Criminal Procedure Cases in the 2020-21 Term of Wisconsin's Appellate Courts

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Preliminary Hearings - Delays in Appointment of Counsel

State v. Lee, 2021 WI App 12

p 2 – COA J. Hruz Jan 2021 - Marathon Co J. Jacobson ***Cert granted**

- Wis. Stat. § 970.03 requires P.X. to be held wi/10 days of I.A. for in-custody def. with bail set >$500. Time limit may be extended "on motion and for cause."
- Def held in custody for 113 days after I.A., unrepresented. Circuit judges and a commissioner repeatedly extended the time limit, on own motion, solely on basis that the SPD was still searching for counsel. Def never consented to the adjournments.
- After obtaining SPD-appointed counsel Def moved to dismiss – erroneous exercise of discretion, failure to consider other factors, e.g. prejudice from delay. Also, isn't County required to appoint?
- Circuit Ct denies – COA Reverses. Going forward, there must be robust consideration of other factors, including necessity and feasibility of appointing at County expense, especially in instances of prolonged delay.
- Failure to hold timely P.X. resulted in loss of personal jurisdiction over the Def. Case remanded with directions to dismiss wo/prejudice.
- Supreme Court (?)

"Stipulated Trials" – Guilty Plea Waiver Rule

State v. Beyer, 2021 WI 59

p.7 – S. Ct. J. Roggensack, June 2021 - Dane Co. J Hanrahan

- Poss. Child Pornography prosecution. Def files motion to examine govt computer for evidence cited in warrant affidavit. Circuit Ct denies discovery motion and subsequent motion to suppress.
- Parties agree to stipulated trial on agreed set of facts that allowed the court to find Def guilty and intended to preserve appeal of discovery and suppression motions (expanded preservation of claims for appeal on a plea). Wis Stat § 971.31 (10). Def found Guilty and appeals. COA certifies.
- WI SC: "Simply calling a proceeding a trial does not necessarily make it so." This more closely resembled a conditional guilty plea permitted under the Federal Rules of Evidence, but not permitted by WI statute.
- Accordingly, Def cannot be held to the stipulation because he relied upon an invalid procedure. Case remanded for Def to determine whether he wants to plead guilty or proceed to trial (note: on 10 counts; the stipulated procedure dismissed and read-in 9 counts).

Confrontation – Hearsay – Law of the Case

State v. Jensen, 2021 WI 27

p.8 – S. Ct. J. Dallet, March 2021 - Kenosha Co J. Kerkman

*Petition pending with US Supreme Court; Docket No.21-210

- **Held**: in a retrial of murder case, the court is bound by the earlier decision in *State v. Jensen I* regarding the use of testimonial hearsay. Law of case requires adherence to appellate ct ruling in all subsequent proceedings in trial court or on later appeal.
- Jensen I (& *Crawford*): decedent wife's letter and two voicemails stating that Def should be the first suspect if she died were inadmissible under the confrontation clause – statement of an unavailable witness is testimonial in nature if its primary purpose is top establish or prove past events potentially relevant to later criminal proceedings (*Crawford*); statements are non-testimonial if their primary purpose is to help police meet an ongoing emergency (*Davis*). Forfeiture by wrongdoing left open and used on remand to admit statements – Jensen convicted. Jensen appeals. COA – forfeiture by wrongdoing does not apply, but error = harmless. Habeas. 7th Circuit: error NOT harmless; "beyond possibility of fair-minded disagreement that admitting the statements had a substantial and injurious effect." Circuit Court on remand: conviction reinstated – "a lot has changed since Crawford". WISC: not that much – Law of the case controls - COA affirmed/conviction reversed. Note: concur J. Karofsky – DV context.

Exclusionary Rule - Impeachment Exception

State v. Garcia, 2020 WI App 71

p. 9 - COA J. Reilly Oct. 2020 - Racine Co. J. Piontek

Decision affirmed by an equally divided WI Supreme Court

- Reckless homicide conviction – child victim. Prior to trial, Def's post-arrest statement to police suppressed – Def's English insufficient to properly waive Miranda rights. However, statement found voluntary.
- At trial in State's case-in-chief, defense crosses police officer about failure to investigate particular leads.
- State subsequently allowed to use Def's statement to rehabilitate the officer's testimony, to wit, to explain why he did not explore other leads due to Def's confession.
- COA: "may the State invoke the impeachment exception to the exclusionary rule during the State's case-in-chief to 'rehabilitate one of its witnesses?" No. Long-recognized exception to *Miranda* is limited to impeachment of the defendant himself – should he testify during the defense case-in-chief. Judgment reversed and case remanded for new trial.

