/29/2002

District 4/Dane County

Issues: Does a circuit court have the jurisdiction to reconsider its decision made pursuant to Wis. Stat. §938.18(6), waiving a juvenile into adult court?

State v. M. Carlson 01-1136-CR

REVW 01/29/2002

District 3/Brown County

Issues: What is the legal standard for determining the level of English comprehension that a juror must possess?

See “Review Granted” on Page 53

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 REVW 03/19/2002
 District 4/Lafayette County
Issues: Is the Uniform Child Custody Jurisdiction Act (UCCJA) a special jurisdictional statute allowing a Wisconsin court to exercise personal jurisdiction over an out of state respondent in an action to terminate the parental rights of the respondent, regardless of his or her contacts with the state? ■

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Unintentional Injuries, Weapons and Violence, Suicide, Tobacco, Alcohol and Other Drugs, Sexual Behavior as well as Diet and Exercise.

Interesting trends in the 2001 study include a decrease in students who reported being involved in fights from 39% in 1993 to 31% in 2001. This mirrors a nation drop from 42% in 1993 to 36% in 2001. Students who reported carrying a weapon declined from 19% in 1993 to 13% in 2001. Nationally the decline was from 22% to 17% over the same period. While these statistics show a

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under §904.04(2) — that statute regulates the “unnecessary exposure to character and propensity evidence,” and in a TPR, the “fact finder must necessarily consider the parent’s relevant character traits and patterns of behavior.” ¶18. Though this means that “there is no blanket prohibition on evidence of events prior to a dispositional order,” the court stresses that there is no “blanket authority for its admission,” either. ¶20. ■

decline in violence and the threat of violence, there was a small increase in the number of Wisconsin youth who have stayed home from school because they did not feel safe, from 4% in 1999 to 6% in 2001. It seems that 14 – 18 year olds suffer from the same misperceptions of the threat of youth violence that adults do.

To view the full 146-page report or an executive summary go to: <http://www.dpi.state.wi.us/dpi/dlsea/sspw/yrbsindx.html> ■

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But not all such drivers have, in fact, reinstated. For instance, a person whose operating privilege was revoked for demerit points in 1997, may be charged with a criminal OAR if the person has not yet reinstated his or her operating privilege. In such a case, attorneys are encouraged to argue that the person should not be sentenced to jail, but rather payment of a fine because the underlying offense causing the driver’s original revocation would, under current law, serve only as the basis for a suspension. Therefore, a monetary penalty is more consistent with the penalty intended by the legislature than a sentence involving jail.

The same sentencing argument should be made for a person who is charged with a criminal OAR when the revocation is for safety responsibility (SR) or a damage judgment. The safety responsibility and damage judgment laws are debt collection tools to insure the payment of damages resulting from automobile accidents. For years, license actions under these Chapter 344 programs were suspensions. In 1991 Wis. Act 269, the legislature changed the sanction from a suspension to a revocation in order to require proof of insurance (usually an SR-22) as a condition of license reinstatement from these license actions. (Under pre-Act 84 law, the primary difference between a revocation and a suspension was that people were required to file proof of financial responsibility to reinstate their operating privileges following a revocation.)

Act 84 required DMV to rewrite its computer systems to allow proof of financial responsibility requirements to be established independently of whether the license sanction imposed by the legislature was a suspension or a revocation. Accordingly, the driver record system’s need to classify safety responsibility and damage judgment actions as revocations disappeared and the legislature reclassified the license actions as suspensions once again. Thus, drivers who had damage judgments entered against them before January 1, 1993, (the effective date of 1991 Act 269 provisions) or after April 9, 2001, (the effective date of Act 84 provisions) have had their operating privileges suspended, and drivers who had damage judgment entered between those dates had their operating privileges revoked. All the drivers engaged in the exact same behavior resulting in loss of driving privileges. Therefore, all the drivers should face similar penalties for operating their vehicle.

One reason so much discretion is left to the courts in the OAR sentencing statute is precisely to allow courts to deal with OAR defendants such as these in basically the same manner as they would deal with OWS defendants who committed the exact same offense and were suspended for the exact same reason. Had the legislature not intended to permit courts to impose no jail or a minimal fine for repeated OAR offenses, it would have continued to use a progressive sentencing structure similar to that in the old law. Instead, it left the penalty for any OAR offense, regardless of the number of previous offenses, with no minimum fine or jail requirement.

Using the Bankruptcy Laws to Deal with Safety Responsibility, Damage Judgment and Failure to Pay Suspensions or Revocations

One other arrow in a defendant’s quiver to deal with safety responsibility or damage judgment

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revocations or suspensions that is often overlooked by defense counsel is the bankruptcy code. Filing for bankruptcy will stay a safety responsibility or damage judgment revocation or suspension. See 11 U.S.C. §362. Upon receipt of a notice of bankruptcy, DOT will ordinarily lift any damage judgement, safety responsibility, or failure to pay (FPF, FPN, FPJ) suspension related to the named debtor(s). The automatic federal injunction prohibiting debt collection can provide a defendant with a means to reinstate his or her operating privilege.

Keep in mind, however, that the fact that DMV reacts to the automatic stay does not mean that the underlying debt is discharged in the bankruptcy. A damage judgment revocation or suspension can be refiled if the underlying damage judgment is related to death or personal injuries arising out of an incident involving the operation of motor vehicle while under the influence of alcohol or drugs, because the bankruptcy discharge will not discharge such a debt. See 11 U.S.C. 523(a)(9).

Similarly, once the bankruptcy is closed, an agency that originally imposed an FPF, FPN or FPJ suspension can refile it with DMV. This is because fines and forfeitures are also non-dischargeable under 11 U.S.C. §523(a)(7). In practice, however, few local units of government actually follow-up and re-suspend the driver's operating privilege at the close of the bankruptcy case.

While public defenders cannot file bankruptcy petitions for debtor clients, they can provide their clients with basic information about the benefits the use of a bankruptcy might have in assisting them to reinstate their operating privilege and to avoid criminal prosecution or penalties.

Questions about reinstatement should be addressed to the DOT's Compliance/Restoration Section at 608.266.2261. Questions about safety responsibility should be addressed to the DOT's Uninsured Motorists Unit at 608.266.1249. ■

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