WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2017

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Chippewa
Door
Fond du Lac
Milwaukee
Washington
Winnebago

WEDNESDAY, NOVEMBER 1, 2017

9:45 a.m.	15AP330	State v. David Hager, Jr.
10:45 a.m.	16AP474	CED Properties, LLC v. City of Oshkosh
1:30 p.m.	15AP1311	State v. Howard Carter

TUESDAY, NOVEMBER 7 , 2017

9:45 a.m.	13AP653-D	Office of Lawyer Regulation v. Wendy Alison Nora
10:45 a.m.	16AP832	Horizon Bank, National Assn. v. Marshalls Point Retreat LLC
1:30 p.m.	16AP619	Winnebago County v. J.M.

TUESDAY, NOVEMBER 14, 2017

9:45 a.m.	15AP2506-CR	State v. Daniel J. H. Bartelt
10:45 a.m.	15AP2375	Milwaukee Police Association v. City of Milwaukee
1:30 p.m.	16AP866-CR	State v. Diamond J. Arberry

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Wednesday, November 1, 2017
9:45 a.m.

2015AP330 State v. Hager

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Chippewa County, Judge James M. Isaacson, reversed and cause remanded for further proceedings
Long caption: State of Wisconsin, petitioner-respondent, v. David Hager, Jr., respondent-appellant-petitioner

Issue presented: This is one of two cases (see also 2015AP1311 State v. Carter) recently granted for review that examines amendments to Wis. Stat. § 980.09. The amendments changed the standards for the circuit court's determination of whether a petitioner who has been committed under ch. 980 – the state law addressing the commitment of a sexually violent person – will receive a discharge trial.

The Supreme Court reviews the question: When circuit courts are determining whether a patient has met this higher "would likely conclude" standard, can the courts now compare the newly proffered evidence with evidence already in the record and submitted by the State to determine whether to grant a discharge trial?

Some background: Effective Dec. 14, 2013, a circuit court must grant a committed ch. 980 patient a discharge hearing if the patient's petition alleges facts from which a factfinder "would likely conclude" that the patient's condition has changed so that he no longer meets the criteria for commitment as a sexually violent person. Wis. Stat. § 980.09(2) (2013–14).

In 1995, David Hager, Jr. was convicted of three counts of incest with a child. He was civilly committed as a sexually violent person in 2008, following a jury trial. Hager filed petitions for discharge each year from 2009 to 2011. Each time, he voluntarily withdrew the petition before receiving a discharge trial. Hager voluntarily withdrew his 2011 petition despite the state's concession that the petition, together with the accompanying examination report by a licensed psychologist, was legally sufficient to warrant a trial.

In 2012, Hager filed a pro se discharge petition. The state opposed the petition, and the circuit court denied it. Although he was represented by counsel, Hager filed another pro se discharge petition in 2013. At Hager's attorney's request, the circuit court appointed psychologist Hollida Wakefield to conduct a psychological examination.

Wakefield concluded that Hager's risk of reoffending was "below the level of risk required for commitment under ch. 980."

The state filed a response urging the circuit court to deny Hager's petition without holding a discharge trial. The circuit court denied Hager's petition following a non-evidentiary hearing. The court remarked that Hager was "still the same person he was," and the court said it was "not satisfied there has been any change in the expert's knowledge of Mr. Hager or his offense." A motion for reconsideration was denied.

The Court of Appeals ultimately agreed with Hager.

The Court of Appeals noted that initially, circuit courts were required to hold probable cause hearings under certain circumstances to ascertain whether facts existed to warrant a discharge hearing. See § 980.09(2)(a) (2003-04).

In 2006, the Legislature replaced a mandatory probable cause hearing with a two-step process. The first step, as mandated by § 980.09(1) (2005-06) was "a very limited review aimed at ensuring the petition is sufficient." State v. Arends, 2010 WI 46, ¶28, 325 Wis. 2d 1, 784 N.W.2d 513.

If the petition was facially sufficient, the court proceeded to a review under § 980.09(2), which contained a second level of review before the petitioner would be entitled to a hearing. This level of review focused on whether the record in toto contained facts that could support relief for the petitioner at a discharge hearing. During this second phase of review, the circuit court was not permitted to make credibility determinations or weigh evidence favoring the petitioner directly against evidence disfavoring him.

The Court of Appeals noted that in Act 84, the legislature changed both § 980.09(1) and (2). The state argued the changes altered the procedure articulated in Arends in a manner that abrogated Arends.

The state argued that § 980.09(2) now requires circuit courts to "weigh" the petitioner's proffered evidence against any evidence the state marshals in its favor. Hager rejected the state's claim that a weighing or balancing process was contemplated, and he argued that Arends survived Act 84's enactment.

