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Protecting justice for all

The Wisconsin Defender

Inside This Issue:

Focus on OWI and OAR Cases

- New vehicle sanctions for OWI offenders
- Challenging prior OWI convictions
- Victim impact panels and their effect on drunk driving recidivism rates
- Treatment available in prison for the felony OWI offender
- Overview of recent OAR penalty changes

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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.

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From the Editor...

It seems lately that I've heard from an increasing number of attorneys who want information about traffic laws, particularly the laws related to drunk driving. Not only are the drunk driving penalties complex, with variations in the penalties dependant upon the offender's number of prior convictions, his or her blood/alcohol level, and even whether there were minor passengers in the vehicle at the time of the offense, but they seem to frequently change.

In this issue of the *Wisconsin Defender*, we hope to help you get your hands around the OWI laws a little better. This issue leads off with an in-depth article about federal vehicle sanctions for OWI offenders that went into effect on September 30, 2001, as well as new penalties under state law that went into effect on January 1, 2002. Also, this issue provides tips on challenging prior OWI convictions in light of the Wisconsin Supreme Court's decision in *State v. Hahn*.

This issue contains other useful information about OWI offenses, such as the effectiveness of victim impact panels in reducing recidivism rates and the treatment program available in prison for felony OWI offenders.

Finally, this issue includes an overview of changes made to OAR laws, including a reminder that effective May 1, 2002, OAR-1st offense becomes a *criminal* violation.

I'd like to thank all of the authors who took time out of their busy schedules to share with you their expertise in traffic law. A special thanks goes to John Sobotik, Assistant General Counsel at the Wisconsin Department of Transportation, for the invaluable assistance he provided in preparing this issue.

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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NEW DRUNK DRIVING PROVISIONS ALREADY IN EFFECT

By: John Sobotik*

2001 Wis. Act 16, this year's state budget, included numerous changes to Wisconsin's drunk driving law that are designed to avoid federal control over the manner in which federal highway monies may be spent. Buried in section 1406 of the Internal Revenue Service Restructuring and Reform Act of 1998, was a provision of federal law that provides states an "incentive" to adopt a federally approved OWI vehicle sanction program.

A primary feature of the new budget provisions is that they create a "federal repeat offender" category of drunk driver. Persons who accumulate 2 or more "OWI convictions" (countable offenses under s. 343.307(1), Stats.) in any 5-year period are subject to the new federal requirements as of September 30, 2001.

Drivers who fall into this category are ineligible for an occupational license for 1 year after conviction. s. 343.30(1q)(b)3. and 4., 343.305(10)(b)3. and 4., Stats., as amended by 2001 Wis. Act 16. In addition, ***every*** vehicle on which the driver's name appears as an owner or lessee in the department's vehicle title records is subject to a vehicle sanction such as seizure, immobilization or installation of an ignition interlock device. ss. 346.65(6)(a)1., 343.301, Stats., as amended by 2001 Wis. Act 16. If the vehicle is owned by the offender and operated at the time of arrest, it may be seized (same as current law). Otherwise, the vehicle must be immobilized or equipped with an ignition interlock device.

The rules concerning installation of ignition interlocks change substantially for a driver who is subject to the federal mandate. Federal law requires ignition interlocks be installed only after the one-year "hard suspension" is served by the driver. As a result, a driver arrested in December, 2001, for 2nd offense OWI and who has 2 offenses within a 5-year period will face a 12-18 month revocation, will be ineligible for an occupational license for a 1-year period and, if required to install an ignition interlock device as a vehicle sanction, will need to install the device in December, 2002. Drivers who commit offenses on or after January 1, 2002, will face the additional sanction of an IID driver license restriction.

There are "hardship exemptions" available from each of the three sanctions that apply to drivers who committed two offenses in a 5-year period. The standard for exemption varies between the three sanctions. A vehicle is exempt from seizure if "seizure would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person." s. 346.65(2g)(d), Stats., as amended by 2001 Wis. Act 16, s. 3443c. A vehicle may be exempt from the ignition interlock requirement if equipping each of the defendant's motor vehicles with an ignition interlock device would cause an "undue financial hardship." s. 343.301(1)(a), Stats., as created by 2001 Wis. Act 16 s. 3417m. Finally, a vehicle may be exempt from immobilization if immobilizing each of the defendant's motor vehicles "would cause undue hardship to any person, except the person to whom the order applies, who is completely dependent on a motor vehicle subject to immobilization for the necessities of life, including a family member or any person who holds legal title to a motor vehicle with the person to whom the order applies." s. 343.301(2)(a) as created by 2001 Wis. Act 16, s. 3417m. Apparently, economic hardship of the defendant provides grounds for an exemption from the ignition interlock

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requirement but not from immobilization. Conversely, economic hardship of the family, but not the defendant, provides grounds for an exemption from immobilization.

One aspect of the budget provisions that have received a fair amount of notice in defense circles is the community service provision in newly created s. 346.65 (2g) (d). It provides that if a court permits the substitution of community service for jail time under s. 973.03, Stats., that a second offender serve not less than 30 days of community service, rather than the minimum 15 days that would otherwise apply under ss. 973.03 and 346.65(2)(b), Stats. At the time the legislation was being drafted, *State v. Shipler*, 630 N.W.2d 275, 2001 Wis. App. LEXIS 493 (Ct. App. 2001) (available at http://www.courts.state.wi.us/html/ca/00/00-1738.htm), was slated for publication (The court of appeals later decided not to publish the case.) The National Highway and Traffic Safety Administration required Wisconsin to clarify that if s. 973.03, Stats., community service is imposed, that no less than 30 days of community service is required. Given the fact that *Shipler* would have made it clear that community service and electronic monitoring are potentially available for courts to use in sentencing OWI defendants, the legislature acquiesced to NHTSA's demands.

[NOTE: Although *Shipler* was not ultimately published, it is still persuasive on the issue of availability of community service in OWI cases. Section 346.65(2g) contains various provisions that allow courts to require community service in lieu of all or part of a fine. Nothing in those provisions prohibits a court from ordering community service for all or part of a jail sentence under s. 973.03, Stats. Of all "OWI-type" offenses, only homicide and great bodily harm by intoxicated use offenses (ss. 940.25 and 940.09, Stats.) are offenses for which s. 973.03(3)(e) prohibits substitution of community service for jail time. Finally, s. 973.03(3)(d) specifically makes inmates in Huber centers eligible for the community service substitution option. Thus, it appears that community service is technically available in OWI cases, although prosecutors and judges may be reluctant to use it. This author's impression is that research on OWI offender patterns support the idea that imprisonment and treatment in combination are needed to effectively prevent recidivism. Keep in mind, however, that even if community service is used, s. 346.65(7), Stats., appears to require 48 hours consecutive hours "in the county jail" for persons convicted of 2nd and subsequent offense OWI.]

Of course, while the budget adds new federal sanctions to Wisconsin's already complex OWI penalty scheme, it did not change the sanctions available under state law. Thus, while a new counting scheme was introduced to determine the applicability of federal sanctions, for purposes of criminal sentencing, the law remains the same. To determine the number of prior offenses a defendant has for criminal sentencing purposes, follow the same steps that have been in effect for the past year:

1. Total all OWI-type offenses that are described in s. 343.307(1), Stats., committed since January 1, 1989, plus all homicide (s. 940.09) or great bodily harm (s. 940.25) convictions occurring at any time.
2. If the total is 2 or more, all the convictions count as prior convictions.
3. If the total is 1, and the prior offense occurred less than 10 years before the current offense, or was a ss. 940.09 or 940.25 violation, the current offense is a second offense.
4. If the total is 1, the prior offense occurred more than 10 years ago and was not for a ss. 940.09 or 940.25 violation, the current offense is a first offense.

So why did Wisconsin adopt these changes in state law? Section 1406 of the Internal Revenue Service Restructuring and Reform Act of 1998, amended 23 U.S.C. §164 which deals with

funding for state DOTs. It now provides that federal highway safety related monies (for things such as guardrails, railroad crossing improvements, driver education, drunk driving prevention) can be spent on non-safety related highway matters (such as bridges and structures), if a state adopts a law conforming to federal requirements. The federal requirement calls for states to impose sanctions against the vehicles of "repeat OWI offenders." 23 U.S.C. §164(a)(5), 23 CFR §1275.4. The sanctions required are vehicle seizure, immobilization, ignition interlock installation, or registration suspension. Wisconsin's legislature decided to adopt a conforming law, but not to use suspension of registration (license plates) as a sanction.

Of course, Wisconsin, through years of experimentation with vehicle sanctions, had already concluded that imposing IID sanctions on vehicles instead of drivers was a losing proposition. Drivers can sell the cars that are to be subject to sanction, title them in the name of a corporation, trust, spouse or friend, or find countless other ways to avoid the imposition of vehicle-specific sanctions. Imposing an IID requirement on a specific vehicle, for example, allows a driver to comply with the law without installing an IID in the vehicle by simply driving a different vehicle than the one identified in the IID order.

