

Criminal Procedure in the 2015-16 Term of Wisconsin's Appellate Courts

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Discovery

Witness List – Sanction - Failure to Disclose *State v. Prieto, 2016 WI 15*

Pg 3. WI COA Dist. 2, Dec 2015. Kenosha Co. Judge Kerkman

- Issue: Did circuit court err when it excluded prosecution witnesses after state failed, and failed again, to provide witness list prior to trial?
- Great bodily harm to child charge – shaken baby – Discovery & w. list demanded, trial set, state ignores request, trial adjourned and state ordered to provide list in 20 days – ignored. Before 2nd trial, defense moves to exclude witnesses – granted. State acknowledges no good cause to ignore requests for witness list and two court orders but begs forgiveness – and argues list still provided 13 days before trial. Denied.
- Discovery Statute §971.23: state shall provide witness list within reasonable time before trial – court shall exclude any witness not listed unless good cause is shown. Court may also grant continuance.
- COA: Declines state's invitation to create exception to the discovery sanctions borne by the 'blameless public'. COA regrets, with trial court, that serious case will not be fully tried on the merits. However, it is the district attorney who ultimately determines the sanction available against it, and DA's office ignores the statute and court orders at its peril. Aff'd.

Evidence & Due Process - Pretrial Motion Hearings

State v. Zamzow, 2016 WI App 7

Pg 5. WI COA Dist. 2, Dec 2015. Fond du Lac Co. Judge Sharpe

- Issue: Did trial judge properly admit squad dash cam audio/video recording at suppression hearing when arresting officer (deceased) did not testify? OWI-3rd case.
- At suppression hearing, def. objects to dash cam's audio recording of officer stating that the suspect car crossed the center line on hearsay grounds, and 6th Am confrontation.
- Note Wis.Stat. §901.04(1): preliminary questions [including] the admissibility of evidence is determined by the judge, who is not bound by rules of evidence except for privilege. COA: Confrontation clause reflects a preference for face-to-face confrontation *at trial*. Def. retains right to challenge officer's statements at trial.
- Conviction affirmed. *Note: issue here was off's stmnts.*

Plea Negotiations - Breach

State v. Tourville, 2015 WI 5

Pg 5. WISC, J. AW Bradley, Mar 2016. Polk Co. Judge GaleWyrick

- Def. plead guilty to multiple felony cts. Deal: State will recommend top end of PSI – concurrent/consecutive not addressed in negotiations. At sentencing State asks for high end each count, CQ. Def. gets 11 yrs. Instead of 6.
- Defense: trial lawyer was ineffective, and state violated plea agreement by recommending CQ sentences.
- Ct: since agreement was silent on issue of CC/CQ, no breach of plea, and since there was no breach, counsel was not ineffective for not objecting.
- (BUT) was counsel's performance was not great, right?
- COA & conviction affirmed.

Plea Negotiations/Guilty Pleas

Immigration Warning Failure

State v. Valadez, 2016 WI 4

Pg 7. WISC , J. Abrahamson Jan 2016. Walworth Co. Judge Reddy

- Controlled Substance Charges. Defendant = LPR, pleads in 2004-5 in 2 cases, neither court failed to advise her of immigration consequences of plea. Circuit ct. denies motion to withdraw plea because def did not show she was in ongoing immigration proceedings for deportation, denial of naturalization, or exclusion of admission, (but, def's green card could not be renewed).
- SC: focus here, as opposed to prior Negrete/deportation case, is that def. has shown that she is likely to be denied admission. Govt: but she hasn't left the country and been denied admission yet. SC: Statute – Wis. Stat. §971.08(2) requires Def to demonstrate immigration consequence “likely”, not certain. Remand with order to vacate the pleas. Note: advocacy in opinion: she completed all sentence terms, etc.