The Court of Appeals said the increase in the pleading standard brought about by Act 84 did not clearly signal the Legislature's intent to overrule Arends and adopt a "weighing" procedure during a § 980.09(2) review. Instead, the Court of Appeals said the Act 84 changes to § 980.09(2) suggest that the Legislature intended to codify State v. Combs, 2006 WI App 137, 295 Wis. 2d 457, 720 N.W.2d 684, and its progeny.

The state says the Court of Appeals' decision leaves basic questions undecided including:

- How are courts to determine when a patient meets his burden for receiving a discharge trial?
- Can courts only consider half of the evidence when it makes that determination?
- How could a circuit court ever conclude that a patient has not met his burden when a court can only consider the evidence in favor of the patient's petition?

Hager says the state's push to require circuit courts to "weigh" the evidence supporting and opposing a committed person's petition for discharge is an invitation to read language into § 980.09(2) that is not there.

Wisconsin Supreme Court
Wednesday, November 1, 2017
10:45 a.m.

2016AP474 CED Properties, LLC v. City of Oshkosh

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Winnebago County, Judge John A. Jorgensen, affirmed
Long caption: CED Properties, LLC, plaintiff-appellant-petitioner, v. City of Oshkosh, defendant-respondent

Issue presented: This dispute over special property tax assessments is on its second appeal to the Supreme Court. The Supreme Court reviews the process used to decide the case in lower courts, and whether a special assessment can be levied for a benefit that adds no monetary value to a commercial property. CED Properties, LLC contends the case presents a genuine issue of material fact, and therefore, should not have been decided on summary judgment.

Some background: At the center of this case is the city of Oshkosh's (the city) effort to impose a special assessment on property owned by CED Properties, LLC (CED) (which has a Taco Bell on it), for installation of a roundabout intersection and related improvements.

On July 27, 2010, the City passed a resolution to "reconstruct" the intersection to install a roundabout, and to replace traffic signals, concrete paving, asphalt paving, sanitary sewer laterals (new and relaid), storm sewer main and laterals, sidewalk replacement and repair, concrete driveway approaches, and streetscaping/landscaping improvements.

The total cost of the project was $4,060,000. The city's share was $1,449,250, of which $307,118.72 was special assessed to property owners adjacent to the intersection. The balance was paid by the state. First, the City used its power of eminent domain to acquire approximately six percent of CED's property for the project. CED and the city litigated the amount of just compensation owed to CED for this taking. In April 2012 the parties settled, agreeing that the City would pay $180,000 in just compensation for the taking. The city was released from claims arising out of the condemnation action.

In the first appeal that came to the Supreme Court, CED challenged the initial assessments under Wis. Stat. § 66.0703(12). The circuit court granted the city's motion for summary judgment, finding that CED's appeal was ineffective and untimely. The Court of Appeals affirmed. *See* CED Props. LLC v. City of Oshkosh, 2013 WI App 75, 348 Wis. 2d 305, 836 N.W.2d 654, *rev'd*, 2014 WI 10, 352 Wis. 2d 613, 843 N.W.2d 382.

The Supreme Court reversed, with directions to the circuit court to enter summary judgment in favor of CED on remand due to the city's failure to comply with certain statutory assessment requirements.

The city thereafter reopened the matter and imposed special assessments on CED under § 66.0703(10). CED again contested the special assessments. The circuit court again granted summary judgment in favor of the city.

CED appealed and the Court of Appeals affirmed.

CED argues that the circuit court erred when it interpreted § 66.0703 to allow the city to exercise its police power and levy a special assessment because the city had failed to allege special benefits in the preceding eminent domain action under Wis. Stat. § 32.09(3).

The Court of Appeals, Judge Mark D. Gundrum dissenting, ruled that "special benefits" under eminent domain law and "special benefits" under special assessment law are completely different things. As such, it agreed that you don't need to have "special benefits" in an eminent domain action under § 32.09(3) in order to properly allege special benefits under a Wis. Stat. ch. 66 special assessment.

CED claims that it presented evidence supporting a genuine issue of material fact regarding the presence of special benefits in the special assessment context, such that summary judgement should not have been entered. They say that a jury issue exists as to whether the project conferred special benefits on the CED property.

CED disputes these "special benefits." It claims that the traffic "improvements" were actually detrimental to its tenant, Taco Bell, because roundabout intersections are disfavored by the public and actually impair fast food sites as fast food sites are "impulse stop[s]" which benefit from longer intersection delays.

CED says the city's power to levy a special assessment, while broad, is limited by § 66.0703 in that it must satisfy three requirements: (1) the assessment must be levied on property within a limited and determinable area, (2) the assessment must be "for special benefits conferred upon the property," and (3) the assessment must be made on a reasonable basis.