Thus, less than a year before the budget was adopted, in 1999 Wis. Act 109, the Wisconsin legislature moved away from vehicle specific sanctions and toward driver-specific IID sanctions. Under 1999 Wis. Act 109, IID requirements result in restriction of the driver's operating privilege so that an IID is required on any vehicle the person drives. The Act 16 budget provisions complicate matters by requiring vehicle specific IID sanctions on top of the driver-focused sanctions created in 1999 Wis. Act 109 if the driver qualifies as a "repeater" under the federal "2 in 5 years" standard.

The effective date of September 30, 2001, for Act 16 OWI sanction provisions, and the effective date of January 1, 2002, for Act 109 OWI sanction provisions will make matters interesting for a while. Defendants arrested before September 30 are not subject to either set of sanctions, but rather, are subject only to the pre-existing law. Drivers arrested between September 30 and the end of this year are subject to federal sanctions, but not the new Act 109 requirements. Drivers arrested after the New Year are subject to both the federal sanctions and new Act 109 requirements.

Charts outlining the various vehicle sanctions have been prepared by the Division of Motor Vehicles and appear on the following pages.

To summarize:

- As of September 30, 2001, federal sanctions began applying to drivers who committed 2 or more OWI offenses in any 5-year period. 2001 Wis. Act 16.

- As of January 1, 2002, new state IID and immobilization laws become effective. 1999 Wis. Act 109, as amended by 2001 Wis. Act 16.

- All vehicles of an offender with 2 convictions in a 5-year period are subject to one of three sanctions: immobilization, seizure, or IID installation.

- IID installation occurs one year after conviction for an offender with 2 convictions in a 5-year period.

- Offenders with 2 convictions in a 5-year period are ineligible for occupational licenses for one year after conviction.

- Hardship exemptions for all three federally required sanctions exist, but the standard for obtaining a hardship exemption is different for each sanction. ■

VEHICLE SANCTIONS CHARTS

Immobilization

For violations committed before September 30, 2001 resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st and 2nd	None		
3rd or subsequent (3 or more in lifetime)	Court shall order a vehicle owned by the person immobilized if vehicle used in offense wasn't ordered seized or if a vehicle owned by the offender wasn't ordered equipped with an IID.	Not more than the period the offender's operating privilege was revoked. ***Note: The time-period starts on the date of revocation for the offense and is based on the actual ordered period of revocation vs. the maximum revocation period for the offense.***	343.305(10m) 346.65(6)(a)1. 346.65(6)(m)
Hardship exception: "The court may not order a vehicle... immobilized if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person."			346.65(6)(a)1.

Immobilization

For violations committed September 30, 2001 - December 31, 2001 resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st	None		
2nd (2 within 10 years or 1st offense was NHI or GBH OWI - but none within 5 years of another)	None		
3rd or subsequent (3 or more in lifetime - but none within 5 years of another)	Court shall order a vehicle owned by the person immobilized if vehicle used in offense wasn't ordered seized or if a vehicle owned by the offender wasn't ordered equipped with an IID.	Not more than the period the offender's operating privilege was revoked. ***Note: The time-period starts on the date of revocation for the offense and is based on the actual ordered period of revocation vs. the maximum revocation period for the offense.***	343.305(10m) 346.65(6)(a)1. 346.65(6)(m)
Hardship exception: "The court may not order a vehicle... immobilized if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person."			346.65(6)(a)1.
2nd or subsequent (2 offenses within any 5-year period.)	All vehicles for which the offender's name appears on the title or registration shall be immobilized unless they were ordered equipped with IID or ordered seized.	Not less than 1 year nor more than the maximum revocation period for the offense. ***The time-period starts on the date of revocation for the offense.***	343.301(2)(b) 343.305(10m)
Hardship Exception: If immobilizing each motor vehicle would cause undue hardship to any person, except the person to whom the order applies, who is completely dependent on a motor vehicle subject to immobilization for the necessities of life, including a family member or any person who holds legal title to a motor vehicle with the person to whom the order applies, the court may order that one or more motor vehicles not be immobilized.			343.301(2)(a)

Immobilization

For violations committed January 1, 2002 and after resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st Offender	None		
2nd or subsequent (2 within 10 years or 1st offense was NHI or GBH OWI, but none within 5 years of another)	Court may order immobilization of the vehicle owned by the offender and used in the offense.	Not less than 1 year nor more than the maximum revocation period for the offense. ***The time-period starts on the date of revocation for the offense.***	343.301(2)(a)1. 343.305(10m)(a)
2nd or subsequent offender - 2 offenses within any 5-year period.	All vehicles for which the offender's name appears on the title or registration shall be immobilized unless they were ordered equipped with IID or ordered seized.	Not less than 1 year nor more than the maximum revocation period for the offense. ***The time-period starts on the date of revocation for the offense.***	343.301(2)(a)2. 343.305(10m)(b)
Hardship Exception: If immobilizing each motor vehicle would cause undue hardship to any person, except the person to whom the order applies, who is completely dependent on a motor vehicle subject to immobilization for the necessities of life, including a family member or any person who holds legal title to a motor vehicle with the person to whom the order applies, the court may order that one or more motor vehicles not be immobilized.			343.301(2)(a)2.

Ignition Interlock Devices (IID)

For violations committed before September 30, 2001 resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st or 2nd	None**		
3rd or subsequent (3 or more in lifetime)	IID restriction for Class D operation on occupational license if the court ordered a vehicle owned by the offender equipped with an IID.	Duration of occupational license	343.10(5)(a)3.
	Court shall order IID on the vehicle owned by the person and used in the offense if the vehicle used in the offense wasn't ordered seized and if a vehicle owned by the offender wasn't ordered immobilized.	Not more than 2 years more than the period the offender's operating privilege was revoked. (this language will be repealed 1/1/02) ***Note: The time-period starts on the date of revocation for the offense and is based on the actual ordered period of revocation vs. the maximum revocation period for the offense.***	346.65(6)(a)1. 346.65(6)(m) 343.305(10m)
Hardship exception: "The court may not order a vehicle... equipped with an IID... if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person."			346.65(6)(a)1.

Ignition Interlock Devices (IID)

For violations committed September 30, 2001 - December 31, 2001 resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st	None**		
2nd (2 within 10 years or 1st offense was NHI or GBH OWI - but none within 5 years of another)	None**		
3rd or subsequent (3 or more in lifetime but none within 5 years of another)	IID restriction for Class D operation on occupational license if the court ordered a vehicle owned by the offender equipped with an IID.	Duration of occupational license	343.10(5)(a)3.
	Court shall order IID on the vehicle owned by the person and used in the offense if the vehicle used in the offense wasn't ordered seized and if a vehicle owned by the offender wasn't ordered immobilized.	Not more than 2 years more than the period the offender's operating privilege was revoked. (this language will be repealed 1/1/02) ***Note: The time-period starts on the date of revocation for the offense and is based on the actual ordered period of revocation vs. the maximum revocation period for the offense.***	346.65(6)(a)1. 346.65(6)(m) 343.305(10m)
Hardship exception: "The court may not order a vehicle... equipped with an IID... if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person."			346.65(6)(a)1.
2nd or subsequent (2 offenses within any 5-year period.)	IID restriction for Class D operation on occupational license if the court ordered each vehicle owned by the offender equipped with an IID.	Duration of occupational license.	343.10(5)(a)3.
	Operation of Class D vehicles is restricted to vehicles equipped with an IID. All vehicles for which the offenders name appears on the title or registration shall be equipped with IID unless they were ordered immobilized or ordered seized.	Not less than 1 year nor more than the maximum revocation period for the offense. ***The time-period starts 1 year from the date of revocation for the offense.***	343.301(1)(a) 343.301(1)(b) 343.305(10m)
Hardship Exception: If equipping each motor vehicle with an IID would cause an undue financial hardship, the court may order that one or more motor vehicles subject to the IID requirement not be equipped with an IID.			343.301(1)(a)

***** DMV will place the restriction on the occupational license privilege whenever the court orders it. See Trans 117.03(5)(a)2.***

Ignition Interlock Devices (IID)

For violations committed January 1, 2002 and after resulting in a conviction

Offender Status	Sanction	Time Period	Wis. Statute
1st	None**		
2nd or subsequent - but none within 5 years of another	IID restriction for Class D operation on occupational license if the court ordered a vehicle owned by the offender equipped with an IID.	Duration of occupational license	343.10(5)(a)3.
	Court may order IID as restriction on Class D driving privilege.	Not less than 1 year nor more than the maximum revocation period for the offense.	343.301(1)(a)1. 343.301(1)(b)1. 343.305(10m)(a)
2nd or subsequent (2 offenses within any 5-year period.)	IID restriction for Class D operation on occupational license if the court ordered each vehicle owned by the offender equipped with an IID.	Duration of occupational license.	343.10(5)(a)3.
	Court may order IID as a restriction on Class D driving privilege.	Not less than 1 year nor more than the maximum revocation period for the offense.	343.301(1)(a)1.
	Operation of Class D vehicles is restricted to vehicles equipped with an IID. All vehicles for which the offenders name appears on the title or registration shall be equipped with IID unless they were ordered immobilized or ordered seized.	Not less than 1 year nor more than the maximum revocation period for the offense. ***The time-period starts 1 year from the date of revocation for the offense.***	343.301(1)(a)2. 343.301(1)(b)2.
Hardship Exception: If equipping each motor vehicle with an IID would cause an undue financial hardship, the court may order that one or more motor vehicles subject to the IID requirement not be equipped with an IID.			343.301(1)(a)2.

