

Criminal Procedure in the 2014-15 Term of Wisconsin's Appellate Courts

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Criminal Complaints

Delayed Child Sexual Assault Report

State v. Kempainen, 2015 WI 32

Pg 1. WISC, J. Gableman March 2015. Sheboygan Co. Judge Bourke

- Issue: Due process violated by 2012 complaint charging child SA from 8/97-12/97 and 3/01-6/01?
- Def: charges too vague, can't prepare defense.
- Trial Court: Due process violated.
- SC: More flexible notice in pleading allowed in child SA cases due to difficulty in detection and time not of essence so it is not as relevant.
- Relevant Factors: victim age; circumstances; offense nature; offense period length; time since arrest/charging; victim ability to particularize. Little regard for alibi issues.
- No due process violation. Conviction affirmed.

Preliminary Hearings Hearsay

State v. Hull, 2015 WI App 46

Pg 3. Dist. 3, May 2015. Brown Co. Judge Kelley

- Issue: 2011 law allowing hearsay at PX ex post facto? Child SA occurred (at taxidermy convention) before law change, but charged after law change. PX conducted with hearsay. Def challenges.
- Note: 2014 SC decision upholding admissibility of hearsay at PX, no confrontation violation, compulsory process, assistance of counsel, and due process
- COA: No ex post facto violation. PX not constitutional right and purpose is not to convict offender. This is evidentiary change only.
- Conviction affirmed. (note: CM rant)

Substitution of Judge Judge Lacks Authority to Preside

State v. Harrison, 2015 WI 5

Pg 4. WISC, J. Abrahamson, Jan 2015. Clark Co. Judge Counsell

- Burglary charge. SOJ timely filed in 1-judge Clark County. Apparently ignored by all parties except def.
- Original judge presides over jury trial and sentencing.
- Defendant raises objection, attorney does not (?)
- Defendant convicted and sentenced. On appeal, State claims defendant waived right.
- SC: only method for waiving SOJ – in writing per statute. Right not waived, and error not harmless.
- Conviction reversed.

Plea Negotiations/Guilty Pleas

Mutual Misunderstanding of Plea Agreement

State v. Fortes, 2015 WI App 25

Pg 6. Dist. 1, Feb 2015. Milwaukee Co. Judge Wagner

- Burglary/Agg Battery Charges. Defense thinks offer is no recommendation; State recommends prison. Def objects at sentencing. Mutual misunderstanding established, sentencing proceeds, sentence consistent with State's recommendation.
- COA: No breach of plea agreement. Mutual misunderstanding ≠ plea agreement, and defendant waived right to enforce when he elected to proceed with sentencing.
- Note: plea form.

Criminal Trials

Voir Dire – Jurors’ Promises

State v. Zdzieblowski, 2014 WI App 130

Pg 12. Dist. 4, Nov 2014. Portage Co. Judge Flugaur

- OWI-6th Trial. Defendant is 73, BAC .035 (.02 limit)
- Voir Dire: DA asks for jurors to promise to decide case on law; no objection. At closing, DA reminds jurors of their promises.
- Defense: DA’s promise strategy precluded nullification from onset, interfering with trial by jury
- COA: Promise strategy not plain error, and controversy fully tried. And, if error, harmless. (but not recommended)

Criminal Trials

Evidence – Third Party Defense

State v. Wilson, 2015 WI 48

Pg 13. WISC, May 2015. Milwaukee Co. Judge Manian

- 1993 Homicide. Defense attempts to present Denny evidence. Trial Court rules inadmissible. Lengthy appeal process ensues; new trial ordered.
- SC: Test = Denny elements for 3rd party: motive; opportunity; connection. Test not met here. Opportunity not established – need to show realistic ability to commit crime.
- Conviction reinstated. Petition to US Supreme Court filed.

Sentencing Sentence Credit

State v. Kitt, 2015 WI App 9

Pg 15. Dist. 2, Dec 2014. Racine Co. Judge Torhorst

- Drug conviction. Defendant requests custody credit in post-conviction motion with jail booking sheet. Judge leaves it up to clerk to calculate. Clerk grants partial credit
- COA: Duty to determine sentence credit belongs to court not clerk.