A decision by the Supreme Court is expected to clarify the difference, if any, between special assessments in the eminent domain and assessment context and to address what proof of the impact of the improvements may be needed to survive a summary judgment motion.

Wisconsin Supreme Court
Wednesday, November 1, 2017
1:30 p.m.

2015AP1311 State v. Carter

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Brown County, Judge Kendall M. Kelley, affirmed
Long caption: State of Wisconsin, petitioner-respondent, v. Howard Carter, respondent-appellant-petitioner

Issues presented: This is one of two cases (see also 2015AP330 State v. Hager) recently granted for review that examines amendments to Wis. Stat. § 980.09. The amendments changed the standards for the circuit court's determination of whether a petitioner who has been committed under ch. 980 – the state law addressing the commitment of a sexually violent person – will receive a discharge trial.

The Supreme Court reviews three issues:

- Did the trial court err in denying Howard Carter a trial on his petition for discharge because 2013 Wis. Act 84 did not apply to this case and counsel was ineffective in not objecting to its application?
- If 2013 Wis. Act 84 applied to this case, should the saving construction applied by the Court of Appeals in State v. Hager 2015AP330 be applied and was Carter entitled to a discharge trial under that construction?
- If 2013 Wis. Act 84 applied to this case, was it unconstitutional because it unduly restricted access to the courts for persons committed under ch. 980 seeking to terminate their commitment?

Some background: Howard Carter was civilly committed as a sexually violent person in 2009, following a jury trial. Carter underwent annual examinations to determine if he met the conditions for supervised release or discharge.

Carter filed petitions for discharge in 2010 through 2012, withdrawing each before a discharge trial. He filed another petition in February 2013, following his annual reexamination, in which the evaluating doctor said he was not a suitable candidate for either supervised release or discharge.

An amended petition was filed in December 2013. The circuit court appointed Dr. Diane Lytton, a licensed psychologist, as Carter's expert. Lytton's report supported Carter's discharge petition. She disagreed with earlier experts' diagnoses. She acknowledged that, due to his rule-breaking and dishonesty, Carter "most likely can continue to be diagnosed with antisocial personality disorder."

However, Lytton concluded this condition did not predispose Carter to commit acts of sexual violence, and she opined Carter was not more likely than not to reoffend. Dr. Lytton also cited as mitigating factors Carter's age and significant progress in treatment at Sand Ridge Secure Treatment Center.

At a motion hearing in February 2014, the state argued the circuit court should apply the new amendments to Wis. Stat. § 980.09(1) and (2). The amendments were included in 2013

Wis. Act 84, which became effective on December 14, 2013. The amendments required the circuit court to deny the discharge petition without a hearing unless the petition alleges facts, supported by the record, "from which the court or jury would likely conclude" Carter's condition had changed since his initial commitment such that he should no longer be civilly committed. Carter's attorney did not argue for the application of the previous "may conclude" standard, nor did he object to the application of the new standard.

The state conceded Carter's petition was facially sufficient under Wis. Stat. § 980.09(1). However, the state asserted Carter's petition failed upon a review of the record under § 980.09(2) because Carter had not alleged anything "new."

The circuit court concluded Carter was not entitled to a discharge trial based on either a favorable change in professional knowledge or sufficient progress in treatment.

Carter moved for reconsideration, alleging ineffective assistance of counsel. Carter alleged his first attorney was ineffective for not challenging Act 84's applicability. He also argued the legislature's adoption of the new discharge standard dramatically increased the requirements for obtaining a discharge trial and was thus unconstitutional.

Following a Machner hearing [State v. Machner, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)] , the circuit court denied Carter's motion. It concluded the Act 84 amendments applied retroactively to Carter's petition. It rejected Carter's claim that counsel was ineffective. It also rejected Carter's due process challenge.

Carter argued that the amendments could not be applied retroactively to him because he had a "vested right" to a discharge trial. The Court of Appeals disagreed. It said when the existence of a right is contingent on an uncertain future event, such as Carter's satisfaction of the preliminary requirements under § 980.09 (1) and (2), and that event has not occurred prior to the enactment of a statute, there is no vested right to the application of the prior law. See Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, ¶50, 370 Wis. 2d 500, 881 N.W.2d 702.

Having concluded, as a matter of law, that Act 84's amendments to Wis. Stat. § 980.09(1) and (2) apply retroactively to Carter, the Court of Appeals concluded Carter's first attorney did not perform deficiently by failing to object to the statute's retroactive application. It said trial counsel's failure to bring a meritless motion does not constitute deficient performance.

The state says if only the facts favorable to the patient are considered, then a fact finder will always be likely to rule in favor of the patient. Instead, the state says it views the statutory changes as essentially adapting the well-established rules for obtaining a new criminal trial on the basis of newly discovered evidence to a patient's request for a new discharge trial.