***** DMV will place the restriction on the occupational license privilege whenever the court orders it. See Trans 117.03(5)(a)2.***

Occupational License Eligibility

Effective September 30, 2001, OWI offenders with 2 or more offenses within any five-year period are not eligible for an occupational license until one year from the date of revocation for the offense. Current eligibility criteria apply to multiple offenders with offenses that are not within any five-year period. The Act 109 provisions that change on January 1, 2002, do not make any changes in the occupational licensing.

For violations committed before September 30, 2001 resulting in a conviction

Offender Status	Occupational License Eligibility*	Wis. Statute
1st OWI	Immediately	343.30(1q)(b)2., 343.31(3)(bm)2.
2nd OWI (2 within 10 years or 1st offense was NHI or GBH OWI)	60 days from the beginning date of revocation	343.30(1q)(b)3., 343.31(3)(bm)3.
3rd or subsequent OWI offense (3 or more in lifetime)	90 days from the beginning date of revocation	343.30(1q)(b)4., 343.31(3)(bm)4.
Any OWI offense causing injury (OII)	60 days from the beginning date of revocation	343.31(3m)(b)
All OWI great bodily harm (GBH) OWI homicide (NHI)	120 days from the beginning date of revocation	343.31(3m)(a)
1st Refusal	30 days from the beginning date of revocation	343.305(10)(b)2.
2nd Refusal	90 days from the beginning date of revocation	343.305(10)(b)3.
3rd & subsequent Refusal	120 days from the beginning date of revocation	343.305(10)(b)4.

For violations committed September 30, 2001 and after resulting in a conviction

Offender Status	Eligibility*	Wis. Statute
Same as above unless 2 or more OWI-type offenses occur within any 5 year period	One year from date of revocation	Same as above

***Note: Other driver record criteria may affect eligibility.**

Website of the Month

http://www.legis.state.wi.us/lc/publications.htm
http://www.legis.state.wi.us/lrb/pubs/index.html

This issue of the *Wisconsin Defender* features websites containing the various memoranda and reports on Wisconsin laws published by the Wisconsin Joint Legislative Council and the Wisconsin Legislative Reference Bureau.

The Joint Legislative Council, upon the request of legislators or by law, creates special committees to study a variety of issues which may later result in law changes. The Council is assisted by staff who provide legal counsel and policy research assistance to the legislature. The staff also prepare reports and memoranda on a variety of issues. Those reports and memoranda can be found at:

http://www.legis.state.wi.us/lc/publications.htm.

The Legislative Reference Bureau provides nonpartisan, professional, confidential bill drafting, research and library services to the legislature. The bureau collects and makes available a wide range of information to assist legislators and other government officials in the performance of their duties. The bureau prepares and publishes studies and reports on topics that are or may become a concern to the legislature. Those studies and reports can be found at:

http://www.legis.state.wi.us/lrb/pubs/index.html.

The reports, memoranda, and studies prepared by the Joint Legislative Council staff and the Legislative Reference Bureau provide a wealth of background information on Wisconsin laws and legislative proposals and also explain changes in the law in a concise, easy-to-understand manner.

NEWS BRIEFS

New Study Finds 3-Strikes Law is Overrated in California

The Sentencing Project, a nonprofit research group, has concluded that California's three-strikes law has had no significant effect on the state's decline in crime. In fact, California's crime rate had been declining for several years prior to the law's enactment in 1994. Marc Mauer, an author of the Sentencing Project's study, pointed out that what's been happening with the crime rate in California is consistent with what's been happening all over the country, including in states with no three-strikes laws. For example, New York, with no three-strikes law, saw a 41% drop in crime from 1993-1999---the same decline had in California for the same time period. Mauer states that the "real impact of the law is a tremendous distortion of crime-control resources. As the 25-year-to-life inmates stack up, California will be housing a disproportionate share of elderly inmates. We know that 50-year-olds commit far less crime than 25-year-olds, and every dollar going into housing a 50-year-old inmate is a dollar not going into dealing with a 16-year-old beginning to get into trouble."

Politicians Responding to Public's Concerns

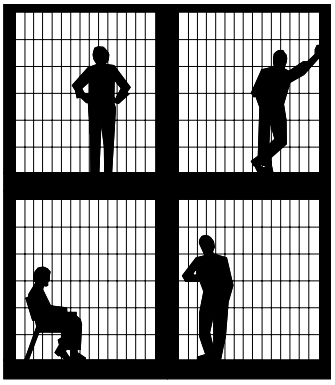
Criminal justice researchers have found that many states in the past year have reversed a 20-year trend toward increasingly tougher criminal laws. For example, Louisiana, Connecticut, Indiana, and North Dakota got rid of some 1990s laws that required offenders to serve long prison terms with no chance of parole. Iowa also passed a law giving judges discretion in imposing what had previously been a mandatory five-year prison term for low-level drug crimes and certain property crimes.

The Vera Institute of Justice in New York, a research organization, states that what has happened in these states implies a lot about a change in the political culture. The new laws reflect a political climate that has changed significantly as crime rates have dropped, prison costs have skyrocketed, and the economy has slowed down. With voters expressing more concern about education than street violence, legislatures around the country are finding ways to reduce the rise in prison populations in order to meet the demand for new services with limited budgets.

Settlement Reached in Milwaukee County Jail Case

After five years, a settlement has been reached in a class-action lawsuit pursued by the Legal Aid Society of Milwaukee. The lawsuit began in 1996 when the Circuit Court in Milwaukee County appointed Legal Aid to represent a Milwaukee county jail inmate in a *pro se* action alleging overcrowded jail conditions and inadequacies in medical and mental health services.

The settlement limits the number of inmates who can be housed in the jail to 1,100. The county board has adopted a plan to maintain this level by utilizing alternatives such as electronic bracelets, the in-house detention program, and the day reporting center. The settlement also provides for additional funds to be used toward medical care for inmates. Finally, the settlement includes the addition of a new program administrator, medical director, nurses, and support staff.



NEWS BRIEFS cont.

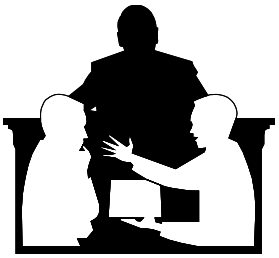
School Suspension Rates Don't Match School Crime Rates

During the 1997-98 school year, 6.8% of all students, or 1 in 15 students, were suspended from school as compared to 3.7% of students during the 1974-75 school year.

Does the higher rate of suspensions mean that students today misbehave more than students of the past? No. According to statistics from the Department of Justice, the percentage of students reporting they were injured with a weapon in 1999 is the same as it was in 1976. Moreover, kids today are less likely to commit homicides, get pregnant during their teen years, and take drugs or binge drink than kids during the late 1970s. Yet nearly two-thirds of Americans believe youth crime is on the rise.

What happens to those kids who are kicked out of school? According to the Centers for Disease Control, those kids are more likely to take drugs, have sex, and use weapons than the kids who remain in school. Kids who have been suspended are also three times more likely as non-suspended kids to drop out of school permanently, which means that their chance at successful earnings and employment in adulthood is negatively impacted.

PRACTICE POINTERS



The following practice pointer was submitted by Jean LaTour, Assistant State Public Defender in the SPD's Waukesha Office. Jean received her undergraduate and law degrees from the University of Wisconsin-Madison and has been an attorney with the Wisconsin SPD for over eight years.

Jean recently represented a client charged with an OWI-4th offense. The facts of the case are as follows: Jean's client had been out for the evening, drinking about 5 or 6 beers between 9:00 p.m. and midnight. Around 12:20 a.m., Jean's client drank a Long Island Iced Tea, which contained 5 shots of alcohol. After finishing the Long Island Iced Tea (around 1:00 a.m.), he left the bar and was pulled over at 1:10 a.m. The pbt, taken at around 1:20 a.m. during the stop, registered .14. The blood test, taken at 2:30 a.m., indicated a BAC of .265. The guidelines for the offense called for 10-12 months in jail.

In order to get a more accurate BAC at the time of driving, Jean provided one of the analysts at the State Hygiene Lab with the above information as well as the client's height and weight and a description of the food he ate for dinner the night of the incident. The analyst estimated the BAC at the time of driving to be at least a .17 or, if one assumed that one-third of the Long Island Iced Tea had been absorbed by the time of driving, a .21.

Jean persuaded the judge to give her client 2 years probation with 6 months conditional jail time (4 months, counting the jail credit) instead of the 10-12 months contained in the guidelines and also recommended by the prosecutor. Jean pointed out the wide discrepancy between the pbt and the blood draw and also provided the court with the conclusion reached by the analyst. Jean also argued that, in all likelihood, the Long Island Iced Tea probably hadn't been absorbed at all by the time of driving.