Plea Negotiations/Pleas

Immigration Warning Failure

State v. Reyes Fuerte, 2016 WI App 78

Pg 8. COA Dist. 4, Nov 2014. Columbia Co. Judge White

- Fleeing/OWI. Def enters pleas, seeks to withdraw under Douangmala, citing judge's failure to properly advise re: immigration consequences and likely deportation. Judge addressed "non-resident" status, not non-citizen, and failed to mention denial of naturalization.
- State: Judge largely complied with statutory warnings, and def knew consequences due to plea waiver form. Circuit court agrees and denies motion without evidentiary hg.
- COA: First, harmless error analysis due to Def's knowledge is not proper analysis (note: State goes after Duoangmala holding in COA brief). Next, Judge did not comply with statute and the deviance from it was not non-substantive (per Mursal case). And lastly, Def has plead sufficient facts on causal nexus between plea and immigration consequence to warrant an evidentiary hearing because cancellation of removal defense is unavailable to Def because of fleeing plea and conviction. Case remanded for evidentiary hearing.

Juror Bias – Ineffective Assistance of Counsel

State v. Tobatto, 2016 WI App 28

Pg 12. COA Dist. 2, Mar 2016. Milwaukee Co. Judge Grady

- DV Ct. - Violation Restraining Order trial. At voir dire, juror 10 admits was victim of stalking, says doesn't know if she can be 100% objective. Defense does not move for cause nor strike peremptory. At Machner hg. Counsel said he thought juror 10 would be good juror - attentive, etc. Trial Ct: juror was telling us about bias, and counsel had duty to act and failed – ineffective.
- COA: IAC Test = deficient performance and prejudice. Not demonstrated here because juror 10 not shown to be subjectively biased (actual bias). Post-conviction judge did not sit at trial so did not see juror's demeanor, juror said she could follow instructions at other points, and complete unequivocation on issues not required. Also, counsel's strategy explanations sound, with limited peremptory strikes.

Trials- Specialized Knowledge - Daubert – Reliable Methodology

State v. Chitwood, 2016 WI App 36

Pg 14. COA Dist. 2, Apr 2016. Washington Co. Judge Muehlbauer

- Operating MV under influence of drugs trial. State offered testimony of Drug Recognition Expert. Defense counsel objects: DRE officer's opinion unreliable because officer unable to complete all 12 steps of protocol due to def's injuries.
- Parties and COA agree that officer's opinion testimony based on specialized knowledge due to officer's additional DRE training.
- COA: Proponents of opinion testimony must demonstrate by preponderance of evidence that opinions are reliable. COA references many studies showing accurate results from application of standard DRE protocol. Additionally, lack of full 12 steps applied insufficient to render opinion inadmissible – better to challenge through cross-examination.

Sentencing

Enhanced Misdemeanors – 75% time cut

State v. Anderson, 2015 WI App 92

Pg 16. COA Dist. 4, Nov 2015. Monroe Co. Judge Goodman

- 2 misdemeanor convictions, each with enhancer under Wis. Stat. §939.62. Def sentenced to WSP 1/1 & 1/1 cc. Moves for 75% time cut under Wis. Stat. § 973.195. Trial Court: No – only for felonies.
- COA: 75% time cut applies to enhanced misdemeanors. Good and lengthy discussion of resolving statutory ambiguities.

Sentencing – Risk Assessment Tools

State v. Loomis, 2016 WI 68

Pg 17. WISC, July 2016. La Crosse Co. Judge Horne

- Fleeing/OMVWOC pleas. DOC's PSI includes COMPAS analysis, a private-developed risk-need assessment tool used by DOC to provide decisional support for managing offenders, making placement decisions, and planning treatment. Three bar charts: pretrial, general, and violent recidivism. Def high on all three. Court maxes Def – 17 yrs 6 mos. Def appeals: use of COMPAS violated Due Process rights.
- SC: COMPAS may be used for limited purposes: diverting low-risk offenders to non-prison alternative, assessing whether offender can be supervised in community safely, and imposing supervision terms; not to be used to decide whether to incarcerate, or length.
- USSC petition pending.