Wisconsin Supreme Court
Tuesday, November 7, 2017
10:45 a.m.

2016AP832 Horizon Bank, National Association v. Marshalls Point Retreat LLC

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Door County, Judge D.T. Ehlers, reversed and cause remanded with directions
Long caption: Horizon Bank, National Association, plaintiff-appellant, v. Marshalls Point Retreat LLC and Marshall's Point Association, Inc., defendants, Allen S. Musikantow, defendant-respondent-petitioner

Issues presented:

- Where a foreclosure on mortgaged premises involves a guarantor, does Wis. Stat. § 846.165 require the trial court to determine the amount to be credited against the guarantor's obligation before confirming a sheriff's sale, or does the trial court have discretion to reach that issue later?
- If the trial court must determine the amount to be credited against a guarantor's obligation in connection with confirming a sheriff's sale, does the guarantor have a due process right to present evidence on the question of fair value?

Some background: In May of 2010, Horizon Bank loaned $5,000,000 to Marshalls Point Retreat LLC. The loan was secured by a mortgage on property in Sister Bay. Allen S. Musikantow provided a continuing guaranty of payment for the loan.

In 2015, Marshalls Point defaulted on the loan by failing to pay the balance due at maturity. The bank filed a foreclosure action asserting a claim to foreclose the mortgage on the property and a claim against Musikantow seeking a money judgment for the outstanding balance of the loan, pursuant to the terms of his guaranty.

The parties entered into a stipulation and order for judgment for foreclosure. The circuit court entered judgment on the stipulation on Sept. 10, 2015. The judgment stated that Marshalls Point owed Horizon Bank $4,045,555.55, and it granted the bank a money judgment against Musikantow in that amount.

The judgment further provided the Sister Bay property would be sold at a sheriff's sale, and *"[t]he amount paid to [Horizon Bank] from the proceeds of said sale of the Premises, remaining after deduction by [Horizon Bank] of the amount of interest, fees, costs, expenses, disbursements and other charges paid or incurred by [Horizon Bank] not included in the monetary judgment against [Musikantow] (set forth below) shall be credited by [Horizon Bank] as payment on said monetary judgment."*

Horizon Bank was the successful (and only) bidder at the sheriff's sale with a bid of $2,250,000. Horizon Bank moved to confirm the sale, asserting that its bid represented the "fair value" of the property. The bank asked the circuit court to reduce the amount of the money judgment against Musikantow by the amount of the bank's winning bid.

In response, the defendants indicated they had no objection to either a statutory fair value finding or final confirmation of the sale provided those actions have no preclusive effect on a future determination of the amount of Musikantow's credit.

Before moving to confirm the sale, the bank had filed a federal action against Musikantow in U.S. District Court for the Middle District of Florida, where he lives.

At the close of the hearing, the circuit court granted the bank's motion for confirmation of the sheriff's sale, finding that the bid price of $2,250,000 represented the "fair and reasonable value for the property." The court also granted Musikantow's oral motion and declined to rule on the credit to be applied to the money judgment against him. Musikantow indicated he had a witness who was prepared to testify that the property had a "market value" in excess of $10,000,000.

The court said it would not address the credit to be applied to the money judgment because the guaranty clearly indicated it was to be governed by federal law. Counsel argued the amount of the credit to be applied against the money judgment was "more likely to be litigated in the State of Florida."

The circuit court entered an "Order Confirming Sheriff's Sale," confirming the sale of the property to Horizon Bank and stating that the amount bid by the bank represented the fair value of the premises. The court crossed out the final paragraph of the order, which stated the amount due under the judgment entered against Musikantow.

The court also entered an order stating that in light of the language in the guaranty document indicating it was to be governed by federal law, granting Musikantow's motion to decline to make a finding of the amount to be credited against the bank's judgment against him. The order said the court "will, if requested by a Federal Court, make a determination as to such amount to be credited against the judgment."

The bank appealed that order. The Court of Appeals reversed and remanded. The Court of Appeals concluded the circuit court misinterpreted the governing law provision. It said there was no reason why the circuit court could not apply whatever law was appropriate, whether it be Wisconsin law, federal law, or Indiana law, in order to determine the appropriate credit to apply to the money judgment against Musikantow. The appellate court concluded that the circuit court erred in refusing to determine the amount of the credit and should have applied a $2,250,000 credit toward the money judgment against Musikantow.

Musikantow argues that § 846.165, Stats., does not require the credit determination mandated by the Court of Appeals. He says there is nothing in ch. 846 to prohibit trial courts from doing exactly what the trial court did here. He says the "credit" referenced in § 846.165(2) is a credit "on the mortgage debt," not on any judgment obtained against a third-party guarantor.