In OWI cases with a wide discrepancy between a pbt and formal test result, attorneys may consider doing what Jean did and use the wide discrepancy as a mitigating factor at sentencing. Your client may end up with less jail time as a result. ■

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 N. Henry St., 2nd Floor, Madison, WI 53703.

CHALLENGING PRIOR OPERATING UNDER THE INFLUENCE CONVICTIONS

By: Tracey A. Wood*

Prior to November 1, 2000, attorneys in Wisconsin were able to collaterally attack prior operating while under the influence (OWI) convictions if there were any true defects in the plea hearings of those prior convictions. See *State v. Foust*, 214 Wis. 2d 568, 570 N.W.2d 905 (Ct. App. 1997); *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992). In November of 2000, however, the Wisconsin Supreme Court changed the rules when it decided *State v. Hahn*, 238 Wis. 2d 889, 618 N.W.2d 528 (2000). With the *Hahn* decision, Wisconsin law now tracks federal law in severely limiting challenges to old convictions.

Our Supreme Court used the United States Supreme Court case of *United States v. Custis*, 511 U.S. 485 (1994) as its model in *Hahn*. *United States v. Custis* essentially held that a defendant may not collaterally attack prior convictions in a current federal prosecution unless the prior conviction involved a violation of the right to counsel.

A collateral attack of a prior conviction is not an appeal of that conviction; it is simply a mechanism for defense attorneys to use to prevent the prior conviction from enhancing the penalties the client faces in the current case. For example, if you, the defense attorney, are representing a person charged with fifth offense OWI (a felony), and you discover the client did not have an attorney or waive counsel in his fourth offense case, he should be sentenced as a fourth offense misdemeanant, as opposed to a fifth offense felon. The conviction for fourth offense OWI will remain on his record, but it cannot be used for sentencing purposes if it is properly challenged.

In practice, the first step an attorney should take when he or she starts representing an OWI client is to get a copy of the driving record. Then, the minutes, plea questionnaires and waiver of rights forms should be retrieved for all prior criminal drunk driving cases. (It was a criminal prior if the revocation of license was for one year or more on the OWI charge and if the client tells you he went to jail on a case.) If you see the client did not have an attorney in any of the prior offenses after reviewing the minutes and other documents, order the transcript of the plea and sentencing hearing. By reviewing that transcript, you will be able to determine if the client made a valid waiver of counsel in the prior case.

If counsel determines there was not a valid waiver of counsel, the prior may be attacked in a number of ways. A motion to dismiss the criminal complaint may be filed if the only prior conviction alleged in the complaint is a criminal uncounseled OWI. More commonly, counsel may file a motion to bar consideration of the questionable prior conviction for sentencing purposes. To meet the initial defense burden, counsel should attach an affidavit from counsel referring to the transcript or, in some cases, an

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***Tracey A. Wood** is a shareholder with the Madison criminal defense firm of Van Wagner & Wood, S.C. She is a past president of the Dane County Criminal Defense Lawyers Association, serves on the Board of Directors of the Wisconsin Association of Criminal Defense Lawyers, and is a member of the National Association of Criminal Defense Lawyers. She is also an active Wisconsin member of the National DUI College and has been certified to administer standardized field sobriety tests.

Tracey is known for her expertise in defending individuals accused of drunk driving and other federal and state crimes. She is often called upon both to mentor other attorneys, as well as to speak at defense seminars. Tracey's most famous trial win to date was in the Fort McCoy military vehicle federal theft case, which received national media coverage and even received a nod from Jay Leno on the *Tonight Show*.

VICTIM IMPACT PANEL (VIP) PROGRAMS

By Nina J. Emerson*

Victim impact panels reach out to the person within us who wishes to be treated well and to treat others well.

The Honorable Marianne Becker, Waukesha County Circuit Court[1]

Despite best intentions to crack down on drunk driving, the behavior of driving after drinking continues, notably, for obvious reasons. First, alcohol is a socially accepted part of our culture so people drink; and second, people are dependent upon their automobiles for transportation so people drive. Therefore, people drink and drive. It is a known fact. And a certain number of those people get arrested for drinking and driving or OWI (Operating While Intoxicated) as it is commonly referred to in Wisconsin. In 1999, the total number of adult arrests for OWI was almost 37,000.[2] That same year, just over 31,000 people were convicted of OWI, 35.45% of those were repeat offenders.[3] The numbers support the fact that people continue to drink and drive. While legislators consider implementing yet more "get tough" measures, victim impact panels can serve as a valuable countermeasure to disrupt the cycle of drinking and driving behavior.

The goal of this article is to answer the following questions: What is a victim impact panel? Where are they conducted in Wisconsin? Are they effective in reducing OWI recidivism? If, after reading this, you have other questions or would like more information, you may contact the author at the Resource Center on Impaired Driving at 1.800.862.1048 or in Madison at 265.3411.

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What is a Victim Impact Panel?

A victim impact panel is typically comprised of two or three people who have either lost a loved one or have personally suffered injuries as a result of a drunk driving crash.[4] The panel participants are there not to blame or judge offenders in the audience but to reach the audience on an emotional level by telling their real life stories. The idea behind victim impact panels is that by listening to the accounts of people directly affected by a drunk driving crash, offenders will realize the potential dangers and consequences of their behavior. The ultimate goal is to change the drinking and driving behavior of offenders, thereby reducing the recidivism rate among offenders.

[H]earing their stories makes you feel or think what they feel and I think this makes it real. . . I'll remember this for a long time.

Anonymous offender's response to a VIP presentation[5]

Victim impact panels are designed to take the offender out of an institutional framework based on conventional punitive measures and place them in a setting that will combat their attitudes on a personal level. Specifically, the panel presentations are intended to get past an offender's denial and anger so that person is more willing to take responsibility for his or her behavior. In this respect, victim impact panels provide an inexpensive alternative for changing the drinking and driving offender.

It's such a good thing because it brings out the impact of driving and drinking with real people, not just on a film or on a newspaper story.

John Rimetz, statewide coordinator of

See "VIP" on Page 19

OVERVIEW OF RECENT OWI AND OAR PENALTY CHANGES

By: Barry S. Cohen*

Penalties for most alcohol offenses can be found at the Wisconsin Department of Transportation's website at:

http://www.dot.state.wi.us/dtim/bts/pdf/alcohol-sec3.pdf.

To determine whether a particular OWI offense should be charged as a 1st offense or a repeat violation, keep the following in mind:

First offense means no 940.09 or 940.25 convictions and no prior offenses in the past 10 years, and not more than one offense that is more than 10 years old but occurred on or after January 1, 1989.

Second offense means there is one prior offense that was committed within the past 10 years.

Third or subsequent offense means that the defendant has two or more prior offenses since January 1, 1989.

The **date of violation** is always used to determine whether prior offenses can be counted. Offenses that occurred prior to January 1, 1989 are not counted, except in cases of felony offenses involving Causing Great Bodily Harm by OWI (section 940.25(1)) and Homicide by OWI (section 940.09(1)). Convictions for these two offenses will be counted as prior OWI offenses regardless of when they occurred in the defendant's lifetime. Wisconsin driver records will generally not reflect violations prior to 1989, but felony OWI offenses will likely show up on general criminal record histories.

Any OWI offense committed with a **minor passenger under 16 years of age** in the vehicle will double all penalties, including incarceration, driver license revocation, and fines. Doubling penalties makes 3rd offense OWI cases felonies.

Fines increase by alcohol concentration in OWI-3rd and subsequent offenses.

- .17 to .199 BAC-doubles fines
- .20 to .249 BAC-triples fines
- .25 and above BAC-quadruples fines

Vehicle forfeiture is no longer mandatory in OWI-4th offense cases. For all OWI-3rd or subsequent offenses, vehicle forfeiture is discretionary with the court. However, in order for the court to forfeit a vehicle, it must have been used in the offense and owned by the operator.

2001 WISCONSIN ACT 16 (BUDGET ACT) CHANGES

For OWI offenses occurring on September 30, 2001 or later, if the offender has two OWI offenses within **any** five-year period, the

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offender is **ineligible for an occupational license for one year**. Also, **all vehicles** registered to or titled in the offender's name will be subject to some sanction (either ignition interlock, immobilization, or forfeiture if applicable). The five-year period does not mean that the current offense must be within five years of a prior offense. For example, if the current offense occurred on October 1, 2001 and offender's prior offenses are from 1991 and 1993, the offender has 2 prior offenses within a five-year period and is subject to the provisions of 2001 Wisconsin Act 16.

Until January 1, 2002, only those second offenders with two offenses within a five-year period will be subject to immobilization or ignition interlock. After January 1, 2002, all second offenders will be subject to immobilization or ignition interlock. This is due to changes from 1999 Wisconsin Act 109.