Sentencing – Considering Expunged Conv.

State v. Allen, 2015 WI App 96

Pg. 20 – COA Dist. 1, Nov. 2015; MKE Co; J. Wagner

- Homicide Intoxicated Use MV conviction. At sentencing, Ct. mentions that PSI notes prior conviction and supervision term, and that Def should have learned from being on supervision to stay out of the system. Jumps plea by one year incarceration. Def appeals.- erroneous discretion.
- COA: according to WISC Leitner case, court may only consider “facts” of underlying conviction, not “records.” Here, trial ct. used the fact of prior supervision to elucidate Def’s character, and failure to learn consequences from breaking law. Expunged offenses still cannot be used to enhance sentence, impeach witnesses, etc.
- WISC petition granted.

Sentencing – Considering Immigration Status

State v. Salas Gayton, 2016 WI 58

Pg. 22 – WISC J. Prosser; Milwaukee Co.; Judge Cimpl

- Homicide Intoxicated Driving wrong way on freeway. Def = undocumented immigrant. At sentencing, victim's family and friends speak and reference Def's illegal status. Def counsel defends, ct. interrupts and says it goes to Def's character. Ct. references Def's being an "illegal alien", being "here illegally", and being an "illegal". Gives 22 yrs WSP. Def appeals – Ct's remarks thinly veiled substitute for sentencing based on national origin – due process violation.
- SC: Trial Ct. placed much emphasis on perils of OWI and Def's alcoholism, and only referenced illegal status in terms of character, and as a minor factor. Disregard for the law in this sense is appropriate consideration and also relevant to operating without license causing death, a charge here.

Probation Revocation – Compelled Statements

State ex rel. Douglas v. Hayes

Pg 25 – COA Dist. 2; Kenosha Co. J. Bastionelli

- Def on supervision. Suspected of new criminal activity. Refuses to give statement to PO despite being told failure to do so is a violation, and that none of this information could be used against him in criminal proceedings. At hearing, ALJ revokes solely on refusal to give statement violation. Trial Ct. denies writ and affirms. Certiorari review by COA.
- Question is whether agent gave Def sufficient explanation of both use and derivative use immunity. If explanation sufficient, then revocation appropriate, if not, then revocation must be reversed. Use immunity = no direct use of the statement in criminal proceedings. Derivative use immunity = no use of any evidence subsequently discovered by either direct or indirect use of the provided information. Def: here, I was only informed about use immunity, but I was also afforded derivative use immunity. State: agent need not provide all details of immunity provided. COA: the difference in immunities is significant, and the fact that derivative use immunity is available but not told to Def is not omission of a “detail”, it is omission of notice of a much broader immunity. As such not sufficient explanation. Revocation reversed.

Sexually Violent Persons Law

EAS: Failure to advise about possibility of 980 commit

State v. LeMere, 2016 WI 41

Pg. 30 – WISC J. Prosser; Eau Claire Co.; Judge Bourget

- 1st degree SA/child conviction. Very bad facts. 45 yrs. WSP sentence: 30 II & 15 ES. On appeal, Def claims counsel did not warn re: ch. 980 and that he would not have plead if he was so advised. Trial Ct: no deficient performance – COA affirms. Def argues Padilla case IAC issue for counsel's failure to warn client re: immigration consequences of plea.
- SC: there are direct and collateral consequences of a plea, and IAC requires counsel on direct consequences. Padilla ruling treated deportation as neither direct or collateral, but as "unique" and requiring counsel. That was a break from previous distinction and Def here seeks to extend that distinction. However here, ch. 980 is a classic collateral consequence and 6th Am does not require counsel to advise.

Observations

- SC Justices divided on criminal cases, with J. AW Bradley & J. Abrahamson writing dissents with markedly different results in criminal law jurisprudence.
- Continuation of a somewhat heightened scrutiny of IAC of prosecuting attys(?)
- Trend toward IAC claims continues - As always for defense attys: Object Object Object (& move for mistrial).



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