Musikantow argues, among other things, that tying guarantors' credit amounts to lenders' credit bids violates the common law rule against double recovery. He says he was prepared to prove that the value of the property is several times the amount of the bank's bid and in light of that fact the Court of Appeals' interpretation of the parties' stipulation should have been guided by the common law rule against double recovery.

The bank says this claim ignores the fact that Musikantow appeared with his attorney for a confirmation hearing scheduled to last three hours so he could present his valuation evidence, but then he affirmatively chose not to present it. The bank says the Court of Appeals enforced the terms of the judgment stipulated to by Musikantow.

The bank argues if a guarantor thinks a lender's bid at a sheriff's sale was too low, then the guarantor should bid the price up to take the opportunity to acquire a valued property at a discount or the guarantor should challenge the fair value finding and force a resale if the amount bid shocks the conscience of the court. The bank says Musikantow did neither.

Wisconsin Supreme Court
Tuesday, November 7, 2017
1:30 p.m.

2016AP619 Winnebago County v. J.M.

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Winnebago County, Judge Karen L. Seifert, affirmed
Long caption: Winnebago County, petitioner-respondent, v. J.M., respondent-appellant-petitioner

Issues presented: This case involves an ineffective assistance of counsel claim by J.M., an individual who appeared before the jury wearing prison garb at his Wis. Stat. § ch. 51 extension proceeding. Chapter 51 pertains to commitments for mental disorders and developmental disabilities and for mental illness, alcoholism, and other drug abuse.

The Supreme Court reviews:

- Whether the subject of a Wis. Stat. § 51.20(l)(a) extension of involuntary commitment and involuntary medication order has a claim for ineffective assistance of trial counsel where his lawyer fails to object to, prevent the admission of, or request a curative instruction to address, evidence of his prisoner status during his jury trial?
- Whether the subject of a Wis. Stat. § 51.20(l)(a) extension of commitment is entitled to a new trial in the interests of justice where the jury repeatedly sees and hears evidence of his prisoner status?

Some background: J.M. contends that he was denied effective assistance of counsel because his attorney did not arrange for him to wear civilian clothes or, at a minimum, request a curative jury instruction. The Court of Appeals' affirmed orders extending J.M.'s ch. 51 commitment and denying his requests for post-disposition relief.

On Nov. 20, 2014, J.M. was involuntarily committed for a period of one year under Wis. Stat. § 51.20. As the end of his commitment approached, the county filed a petition to extend his commitment. J.M. requested and received a jury trial in the ch. 51 proceeding, which is separate and distinct from a criminal case.

J.M. was held at the Wisconsin Resource Center (WRC), a secure treatment center that managed by the Department of Health Services in partnership with the Department of Corrections. The WRC serves medium and maximum security inmates transferred from the Department of Corrections whose behavior presents a serious problem to themselves or others in the state prison system.

Before trial, J.M.'s attorney contacted the WRC about supplying J.M. with civilian clothes to wear on the day of the ch. 51 trial. The record does not say why counsel's attempt to get civilian clothing was unsuccessful.

At trial, the county called two expert witnesses to testify, both of whom had met with J.M. and evaluated his mental status. Both concluded that J.M. had schizophrenia and described incidents in which J.M. was extremely agitated and exhibited behavior they viewed as dangerous

or threatening. J.M. told both doctors that he was "Lord," and he asked to have all of his records at the state Department of Corrections changed to reflect this.

J.M. testified on his own behalf, stating that he believed he was not mentally ill or dangerous and that the experts' conclusions were "opinions, not facts." J.M. then confirmed that he was "Jesus the Lord" and elaborated on this belief.

The jury's task, as set forth in § 51.20, was to determine (1) whether J.M. was mentally ill, (2) whether J.M. was a danger to himself or others, and (3) whether J.M. was a proper subject for treatment.

The jury answered all three questions in the affirmative. The circuit court ordered that J.M.'s commitment be extended. J.M. unsuccessfully sought a new trial. J.M. appealed and the Court of Appeals affirmed, leading to this appeal before the Supreme Court.

J.M. argues that the Supreme Court has "implicitly" found that this statutory right encompasses a right to effective assistance of counsel, citing Winnebago Co. v. Christopher S., 2016 WI 1, ¶4, 366 Wis. 2d 1, 878 N.W.2d 109.

The Court of Appeals found that this was not, actually, the holding of Christopher S. Rather, the ineffective assistance of counsel claim was raised, but the Supreme Court ultimately didn't reach the issue. The Court of Appeals also concluded that defense counsel's performance was not deficient, and, even if it was, J.M. suffered no prejudice under the two-prong Strickland test, Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court of Appeals also found that there is no established affirmative duty for counsel to ensure a ch. 51 client is not wearing prison garb, counsel's failure to pursue a curative limiting instruction was not constitutionally deficient.