OAR CHANGES

On April 9, 2001, all provisions of 1997 Wisconsin Act 84 became effective. Although there are still suspensions and revocations of licenses, **revocation** will only occur in the following:

- All OWI offenses (including 1st offense)
- Implied consent (refusals)
- Non-compliance with alcohol assessment
- Hit and run causing death, great bodily harm or personal injury
- Eluding
- All felony traffic offenses under Chapter 940
- All CDL violations of the above
- Operating after habitual traffic offender (HTO) revocation
- Hit and run causing property damage **may** result in suspension or revocation
- Duty on striking unattended vehicle **may** result in suspension or revocation
- Reckless driving under s. 346.62(2m) or (4), but not under (2) or (3).
- Fourth and subsequent OAR or OWS
- Crossing train tracks illegally (optional for 1st offense; mandatory for subsequent offenses)
- Committing 12 minor or 4 major offenses in a 5-year period (HTO)
- Committing 2 minor offenses within a year of obtaining an HTO occupational license
- Committing 4 minor offenses or one major offense within 3 years of obtaining an HTO occupational license

All other losses of license are **suspensions**.

All OAR offenses are **criminal** and carry a fine of up to $2500 and a jail sentence of up to one year. Keep in mind, however, that until May 1, 2002, OAR-1st offense remains a non-criminal violation punishable by a forfeiture of up to $600. See s. 343.44(2)(am). Also, note that local ordinance violations do **not** count as prior offenses under s. 343.44(2)(am).

All OWS offenses are **civil**, punishable by a forfeiture of $50 to $200.

OAR and OWS violations carry 3 points and are considered minor violations for HTO purposes.

The offense of **violating an occupational license restriction** (VOLR) is eliminated. Violators are now charged according to their underlying status. If the person's status is revoked, the OAR charge is criminal. If the person's status is suspended, the OWS charge is civil.

For any 1st, 2nd, or 3rd OAR or OWS conviction, the court **may** suspend the license for up to 6 months. A 4th conviction requires a revocation for 6 months unless the court orders a lesser period. ■

"Challenge" continued from Page 14

affidavit from the client if counsel is sure that the statement under oath does not subject the client to further prosecution for false swearing or perjury.

Although our Supreme Court really cut off a lot of areas of attack in *Hahn*, it followed up with a case illustrating the stringent requirements of waivers of counsel in *State v. Peters*, 2001 WL 74 (June 28, 2001). In reversing the Wisconsin Court of Appeals, the Supreme Court in *Peters* stressed the importance of a full and proper circuit court colloquy with the defendant as a prerequisite to a finding that counsel was waived. Quoting from the case of *State v. Klessig*, 211 Wis. 2d 194, 201, 564 N.W.2d 716 (1997), the Court required circuit court judges to personally address defendants for the following reasons:

> [T]o ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed upon him . . . If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

Peters, *supra,* at 801.

The *Peters* Court, therefore, made it very clear that waiver of counsel will not be presumed in the absence of a full colloquy between the Court and the defendant establishing a knowing and voluntary waiver of this important right. Counsel should be aware that in prior convictions where a court simply asks the defendant if he was aware he had a right to an attorney, the conviction may still be attacked because this is an invalid waiver under *Peters*. Circuit courts have historically concentrated on establishing that defendants are voluntarily choosing to proceed without counsel but have not addressed whether this choice has been made in a knowing fashion.

Wisconsin case law in the aftermath of *Hahn* is not clear as to whether an attack on a prior conviction may be made on the basis of ineffective assistance of counsel. Federal law under *Custis* would prohibit such an attack, but Wisconsin courts have not precluded this avenue of challenge, at least to date. Additionally, *Peters* specifically leaves open the possibility of attacks based upon Sixth Amendment and due process violations, so counsel should review prior convictions for possible violations in all of these areas. Simply put, where there is an open question of what may be permissibly attacked, counsel should make the challenge. It is also important to note that *Hahn* was not an OWI case, therefore, leaving more room for attacks on priors in the drunk driving context.

Counsel should also be aware that our Supreme Court in *Hahn* did not limit attacks on prior out-of-state convictions. Wis. Stat. §343.307 states that courts should count as prior convictions:

> Convictions under the law of another jurisdiction that prohibits refusal of chemical testing or use of a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof, or with an excess or specified range of alcohol concentration, or under the influence of any drug to a degree that renders the person incapable of safely driving, as those or substantially similar terms are used in that jurisdiction's laws.

Counsel should be challenging the use of almost every other state's convictions for OWI. Counsel, by not stipulating to the prior conviction, will force the prosecutor to come forward with certified records of the prior conviction. Counsel may also argue that unless the prosecutor provides a copy of the exact statute in effect at the time of the client's violation, the burden of showing the client was convicted under a statute with substantially similar terms to Wisconsin's statute has not been met.

Challenging prior convictions is not limited to drunk driving cases. For example, a second offense possession of controlled substance case is a felony in Wisconsin. If the prior offense was uncounseled, that conviction is subject to a collateral attack. The cases of *Foust, Peters,* and *Baker* previously mentioned are very helpful to counsel in determining whether such an attack would be beneficial to the client.

Although the *Hahn* decision severely limited collateral challenges to prior convictions, a surprising number of defendants do not have attorneys on misdemeanor offenses. Moreover, a surprising number of circuit courts do not elicit valid waivers of the right to counsel. Thus, getting all of the information on prior convictions may be the most useful work a defense attorney may do for his or her client. ■

"VIP" continued from Page 15

alcohol education for first-time offenders in Connecticut[6]

The suggested approach for victim speakers is to convey the following:

- You have not hurt me. Some person who chose to drink and drive has hurt me.
- I would like you to learn from my experience.
- I hope you never have to live through the nightmare which is the cruel but predictable consequence of drinking and driving.[7]

The concept of confronting offenders on a personal level is not new. Judges have ordered drunk driving offenders to attend victim impact panels as an alternative to incarceration or as a condition of probation in other parts of the country since 1982. Since their inception, groups like MADD (Mothers Against Drunk Driving) and RID (Remove Intoxicated Drivers) have supported and promoted the use of VIPs. In fact, such organizations are vital for locating, contacting, and screening potential victim panelists.

In Wisconsin, the legislature passed 1991 Wisconsin Act 277, which provided judges with the statutory authority to order a defendant to visit a site that demonstrates the adverse effects of substance abuse or of operating a vehicle while under the influence of an intoxicant or other drug. This site could be an alcoholism treatment facility or an emergency room. Further, the "visit" should be monitored and ordered for a specific time and day to allow the defendant to observe victims of vehicle accidents involving intoxicated drivers. If the defendant does not comply with the court order, the court may order the defendant to show cause why he or she should not be held in contempt of court.[8] Thus, the statute paved the way for Wisconsin's first court-ordered victim impact panel program.

When victims tell their stories from the heart, never in a blaming or accusatory way, as part of a DUI/DWI Victim's Impact Panel, we can change people's thinking about drinking and driving. The Panel is a way of finding some degree of balance and justice in the criminal justice system. The drunk drivers and potential drunk drivers need to hear what happens to the victims of drunk driving crashes. The Victim

Impact Panel is a tool for accomplishing that goal. By victims sharing their personal pain, a victim's panel can enable offenders to understand the impact of their behavior, and can promote change which, as a bottom line, saves lives.

Betty Martin, victim[9]

Where are VIPs conducted in Wisconsin?

Prior to the statutory authority for courts in Wisconsin to order victim impact panels, they were offered as a component of the Traffic Safety School requirement for OWI offenders. Specifically, the VIPs provided a creative addition to the curriculum in Group Dynamics (GD) courses for first-time offenders or in the Multiple Offender Program (MOP) for repeat offenders. In addition, Kenosha County has offered a "Victim's Impact Panel" as part of the Alcohol and Other Drugs (AOD) Council Intoxicated Driver Program since 1992.[10] To date, Kenosha County's AOD Council continues to offer a "Victim's" Panel as one of the Assessment Programs it provides.

The first court-ordered VIP in Wisconsin took place on November 10, 1993, in Waukesha County. Judge Marianne Becker spearheaded the "VIP experiment" with the active support of the other criminal and traffic judges. A task force convened and ultimately designed a VIP pilot program as follows:

- Conduct small, quarterly VIPs in a small meeting room of the public library;
- Begin promptly at 7:00 p.m. and conclude no longer than an hour and a half later;
- Make attendance part of the court-ordered assessment process on every third OWI offense; and
- Order attendance within a specified period of time.[11]

The Waukesha County "experiment" ultimately provided the groundwork for other counties to follow in establishing their own victim impact panel programs. To date, the following Victim Impact Panels are offered in Wisconsin:

- Door County, (Contact) Helen Bacon, 920.674.7217
- Jefferson County, Terry Wescott, 920.674.7217
- Kenosha County, Alcohol and Drug Council, Laura, 262.658.8166
- La Crosse County, La Crosse Justice Sanctions, Jane Klekamp, 608.789.4895
- Marathon County, Attic Correctional Services, Michael Dvorak, 715.848.3202
- Outagamie County, Outagamie County Offender Services, Frank Schreiter, 920.832.4928
- Sauk County, MADD Sauk County Chapter, Janet Priewe, 608.985.8246
- Walworth County, MADD Walworth County Chapter, Diane or Joyce, 608.365.8100
- Washington County, Larry, 262.335.6888
- Waukesha County, Waukesha Co. Council on AODA, 262.524.7921, ext. 103
- Winnebago County, Winnebago County Clerk of Courts, Diane Fremgen, 920.236.4849[12]

While most VIPs are ordered at sentencing, Walworth County offers them *prior to* an offender's conviction. For example, second and third offenders who are willing to accept responsibility for their actions can attend a VIP to earn a reduction of either the forfeiture or the jail time normally requested by the District Attorney's Office in accordance with the county's sentencing matrix. The option is only available for offenders who are preparing to enter a no contest or guilty plea to an impaired driving offense by the time of their status conference date. A case will not be continued to allow attendance at a VIP nor will reductions be given after conviction. In addition, The District Attorney's Office will recommend attendance at a panel as a condition of probation in every case

involving fourth and subsequent offenders. However, no reductions will be offered in these cases.[13]

Finally, as of this writing, Brown County plans to hold their first VIP in November 2001 and Judge Tim Duket in Marinette County wants to have a program in place by the first of 2002. The MADD Wisconsin State Office should be contacted for more specific information. Ask for Lindsay Desormier, Victim Assistance Coordinator, 1.800.799.6233.