Sentencing DNA Surcharge

State v. Radaj, 2015 WI App 50

Pg 18. Dist. 4, May 2015. Lafayette Co. Judge Beer

- 4 felonies committed *before* change in law requiring DNA surcharge for each count. Def. sentenced *after* change in law. He asserts ex post facto violation.
- COA Issue: Is law change punitive or regulatory? If punitive, ex post facto.
- As applied here, with charge for each count, law has punitive effect and is an ex post facto violation.

Sentencing Judicial Bias

State v. Herrmann, 2015 WI 84

Pg 20. WISC, July 2015. La Crosse Co. Judge Gonzalez

- OWI Homicide Conviction. At sentencing, Judge discloses losing sister to drunk driver. Def. says no problem continuing. Judge in sentencing remarks: “Pain doesn’t disappear.”
- SC: impartiality presumed. Test for bias = objective test / appearance of bias. Here, defendant fails to rebut presumed impartiality – Judge’s comments viewed as part of overall hearing and do not reveal risk of actual bias.

Expungement

State v. Hemp, 2014 WI 129

Pg. 26 – WISC, J. Gableman, Dec. 2014; MKE Co; J. Jean DiMotto

- Expunction granted at sentencing with successful completion of probation. Def. applied for expunction 1 year after probation complete, when had new charges.
- Trial Ct: deny expunction; def had to timely apply
- COA: affirmed; def. had to forward certificate to court, and one year after discharge was tardy
- SC: Successful completion of probation was automatic entitlement to expunction. No time limit in statute.
 - DOC (not def.) has duty to forward certificate of successful completion to court
 - Trial Ct improperly reversed expunction decision granted at sentencing

Expungement

Kenosha Co v. Frett, 2014 WI App 127

Pg. 27 – Dist. 2, Nov. 2014; Kenosha County; Judge Wilk

- Wis. Stat. § 973.015 doesn't authorize expunction for ordinance violations (underage drinking ticket amended to littering violation).
- Court: expunction statute references violations with imprisonment/probation as penalties. It's clear.
- Note: Although this differs from *Melody PM* (that § applies to forfeitures) that case was unpublished so it's not binding.
- Petition for Review Denied.

John Doe Proceedings

Investigations – Campaign Finance

State ex rel. Two Unnamed Petitioners v. Peterson

State ex rel. Three Unnamed Petitioners v. Peterson

State ex rel. Schmitz v. Peterson, 2015 WI 85

Pg 27 - WISC. J. Gableman/Prosser/Roggensack/Ziegler

- Issue (per majority): “...whether evidence gathered in John Doe proceedings provides reasonable belief that WI’s campaign finance law [Wis.Stat. § 11.01] was violated by a campaign committee’s coordination with independent advocacy organizations.” (But) Question: How is advocacy organization *independent* if it *coordinates* with campaign?
- key distinction: express advocacy vs. issue advocacy
- majority: coordination between campaigns and issue advocacy groups is legal for purpose of issue advocacy. To extent that WI campaign finance law forbids this, it is unconstitutionally overbroad and vague. Since special prosecutor has not alleged any express advocacy, and because issue advocacy, whether coordinated or not, is (lawful), we invalidate the special prosecutor’s theory of the case.

Changes to John Doe Statute:

- Prior law: John Doe could be used to investigate any crime. New law: John Doe only to investigate class A, B, C, or D felony in chs. 940 to 948, Stats., specified class E, F, G, H, or I felonies, felony murder, racketeering if underlying activity is one of above-listed crimes, any crime committed by on-duty L.E. officer, C.O., or DOC officer. This list excludes: bribery of public officials, using elected office for personal gain, or corruptly influencing legislation. Also ID theft, mortgage fraud, dealing small amounts of cocaine/heroin, and white-collar theft.
- No reserve judges may preside, and only a judge not presiding over proceeding may issue search warrant.
- Secrecy order only upon good cause showing, and secrecy only applies to judge, prosecutor, LE officers - no other person.
- Only 6 month term, unless approved unless extension.
- Scope of investigation limited to original complaint.
- Records re: cost of Doe investigation = open records

Observations

- SC Justices still not chummy. At all. And, the middle is gone (RIP J. Crooks)
- Public perception of partisan, outcome-driven decisions as strong as ever.
- New, previously unseen, aggression towards prosecutors at SC (but not likely to carry over for work-a-day prosecutors).
- As always: Object Object Object (& move for mistrial)



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Thank You