J.M. says a defendant has a constitutional right to a presumption of innocence and that well-settled federal case law holds that criminal defendants cannot be compelled to wear prison garb. J.M. contends that trying a defendant in his prison garb may violate his constitutional right to a presumption of innocence under Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971) and to due process and equal justice under Estelle v. Williams, 425 U.S. 501, 506-508.

A decision by the Supreme Court is expected to determine whether the subject of a ch. 51 extension proceeding has a statutory right to *effective* assistance of counsel, and whether a defense lawyer is automatically deficient when he or she fails to procure civilian clothing for a defendant in a ch. 51 involuntary commitment.

Wisconsin Supreme Court
Tuesday, November 14, 2017
9:45 a.m.

2015AP2506-CR State v. Bartelt

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Washington County, Judge Todd K. Martens, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Daniel J.H. Bartelt, Defendant-Appellant-Petitioner.

Issues presented: The central question in this case is whether Daniel J.H. Bartelt's incriminating statements to police officers, and the physical evidence that police found as a result of these statements, should have been suppressed. The Supreme Court reviews the following issues:

- After confessing to an attempted homicide or other serious crime, would a reasonable person feel free to terminate a police interview and leave an interrogation room, such that the person is not "in custody" for Miranda v. Arizona, 384 U.S. 436 (1966) purposes?
- After his confession, did Bartelt clearly and unequivocally invoke his right to counsel?

Some background: Bartelt was convicted after a jury trial of first-degree intentional homicide for killing Jessie Blodgett, a 19-year-old woman he strangled in her bedroom at her parents' home. Bartelt also stands convicted, upon his guilty plea, of first-degree recklessly endangering safety for a knife attack on a different woman in a park several days before Blodgett's murder. Bartelt was friends with, and had briefly dated Blodgett; the woman in the park was a stranger. Bartelt was 19 years old at the time of his crimes.

After gathering information from the knife-attack victim in the park, Washington County Sheriff's detectives interviewed Bartelt about that incident in an interview room at the village of Slinger police station inside the village's municipal building. The interview room doors were left ajar, and the building was not locked to someone attempting to exit the building.

At the beginning of the interview, detective Joel Clausing advised Bartelt that he was "not in trouble" and that he was "not under arrest." Bartelt responded, "[T]hat's good." Clausing repeated that Bartelt was not under arrest and also advised him that he could "get up and walk out of here any time [he] want[ed]." The detectives did not search or frisk Bartelt.

After initially denying he was at the park and making apparently untrue statements to detectives about his employment status and the cause of an injury to his hand, Bartelt admitted being at the park with a knife and knocking the woman down.

Bartelt asked what would happen after he gave a written statement, and Clausing answered that he was unsure, but probably he would have more questions for Bartelt. The following exchange then occurred:

Bartelt: "Should I or can I speak to a lawyer or anything?"
Det. Clausing: "Sure, yes. That is your option."
Bartelt: "Okay. I think I'd prefer that."
Det. Clausing: "All right."

Shortly thereafter, Bartelt was placed under arrest, handcuffed and searched. He was not given a Miranda warning.

The day after Bartelt was arrested, at about 2:30 p.m., city of Hartford Police Det. Richard Thickens, the lead investigator into Blodgett's death, met Bartelt, along with another detective, at the Washington County Sheriff's Department. After informing Bartelt about the nature of the interview, Thickens read Bartelt the Miranda Warning. Bartelt waived his Miranda rights and agreed to speak with Thickens without an attorney present. At the time of this interview, Thickens knew that Bartelt had previously asked about an attorney.

Bartelt spoke with Thickens for about 90 minutes, during which he said that on the morning of Blodgett's murder, he was at Woodlawn Union Park. The interview ended when Bartelt asked for an attorney. After the interview, Thickens went to Woodlawn Union Park to investigate, and he discovered physical evidence in a trash can that was connected to Blodgett's murder (e.g., duct tape, ropes, a homemade gag ball, a bloody towel) and that contained both her and Bartelt's DNA.

Ultimately, the trial court denied Bartelt's motion to suppress his statements to police and the evidence that resulted from those statements, concluding that Bartelt was not in custody at the time he asked about counsel during the first interview.

As for the second interview, the trial court held that the fact that Bartelt had asked about counsel while not in custody did not prohibit Thickens from speaking with him without an attorney present. When Thickens interviewed Bartelt, he was clearly in custody, but Bartelt was given Miranda warnings, and he waived his rights freely, knowingly, and voluntarily. It was not until 90 minutes later that Bartelt invoked his right to counsel, at which point the questioning ceased.