Are VIPs effective in reducing recidivism rates?

When Judge Becker initiated the Waukesha County VIP effort, she was well aware of the CHPPE (Center for Health Policy and Program Evaluation) Study that stated, *We find little evidence that VIPs influence drinking and driving behavior. Our finding no influence of VIPs is consistent with the literature that generally reports only small or no effects of educational programs on the chances that DWI offenders will have a subsequent DWI conviction.*[14] However, when confronted with these findings, members of the task force in Waukesha County agreed that they were not looking for a specific return on their investment of time and energy where human lives were at stake. Thus they echoed the sentiment of Nancy Henning when she said; *If I can save one life, or save one person the heartache and pain I've gone through, it will be worth it.*[15] Judge Becker remained optimistic that eventually the statistics would speak loudly and clearly in support of victim impact panels. However, her resolve was to always look further than statistics and remember the individuals who were markedly affected by the victims' stories.

When I was convicted of my 2nd offense, my first and only reaction was how much this was putting me out, financially and physically…What I went through isn't even in the same ballpark as what these presenters have. The fact that I could have seriously injured or even killed another as a result of my stupidity is something I don't think I could live with.

Anonymous offender's response to a VIP[16]

The passage of time has now revealed that the statistics resoundingly speak in favor of victim impact panels. Specifically a study conducted by an independent evaluator compared the recidivism rates of second-offense OWI offenders in Outagamie County who attended a VIP with the second-offense OWI offenders in Winnebago County who did not. Volunteers in Offender Services contracted with Leona Whitman, a former research assistant at the University of Wisconsin-Oshkosh, to examine the subsequent drunk driving arrests of 150 second offenders in Outagamie County with the arrest records of 175 second offenders in Winnebago County, which does not have a VIP program. Of the Outagamie County offenders, 22 people (14.7%) were later convicted of a third offense, while 69 people (39.4%) of the Winnebago County offenders were convicted of a third offense.[17]

The study's conclusion is clear. *The group rearrest rates for the Outagamie County VIP group were considerably lower than those in the Winnebago County group. This was true for the entire [offender] population as well as when segregated by age and gender.*[18] While not one hundred percent successful in stopping recidivism, Whitman recommends the study be replicated to confirm the findings and provide support for continued use of VIP programs. This is why an evaluation is such a vital component for any victim impact panel program. The information that is gleaned can be helpful in identifying the strengths and weaknesses of the program as well as documentation to be shared with others.

Until the Outagamie County study, the reported statistical results on recidivism had been somewhat inconclusive. However, the anecdotal results have always been compelling in that they

indicate positive attitudinal shifts and changes in behavior. Offenders who have attended a panel presentation express a realization of the potential consequences of their actions, a new understanding of the impact they can have on other people, and an appreciation of the panel members for candidly sharing their tragic stories. One offender recommended that *everyone* who has an OWI should attend.[19]

Victim Impact Panels seem to be a low-cost remarkable opportunity for victims ... to accelerate their own healing process.

Dorothy Mercer, Rosanne Lorden, and Janice Lord, presented at the International Society for Traumatic Stress Studies[20]

As for the victims who volunteer to tell their stories, their panel participation has provided a positive healing experience. However, this was not the theory posited in a study of 482 drunk driving crash victims who participate on VIPs compared to 903 victims who do not. Rather, MADD was concerned about the well being of its victim volunteers and wanted to know how speaking on the panels was affecting them. The researchers learned that 82% of the victims who speak or have spoken on VIPs said that telling their stories to offender audiences was very helpful.[21] They said it helps because they believe they make a difference, even if it is to only one person in the audience.[22]

Consistent with these remarks, panelists showed more positive psychological adjustment than non-panel victims. The most common positive reaction noted by panelists was that their participation made the trauma more bearable and gave them increased self-confidence. Further, panelists expressed less anxiety and a better overall sense of well being and life happiness.

In addition, they reported an added sense of life purpose or goal from their crashes. Panelists were less angry at the drunk driver at the time they were surveyed than were non-panelists.

Therefore, victim impact panels can be effective in changing the OWI offenders' behavior and in healing the victims who participate.

Conclusion

Victim impact panels are designed to confront OWI offenders on a personal level. The idea is that by having offenders listen to the accounts of people directly affected by a drunk driving crash, they will realize the potential dangers and consequences of their behavior. The ultimate goal is to change the drinking and driving behavior of offenders, thereby reducing the recidivism rate among offenders. The study in Outagamie County revealed that the rearrest rates for the offenders who attended a VIP were considerably lower than those who did not. In addition, the victims who participate on panels believe that it is a positive healing experience that enhances their overall well being.

[A]ll I can say is, it must be working. How else do you explain its spread to other parts of the country?

Shirley Anderson, founder of a DUI Victims' Panel in California[23]

Endnotes

[1] The Honorable Marianne Becker, "Court Ordered Victim Impact Panels," *Victim Impact Panels: A Reference Manual,* 3rd ed., 2000.
[2] An adult is defined as anyone 18 years of age or older. Wis. Dep't of Transp., *1999 Wisconsin Alcohol Traffic Facts Book,* p. 16.
[3] *Id.* p. 25.
[4] The author prefers the term "crash" to "accident" in this context. A "crash" refers to an avoidable event caused by a single variable or chain of variables that the author believes more accurately describes what happens in drunk driving incidents. Put simply, "crash" means, "A collision, as between two automobiles." *The American Heritage College Dictionary* 324 (3d ed. 2000).
[5] "Victim Impact Panel Evaluation," Waukesha County Victim Impact Panel (1994).

See "VIP Endnotes" on Page 26

TREATMENT IN PRISON FOR THE FELONY OWI OFFENDER

By: John R. Swiertz*

With the inception of the felony OWI penalties and the potential prison sentence that can accompany a conviction, the Wisconsin State Prison System has had to prepare for an influx of a different and unique brand of offender. This new brand of prisoner brings a different set of issues to prison and to the treatment setting. As a result of this new category of felony offenders, the Wisconsin Prison Systems Drug Abuse Correctional Center (DACC) in Winnebago developed the Operating While Impaired (OWI) Program.

The OWI Program at DACC began operation on October 2, 2000. While it is still evolving, the program is currently set up as a six month, 40 bed, closed group program for substance abusing male offenders incarcerated for the offense of Operating While Impaired- 5th Offense or greater, under Wisconsin Statutes 346.63 (1)(a). The female felony OWI offender will be discussed later in this article.

The OWI program is a research program with on-going data collection, funded partially by a Byrne Law Enforcement Grant. The mission of the program is to enhance safety in the community by providing a continuum of substance abuse treatment services specific to the needs of the repeat OWI offender population. Services begin in the confined minimum-security setting of DACC on a residential treatment unit. The goal of the program is to continue with aftercare, intensive supervision, and monitoring of alcohol and drug use throughout the offender's parole or extended supervision within the community.

Treatment components within the OWI Program include AODA education, understanding dependency and addiction, relapse prevention, high risk and thrill seeking behavior modification, rational behavior/cognitive intervention training, fostering responsible decision making skills, employment skills training, and restorative justice concepts. The final phase of the residential program focuses on community reintegration and is designed to assist and follow-up with the offenders in the development of release plans.

The OWI program at DACC is voluntary. Offenders selected for this program must be eligible for minimum-security status and have an identified AODA Level 7B/C need. Offenders must be convicted after January 1, 1999 and must be 18 months or less from mandatory release (MR). A reading level of 6th grade or above is required.

Currently offenders who are dually diagnosed with mental health and AODA issues and on psychotropic medication, as well as offenders with sex offender histories are not being accepted for this program. Offenders on psychotropic medication are normally ineligible for placement at all DACC programs due to a lack of Clinical Services within the facility.

The Classification Specialists and Program Review Committee (PRC) at Dodge Correctional Institution flag each offender appropriate and eligible for the OWI program. The Program Review Committee at the institution where the offender is placed after Dodge must also approve an offender for placement into the program and make a reservation for the offender with DACC.