Sex Assault – Child Witness – Recorded Statements - §908.08

State v. Mercado, 2021 WI 2

p 10 - S. Ct. J. Roggensack Jan. 2021 - Milwaukee Co. Judge Conen

- Sex assault of child multiple counts. At trial, three forensic child interviews admitted pursuant to §908.08 and after trial court reviewed "relevant portions of the videos necessary to make a ruling on admissibility. Three children testified, sometimes inconsistently with recordings and unclear on ability to discern truth from lie. Convicted.
- Main issue on appeal: whether trial court complied with requirements of § 908.08 in admitting the video statements. COA: Conviction reversed and remanded for new trial, mainly for not following § 908.08: Circuit Ct did not watch entire statements, specific required findings of 908.08 are not met in the record – recording free from alter/excision, oath/affirmation or understanding importance of telling truth, statements provide sufficient indicia of trustworthiness. Statements also not residual exceptions or prior inconsistent statements.
- WISC unanimous: COA reversed. First, several OBJ's forfeited. Second, trial court not required to review entire recording, only necessary portions required to make finding. Third, child may testify first. And last, the recorded statements are admissible as residual hearsay exceptions.

Expert Testimony – Human Trafficking

State v. Hogan, 2021 WI App 24

p 12 - COA J. Davis March 2021 - Sheboygan Co. J. Persick

- Human trafficking prosecution where π presented law enforcement as expert in human trafficking – testified to experience, training, presentations, work w/ victims and traffickers; no publications. Testimony admitted; convicted.
- At trial, expert presented exposition testimony without drawing conclusions/opinions about defendant (why victim may feel pressured by trafficker into prostituting herself)
- Court relied on commonalities in the plurality opinion in *Siefert v. Balink* (2017WI2), which relied on *Kumho Tire* for analysis of non-scientific experts
- *Hogan* Court holds this topic area is not junk science.
- Upholds trial court's reliance on expert's work, trainings, but mostly on participation in a regional task force that staffed cases together giving her "broader insight into what's going on.'"
- Reiterated that while social science testimony is not easily evaluated under *Daubert's* reliability factors - some, all, or none may apply - the court does not have to take the expert's word for it (*ipse* dixit) either
- While the expert must still relate the opinions to her training/experience, expert is not required to explain "precisely which portions of his or her background generated each individual conclusion."

Hearsay - Confrontation

State v. Keller, 2021 WI App 22

p 12 - COA J. Gundrum March 2021- Waukesha Co. J. Dreyfus

- Prosecution and trial for causing mental harm to a child. At issue: trial court's admission of statements made by confidential reporters to CPS access workers. Def asserts that right to confrontation violated by admission.
- COA: Right to Confrontation violated if trial court receives into evidence out-of-court statements by non-testifying declarant if those statements are testimonial, and no prior cross-examination. Testimonial turns on whether, in light of all circumstances, the declarant is acting as a witness against the defendant. Courts must consider whether the primary purpose of the statement was to gather evidence for prosecution or to substitute for testimony in a criminal prosecution. Factors include: formality, whether LE takes statement, age of declarant, context in which stmnt. given. COA reviews each factor – stmnts not testimonial – Conviction Affirmed.

Bail – Application of Bail Money to Pay Restitution

State v. Jones, 2021 WI App 15

p 14 - COA J. Hruz Feb. 2021 – Outagamie Co. J. McGinnis

- Five separate criminal cases, global plea agreement, three cases pled guilty & convicted, two cases dismissed and read-in.
- Issue: Court orders restitution on the read-in cases, defendant appeals, asserting Wis. Stat. § 969.03(5) requires any bond $ posted shall be returned once complaint against a Def is dismissed. State argues (non-textual) exception for read-ins, referencing the restitution statute ("crime considered at sentencing") in conjunction with reading of 969.03.
- COA: contrary to the complex interpretive interpretive efforts to reach the State's conclusion, Jones offers a straightforward and sensible interpretation of Wis. Stat. § 969.03(5), which we adopt. When all counts of a complaint are dismissed and read-in, the complaint is dismissed for purposes of 969.03(5).
- Note: COA: "State correctly observes that the restitution statute permits a court to order restitution on a dismissed/read-in count as part of a judgment for a crime of conviction. However, the statute does not dictate whether bond money should be applied."

Child Porn Surcharge-Non-Punitive Sanction-Read-in Offenses

State v. Schmidt, 2021 WI 65

p 15 – S.Ct. CJ. Ziegler June 2021 - Walworth Co J. Koss

- Multiple – 14 – cts. Possession Child Pornography. Plea agreement required a plea to 6 cts. Def sentenced to 30 yrs. WSP (15/15) and imposed $500 child pornography surcharge for each of 14 images for which the Def was charged.
- Motion to withdraw plea denied and appealed. COA bypassed.
- WISC: 1) Child pornography surcharge not a "punishment," and thus the court was not required to inform Def of it prior to accepting plea. Here, the intent-effects test used: is the function or the effect punitive? Here, purpose is to fund CP investigations – NO.
- WISC: 2) the surcharge could be imposed on the images forming the basis for read-in charges. Key language: Ct shall impose a $500 surcharge for each image or copy of each image associated with the crime. Determined by preponderance of evidence. Associated with the crime means the image is connected or brought into relation with the offense of possession of CP. Here, the read-in images were collected at same time, found on same devices, etc.