Bartelt appealed, unsuccessfully. He argued on appeal that, upon admitting to attacking the woman in the park, and given the other circumstances present at the time, a reasonable person in his situation would not have felt free to terminate the interview and leave. When, shortly thereafter, he invoked his right to counsel, all further interrogation had to cease, Bartelt claimed. When the detectives approached him the next day to question him about Blodgett's murder without counsel present, and without him ever having validly waived his asserted right to counsel, he contends his right to counsel was violated.

The Court of Appeals held that the fact Bartelt made incriminating admissions did not render him in custody, when considered among all the other circumstances.

The Court of Appeals went on to say that if it adopted Bartelt's argument, then at the moment of a suspect's first incriminating statement, the police would have to stop questioning the subject and administer Miranda warnings. This result has no basis in Miranda jurisprudence, the Court of Appeals said.

Bartelt asks the court to decide whether a person who has confessed to a serious crime in the presence of police, but who has not yet been formally placed under arrest, is in custody for Miranda purposes. Bartelt also argues that this case presents a second significant question of constitutional law: whether Bartelt unequivocally invoked his right to counsel, given his statement that "I think I'd prefer that [a lawyer]."

Wisconsin Supreme Court
Tuesday, November 14, 2017
10:45 a.m.

2015AP2375 Milwaukee Police Association v. City of Milwaukee

Supreme Court case type: Petition for Review
Court of Appeals: District I [District IV judges]
Circuit Court: Milwaukee County, Judge Timothy G. Dugan, affirmed
Long caption: Milwaukee Police Association and Michael Crivello, Plaintiffs-Appellants-Petitioners, Milwaukee Professional Fire Fighters Association, Local 215 and David R. Seager, Jr., Intervenors-Plaintiffs-Co-Appellants-Petitioners, v. City of Milwaukee, Defendant-Respondent-Respondent

Issues presented: This case challenges an amendment to the city charter ordinance affecting the Annuity and Pension Board of the City of Milwaukee Employes' Retirement System. The Court of Appeals agreed with the circuit court that the city was entitled to amend the size, composition, and manner of election of the pension board on a prospective basis and that in doing so the city did not violate the rights of retirement system members.

The Milwaukee Police Association and the Milwaukee Professional Fire Fighters Association have each filed a petition for review of a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of the City of Milwaukee.

The Firefighters Association raises one issue: Whether a municipality may ignore the legislature's specific mandates regarding the size and composition of the pension board simply by passing its own ordinance.

Milwaukee Police Association and Michael Crivello raise the following issues:

- Whether a municipality may lawfully disregard specific requirements the Legislature has placed on the municipality, by simply passing an ordinance at odds with the law.
- Whether home rule allows the city of Milwaukee to avoid the mandates identified by the legislature in the Session Laws of 1937 and 1947.
- Whether the Session Laws of 1937 and 1947 vested the Employee's Retirement System (ERS) members with the right to vote for and seat ERS board members.
- Whether the decision of the Court of Appeals is in conflict with the decisions of the Supreme Court in Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936) and Johnston v. City of Sheboygan, 30 Wis. 2d 179, 140 N.W.2d 247 (1966)?

Additionally, the Milwaukee Fire Fighters Association, Local 215 and Seager ask whether a municipality may ignore the Legislature's specific mandates regarding the size and composition of the Pension Board simply by passing its own ordinance.

Some background: In the Laws of 1937, the legislature assigned responsibility for the operation of the Milwaukee Employes' Retirement System to the pension board. That law detailed the membership of the board and how members were to be elected. When the law was enacted, Milwaukee police officers and firefighters were not covered by the retirement system and were not subject to the jurisdiction of the pension board.

The Laws of 1947 granted all first-class cities, such as the city of Milwaukee, the authority to amend the 1937 law as long as the cities did not modify the "annuities, benefits or other rights" of any persons who were members of the retirement system. The 1947 law gave employees "a vested right" to the "annuities and other benefits" offered by the retirement system that "shall not be diminished or impaired by subsequent legislation or by any other means" without members' consent. The 1947 law provided that city police and firefighters hired on or after July 30, 1947, become members of the retirement system.

The city codified the pertinent part of the 1947 law in its home rule charter ordinance. In 2013, the city amended the charter ordinance to change the size and composition of the pension board and the manner of election of its active employee-members. Among other things, the 2013 amendment added three mayoral appointments and provided that only active firefighters can vote for the person to fill the fire department's seat and only active police officers can vote for the person to fill the police department's seat.

The Police Association filed suit, seeking a declaratory judgment and an injunction. The Police Association alleged that the 2013 amendment violated the vested rights of retirement system members in the size and composition of the pension board and their vested rights to elect members to the board without being limited to voting only for members in their same employment classification. The Firefighters Association was allowed to intervene.