Like all treatment programs within the prison system, judges cannot order an offender into the

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OWI program. A judge can recommend that an offender be placed into the program if sentenced to prison. The judge's recommendation, if made part of the judgement of conviction, will be factored into the decision to place an offender into the OWI program. DACC has the right to re-screen individuals who may have been placed in an inappropriate program.

Offenders may be removed from the OWI program as a consequence of misconduct and/or failure to participate in the program activities. Offenders may also withdraw from the program and be referred back to PRC.

A limited number of Alternative to Revocation (ATR) placements are also available with each treatment group when space is available. ATR placements will likely only be approved for probationers with a limited criminal history. Sheryl Graeber, Certified Clinical Supervisor of the OWI program at DACC, reviews each ATR request and makes a case by case decision. No more than three ATR slots are available for each treatment group. ATR referrals for the OWI program must come from the supervising probation agent.

There currently exists no program to specifically deal with the needs of the female felony OWI offender sentenced to prison. Some grant monies were made available for a cycle of programs for female state prison inmates incarcerated within the Dodge County Jail. However, the programs did not specifically target the OWI offender.

Because there are very few women in prison for OWI, it appears most female OWI offenders will be targeted to participate in the Women in Need of Substance Abuse Treatment (WINSOT) program, a residential AODA program at Ellsworth Correctional Center. Suzanne Schmidt, Chief of Program Planning and Evaluation for the Bureau of Offender Programs indicated that her agency is revisiting all current treatment programs available to women within the prison system. Ms. Schmidt said they are in the process of developing an OWI program for women, among other things.

Current Program Details

As of September 2001, 358 male offenders and 13 female offenders were in the prison system serving sentences after a felony OWI conviction. According to Sheryl Graeber, roughly 5% of all inmates sentenced to prison for OWI are receiving less than a 24-month sentence. Approximately one-third of the prison sentences are between 25 and 36 months, with another one-third between 37 and 48 months. The remaining prison sentenced offenders are receiving between 49 and 60 months.

Each treatment group is made up of about 20 offenders with a new group starting every three to four months. It takes six months to complete the residential portion of the program, therefore only 60 to 80 offenders can be involved in the program each year. The treatment groups are currently being administered on a daily basis by five licensed social workers. These social workers are not AODA certified but have taken the first step in the certification process. Some of the Byrne Law Enforcement Grant money is being used for the training and certification process of these five social workers.

With the sheer numbers of felony OWI offenders coming into the system and the limited number of slots available within the program, participant selection for the program is limited. In addition to the exclusion of offenders with a sexual offense history, and those on psychotropic medications, offenders with a history of being the perpetrators of domestic violence are often not accepted. It is thought that the Domestic Violence Offender Program (DVOP) at DACC might better serve that population of offender. The DVOP program is a 36 bed, 16-week treatment program for batterers with alcohol and drug abuse issues. The program incorporates many of the same cognitive thinking programs as the OWI program but with a focus on domestic violence.

When deciding on whom to accept into the program, Sheryl Graeber said she makes a judgement call as to whom she believes the most impact can be made. She also factors in the potential for harm if the offender is released back into the community without treatment. A majority of the felony OWI offenders sentenced to prison do not have a criminal history outside of driving offenses. They are usually classified as non-assaultive and targeted for minimum-security placement. They are often pro-social in many aspects of their lives. Prior to coming to prison, these offenders are often gainfully employed, pay their child support, and otherwise live as productive members of society. For these reasons, prison system treatment providers have found this population of offender unique. Treatment providers have also discovered these offenders to have an incredibly strong denial system.

With truth in sentencing, one might question what incentive an offender would have to participate in the OWI program. Although completion of the program will not earn an offender a quicker release, it may get him placed at a minimum-security work camp. Each work camp then individually determines their community's comfort level with releasing this profile of offenders into the community on work release.

Aftercare

As of September 2001, only 17 offenders have completed the residential portion of the OWI program. Because offenders will likely be completing the program with six to twelve months remaining on their sentence, grant money has been made available for aftercare services. Aftercare services include individual and group counseling and the potential for a halfway house placement. Grant monies were also targeted for items like breathalyzer interlock devices to be used on offender vehicles upon their release into the community.

Thus far, aftercare money has been targeted to work release camps within the Department of Corrections. Purchase of service money is being used to bring treatment providers from the community into the work release camps to administer aftercare counseling. Coordinating cost-effective aftercare upon release into the community on extended supervision will be more challenging because offenders are coming into the prison system from every area of the state.

It also appears monies targeted for items like interlock devices may be better spent elsewhere. Most offenders do not seem interested in getting their driver's license back in the near future. Offenders often owe huge fines. Combined with the high cost of insurance, obtaining a vehicle, and registering the vehicle in their name, the likelihood of the interlock device being used on offenders upon release from prison is minimal.

Summary

It is too early to tell what effect prison sentences for felony OWI offenders will have on repeat drunk driving in Wisconsin. It is also too early to gauge the effectiveness of the OWI program at DACC. Treatment within the prison system to address a specific type of offender can be beneficial as long as judges realize that only a limited number of offenders sentenced to prison will have the opportunity to participate in the program.

More specific questions regarding the OWI program or other DACC programs can be addressed to Sheryl Graeber at 920.236.2709 or e-mail at Sheryl.Graeber@doc.state.wi.us.

(Much of the information gathered for this article was obtained from Sheryl Graeber, Certified Clinical Supervisor of the OWI program at DACC.) ■

"VIP Endnotes" continued from Page 22

[6] Sharon L. Bass, "Drunken Drivers Hear From Victims," *The New York Times,* Oct. 1, 1989.
[7] The Honorable Marianne Becker, *supra* note 1.
[8] Wis. Stat. § 346.65(2i) 2000-01.
[9] Denis Foley, "Using Victim Impact Panels," *Impaired Driving Update,* Vol. I, No. 2, Jan./Feb. 1997.
[10] Center for Health Policy and Program Evaluation, UW-Madison, "Victim Impact Panels: An Evaluation," Spring 1993.
[11] Becker, *supra* note 7.
[12] Lindsay Desormier, "Victim Impact Panels Around Wisconsin," MADD Wisconsin State Newsletter, Summer 2001.
[13] Maureen Boyle, "Victim Impact Panels in Walworth County," *7th Annual Traffic and Impaired Driving Law Program,* 2001.
[14] Center for Health Policy and Program Evaluation, *supra* note 10.
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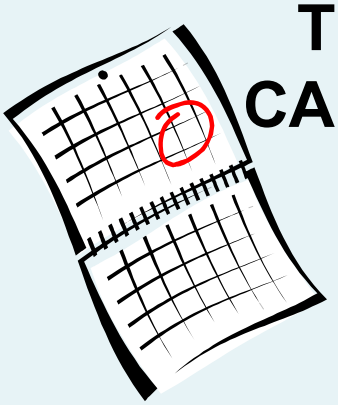
[17] Karen Leone de Nie, "Impact Panel Cuts Drunken Driving," *The Third Branch,* Spring 2000.
[18] Univ. of Wis. Law School, "An Evaluation of the Outagamie County Victim Impact Panel," *Victim Impact Panels: A Reference Manual,* 3rd ed., 2000.
[19] Karen Leone de Nie, *supra* note 17.
[20] Dorothy Mercer, et. al., "Victim and Situational Facilitation or Impeding Post-victimization Functioning," *Drunken Driving Victim Impact Panels: Victim Outcomes,* Preliminary Report, Oct. 27, 1993.
[21] Dorothy Mercer, et. al., "Victim Impact Panels: A Healing Opportunity For Victims of Drunk Driving Crashes," *MADDVOCATE*, Winter 1999.
[22] Ten percent said that it had been neither helpful nor hurtful, and eight percent said that telling their story felt more hurtful than helpful. *Id.*
[23] Doug Brown, "Victims Talk, and Drunk Drivers Listen," *Los Angeles Times,* Dec. 31. 1987. ■

TRAINING CALENDAR



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CASE DIGEST

This composite digest includes all available digests from August 1, 2001 to November 30, 2001. Segments are arranged in reverse chronological order.

Summaries by Brian Findley*

WISCONSIN SUPREME COURT AND COURT OF APPEALS OPINIONS

CRIMES

EVIDENCE THAT THE DEFENDANT LIED ABOUT THE CAUSE OF INJURY AND EVIDENCE OF THE AMOUNT OF FORCE NECESSARY TO CAUSE A CHILD'S DEATH WAS SUFFICIENT TO PROVE CRIME OF 2ND DEGREE MURDER

State v. Hirsch, 2001 WI App ____, No. 01-0023-CR (Ct. App. Dist. II, 11-21-01)
For Appellant: Paul G. Lazotte, Madison; Christina Petros, Sheboygan
For Respondent: David J. Becker, Madison; Robert J. Wells, Jr., Sheboygan

The evidence was sufficient to convict Hirsch of an old murder of his child. "After considering the evidence as a whole, and especially the medical testimony and the evidence that Hirsch significantly changed his story both over time and depending on his audience, we conclude that the jury could eliminate accident or misadventure as a reasonable hypothesis of innocence. The medical testimony concerning the level of force needed to cause the injury coupled with the surrounding circumstances, arguably places such a theory beyond the realm of possibility."