Sentencing - Religious Beliefs - 8th Am - *Gallion*

State v. Whitaker, 2021 WI App 17

p 17 – COA J. Blanchard Feb. 2021 - Vernon Co J. Rood ***Cert Granted**

- Repeated Sex Assault of Child(ren) case from when Def and victims were juveniles in Amish community. Def family and victims lived in Amish community at time of offenses. Trial Ct sentences Def to 4 yrs. WSP (2/2). Court repeatedly references need to encourage effective intervention by adults within the pertinent Amish community to protect girls from sexual assaults by family members. Court aimed to encourage elders to refrain from keeping the issue of child sexual assaults within the community instead of being addressed in the judicial system.
- Def appeals – violation of 1st and 14th Am rights by considering his religious beliefs and associations. Also, violation of 8th Am because of Def's young age at time of offense and his "zero risk" of re-offending.
- Court: Trial court identified a reliable nexus which the court could rely upon between the circumstances of the assaults and what the court assumes are constitutional rights infringed by the challenged sentencing rationale. Ct. relied on legitimate rationale of protecting Amish children by encouraging adults to intervene and prevent sex assaults. Also, no 8th Am violation as only fraction of max imposed, and *Gallion* satisfied.

Sentencing - Conditions of ES - Restrictions on Internet Use

State v. King, 2020 WI App 66

p 18 - COA J. Fitzpatrick Sept. 2020 - Sauk Co J. Klicko

- Convicted of use of computer to facilitate child sex crime (4in/4out) and child enticement (10 yrs probation CQ). Condition of ES: no use/access internet, but only for job applications with agent permission.
- King revoked for violating this rule. Released + revoked *again* for violating rule. Finished ES, while on probation, revoked *again* for same violations. Sentencing after revocation - 4in/4out with rule that he can't access the internet and there was *no* exception for work.
- King argued this violated right to free speech + association under *N. Carolina v. Packingham* (+to modify his sentence; denied). Rule modified to allow *some* internet access fully controlled by agent. Same challenge here.
- **Holding**: Internet restrictions are not unconstitutional as to both challenges. *Packingham* doesn't control b/c that defendant was not on active supervision. King doesn't have a blanket ban. The conditions aren't overbroad – gov't interest in protecting public from sex offenders, they're reasonably related to King's rehabilitation and are narrowly tailored.

Expungement-Violation of Probation Conditions Imposed by DOC

State v. Lickes, 2021 WI 60

p 20 – S.Ct. J. RG Bradley June 2021 – Green Co J. Beer

- Lickes put on probation following plea to 4 sex-related charges; expungement granted upon successful completion of probation. During probation, he entered into an ATR admitting that he: had sexual contact, gave agent false information, and was terminated from SOT; filed with court.
- At end, agent filed notice of successful completion of probation with court.
- Lickes argues that the statutory phrase "conditions of probation" only includes those imposed by the court, not DOC. After hearings and briefing, the trial court granted expunction, noting that DOC didn't think the violation was worthy of revocation.
- **Holding**: Expunction unlawful. Successful completion of probation under the expungement statute (973.015(1m)) requires compliance with conditions from the court *and* DOC. Also, the trial court has *no* discretion on whether probation has been satisfied. The court *only* has discretion as to whether to grant expunction at the time of sentencing.
- "Therefore, once an individual completes his term of probation, if it is undisputed that the individual violated at least one of his conditions of probation – as in this very case – circuit courts must deny expungement."

Malpractice Against Criminal Defense Atty - Actual Innocence

Jama v. Gonzalez, 2021 WI App 3

p 29 – COA J. Kloppenburg Dec. 2020 - Dane Co. J. Bailey-Rihn

Decision affirmed by an equally divided WI Supreme Court

- Jama charged with theft, 2 cts SA, 2 cts burglary. Hired an attorney and admitted to theft, but denied the felonies. Jury convicted on all counts.
- Counsel didn't meet with Jama until *after* both sides rested at trial, and didn't ask him details of case until preparing for sentencing. All convictions were vacated based on IAC; he plead to 2 misdemeanors. Sentenced to 9 mo T/S, but served 2.5 years + ordered to lifetime SOR.
- Jama alleged malpractice as to SA charges only; not all counts. Dismissed as not innocent of all charges. Jama appeals.
- OLD RULE: criminal malpractice plaintiff must also prove that s/he is innocent of the charges s/he was ultimately convicted of.
- Citing public policy reasons that have consistently been upheld in precedent, the Court **held** that Jama's "split innocence" situation falls within the actual innocence rule as the injurious charges (SAs) are the only ones that Jama raises in his complaint. Reversed.
- **ETHICS:** 20:1.1 Competence: competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for representation.

Observations

- SC Justices less divided on criminal cases, with new majority groups.
- The defense is still getting hammered.
- New SC guidance forthcoming on sentencing consideration (?). And, need for expungement reform is glaring.
- (And) As always for defense attys: Object Object Object (& move for mistrial).

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Thank You ☺