The circuit court granted summary judgment in favor of the city, concluding that the pertinent session laws and charter do not provide members of the retirement system with a specific right to the makeup of the pension board. The circuit court also concluded that the 2013 amendment modifying the makeup of the board did not affect any of the rights of the members.

The Court of Appeals affirmed, relying heavily on the Supreme Court decision in Stoker v. Milwaukee County, 2014 WI 130, 359 Wis. 2d 347, 857 N.W.2d 102

It noted that in Stoker, the Wisconsin Supreme Court reviewed a county ordinance in light of Wisconsin session laws that established the county retirement system and corresponding benefit funds, and that gave the county the power to make changes to benefit funds as long as the changes did not operate to diminish or impair the annuities, benefits, or other rights of any person who is a member of the benefit fund prior to the effective date of any such change.

The Court of Appeals rejected the unions' argument that retirement system members have a vested right in the size, composition, and manner of election of the pension board as it existed before the 2013 amendment.

The Firefighters Association argues the home rule amendment recognizes the legislature's ability to supplant municipal ordinances. The Firefighters Association argues the city's ordinance modifies not only the size and composition of the board but also the voting rights of members which, it argues, conflicts with the mandates of the session laws of 1937 and 1947.

The Police Association argues that the ordinance directly conflicts with Wisconsin public sector pension law because it modifies not only the number of members of the pension board but also the voting rights of city employees, by limiting them to voting for only a board member who is within the employee's same employment classification.

The city says the case involves only questions of interpretation of state enabling laws and charter provisions affecting only members of the Milwaukee retirement system. The city argues this is entirely a local dispute, given that all public employees in Wisconsin other than those who work in Milwaukee are all members of the Wisconsin Retirement System, which is governed by an entirely different set of statutes.

Wisconsin Supreme Court
Tuesday, November 14, 2017
1:30 p.m.

2016AP866-CR State v. Arberry

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Fond du Lac County, Judge Peter L. Grimm, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Diamond J. Arberry, Defendant-Appellant-Petitioner

Issues presented:
This case examines whether State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d 811 precludes a post-conviction court from considering expungement. More specifically:

- When a defendant is eligible for expungement, but it is not addressed at her sentencing hearing, can the defendant raise this issue in a post-conviction motion?
- Did the circuit court err in its exercise of discretion when it denied expungement eligibility but gave reasons for doing so that could apply to any case?

Some background: In August 2015, Diamond J. Arberry pled no contest to two counts of retail theft and her case proceeded directly to sentencing. She was convicted of a Class I felony and a Class A misdemeanor, both offenses that carry a maximum penalty of less than six years of imprisonment and she was under 25 at the time of the offense.

No one, neither the lawyers nor the judge, raised the issue of her eligibility for expungement although there is no dispute that Arberry met the other statutory requirements for expungement. Accordingly, Arberry filed a post-conviction motion for sentence modification seeking eligibility for expungement.

At the post-conviction hearing, the circuit court ruled that it could not grant Arberry eligibility for expungement because the case law interpreting the expungement statute requires "the matter to be granted at the time of sentencing." The court also noted, in passing, that, anyway, it would have denied expungement if the parties had requested it.

Arberry appealed, arguing a post-conviction court may consider eligibility for expungement when it was "overlooked" at sentencing. The state said by failing to request it at that time, Arberry waived her right to request expungement postsentencing.

The Court of Appeals cited Matasek, in which the Supreme Court unanimously held that § 973.015 requires that "if a circuit court is going to exercise its discretion to expunge a record, *the discretion must be exercised at the sentencing proceeding*." Matasek, 353 Wis. 2d 601, ¶45.

The Court of Appeals concluded, in a published decision, that it may not, citing Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), to signal that it considered itself bound by Supreme Court precedent.

The Court of Appeals pointed out that Arberry was sentenced well after Matasek was decided and noted that at the post-conviction hearing, the circuit court stated that it would have considered, and denied, expungement if the parties had requested it.

The Court of Appeals said the circuit court's conclusion that it could not consider expungement after Arberry's sentencing hearing was proper under Matasek. In so holding, the

court noted that “[n]either we nor the circuit court may overrule a holding of our supreme court. *See* Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (‘The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.’).”

Arberry contends that permitting a post-conviction court to consider eligibility for expungement in a motion for sentence modification does not conflict with Matasek. She says that “even issues that are required to be resolved at sentencing are still subject to motions for sentence modification.” Arberry says she is not attempting to revisit an expungement decision after having completed her sentence nor is she asking the court to delay its decision until she has done so (as was proposed in Matasek).

Arberry would like the court to find that the circuit court did not exercise proper discretion when it said that it would not have deemed her eligible for expungement.