A PROMOTIONAL SCHEME COMPLYING WITH WIS. STAT. § 100.16 IS NOT A LOTTERY AND THEREFORE NOT PUNISHABLE UNDER WIS. STAT. § 945.01

Bohrer v. City of Milwaukee, 2001 WI App 237, No. 00-3088 (Ct. App. Dist. I, 9-25-01)
For Appellant: Joely Urdan, Madison; Alan R. Kesner, Madison
For Respondent: Thomas L. Frenn, Milwaukee; Mark E. Sostarich, Milwaukee

ESCAPE FROM A PROBATION OFFICER IS NOT PUNISHABLE AS ESCAPE UNDER WIS.. STAT. § 946.42

State v. Zimmerman, 2001 WI App 238, No. 00-3173-CR (Ct. App. Dist. II, 11-13-01)
For Appellant: Lara M. Herman, Madison
For Respondent: Charles B. Vetzner, Madison; Sally Hoelzel, Racine

The definition of actual custody under the escape statute unambiguously excludes the custody of a probation or parole agent. Therefore, Zimmerman could not be charged with escaping from probation agents who were transferring her to jail after taking her into custody.

DOUBLE JEOPARDY

MULTIPLICITY CLAIM NEED NOT BE MADE PRIOR TO TRIAL BUT IS WAIVED IF NOT MADE PRIOR TO TIME THAT THE COURT SUBMITS THE CASE TO THE JURY

DISTINCT TYPES OF SEXUAL ASSAULT SUPPORT SEPARATE COUNTS

State v. Koller, 2001 WI App 253, No. 99-3084-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Peter M. Koneazny, Milwaukee; Mark G. Lipscomb Jr., Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Daniel J. O'Brien, Madison

Koller argued that his trial attorney was ineffective for not raising multiplicity challenges because the evidence at trial, which was different and less specific than at the preliminary hearing, did not establish separate sexual assaults but rather one continuing sexual assault. Multiplicity is an issue

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decided by the trial court and not the jury. The court rejects the state's claim that multiplicity claims must be made prior to trial. However, "where a defendant claims that the state did not present enough evidentiary detail at trial to support splitting a course of conduct into multiple violations of the same statute, a multiplicity violation is waived if not raised prior to the time the case is submitted to the jury." This allows the court to determine the issue while witnesses are on hand. Note that the court does not answer what burden of proof applies when a defendant raises a multiplicity challenge directed at the proof at trial rather than at pretrial allegations. If multiplicity is merely a foundational issue under Wis. Stat. § 901.04, then preponderance might be the standard of proof. If the question is whether the state has proven each charge, then beyond a reasonable doubt should be the standard. The court explicitly does not resolve this issue.

"When a perpetrator moves from having mouth-to-vagina contact to having penis-to-vagina intercourse, he necessarily engages in a new volitional act warranting a separate charge, conviction, and punishment."

EVIDENCE

TRIAL COURT PROPERLY EXCLUDED AFFIDAVIT IN WHICH AFFIANT PURPORTED TO TAKE FULL RESPONSIBILITY FOR THE CRIME ALLEGED TO HAVE BEEN COMMITTED BY THE DEFENDANT

State v. Malcom, 2001 WI App ____, No. 01-0506-CR (Ct. App. Dist. II, 11-28-01)
For Appellant: John D. Lubarsky, Madison; Domingo Cruz, Racine
For Respondent: Karla Z. Keckhaver, Madison; Robert S. Flancher, Racine

The affiant was unavailable, and admissibility of his affidavit is governed by Wis. Stat. § 908.045(4). That statute allows admissibility of a statement against penal interest to exonerate the defendant only if the statement is "corroborated." Corroboration must be more than "merely debatable," and here substantial and unchallenged evidence also implicated Malcom. Therefore, the affidavit's claim of acceptance of "full responsibility" was "merely debatable" and the trial court therefore did not err when it ruled the affidavit inadmissible.

PRIOR BAD ACTS EVIDENCE WAS PROPERLY ADMITTED WHERE THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE PRIOR BAD ACTS OCCURRED

AN EXPERT WITNESS CAN PROPERLY DEMONSTRATE WITH A DOLL THE AMOUNT OF FORCE NEEDED TO CAUSE INJURIES TO THE VICTIM EVEN WHERE THE EXPERTS DID NOT AGREE ON THE EXACT CAUSE OF THE INJURIES

State v. Gribble, 2001 WI App 227, No. 00-1821-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Charles B. Vetzner, Madison; Charles Giesen, Madison
For Respondent: Wm. Andrew Sharp, Richland Center; Sandra L. Nowack, Madison

The trial court properly admitted evidence of prior child abuse, to both the immediate victim and another child, where the evidence was sufficient for a reasonable jury to find that the prior bad acts occurred. The evidence was also sufficiently similar and close in time to support admissibility.

Neither the fact that the defendant did not contest the amount of force necessary to cause the injuries nor the fact that the experts did not agree on what caused the injuries precluded the trial court from allowing an expert to demonstrate on a doll the amount of force needed to cause the injuries.

ADMISSION OF FORMER TESTIMONY UNDER WIS. STAT. § 908.045 IS A DISCRETIONARY RULING AND COURT NEED NOT FIND WITNESS IN CONTEMPT BEFORE FINDING THAT THE WITNESS IS UNAVAILABLE

State v. Tomlinson, 2001 WI App 212, No. 00-3134-CR (Ct. App. Dist. I, 10-9-01)
For Appellant: John J. Grau, Waukesha; Richard J. Johnson, Racine
For Respondent: Robert D. Donohoo, Milwaukee; Christian R. Larsen, Madison

The court ruled that a witness who testified at the

preliminary hearing but pleaded the Fifth Amendment at trial was unavailable. Although finding the witness in contempt would have created a more complete record, the record demonstrated that the witness persistently refused to answer the questions. The prior statement contained indicia of reliability and did not violate the defendant's right to confrontation because prior testimony at the preliminary is a firmly-rooted exception to the hearsay rule. Tomlinson also had the opportunity to impeach the credibility of the witness against him with proof of the witness' prior convictions, his prior statements, and proof that he received consideration for cooperating with the police.

FIRST AMENDMENT

COURT AFFIRMS THAT PART OF AN INJUNCTION ENJOINING PROSTITUTES FROM LOITERING BUT REVERSES, BECAUSE OF VAGUENESS, THAT PART OF THE INJUNCTION PROHIBITING THE RESPONDENTS FROM COMING WITHIN 25 FEET OF EACH OTHER

COURT REVERSES THAT PART OF AN INJUNCTION PROHIBITING PROSTITUTES FROM ENGAGING, BECKONING TO STOP, OR ENGAGING IN CONVERSATION WITH PASSERSBY AND REQUIRES AMENDMENT OF THE INJUNCTION TO ENSURE THAT THE ORDER DOES NOT PROHIBIT THOSE ACTIVITIES WITH FAMILY AND FRIENDS

COURT AFFIRMS PART OF INJUNCTION PROHIBITING PROSTITUTES FROM STOPPING VEHICLE OPERATORS BY WAVING OR YELLING

INJUNCTION PROHIBITING PROSTITUTES FROM ATTEMPTING TO SPEAK WITH STRANGERS OR LOITERING AT PAY PHONES OR BUS STOPS DOES NOT ABRIDGE APPELLANTS' RIGHT TO TRAVEL

City of Milwaukee, v. Burnett, et. al., No. 00-2308 (Ct. App. Dist. I, 10-9-01)
For Appellant: Jerome F. Buting, Brookfield; Pamela Moorshead, Brookfield
For Respondent: David R. Halbrooks, Milwaukee; Genevieve E. O'Sullivan-Crowley, Milwaukee

The court upholds that part of an injunction prohibiting the many named respondents from "loitering in doorways of business …[or] sitting on the porch or standing anywhere on private residential property" without permission of the owner. However, the court strikes down for vagueness a rule that forbids any of the respondents from coming within 25 feet of any of the other respondents because the court agrees "that this provision does not give to the appellants fair warning of prohibited conduct." The record does not indicate that the respondents all know each other.

The court remands with instructions to amend that part of the injunction enjoining prostitutes from engaging in conversation or beckoning to stop passersby. To the extent the injunction denies the prostitutes the right to talk to their families or friends, the injunction denies their rights to freedom of speech and assembly and their rights to free association.

That part of the injunction prohibiting prostitutes from yelling or waving at cars, other than hailing a taxicab, does not violate the right to free speech, for "[t]here is no evidence in the record that such actions—insofar as they are directed to strangers—have any purpose other than solicitation for prostitution" which is illegal.

The injunction "does not prevent the appellants from travelling anywhere; they may not accost strangers in the manner enjoined, however, and they are perfectly free to use bus stops and pay phones for the intended use of those facilities."

INEFFECTIVE ASSISTANCE OF COUNSEL

COUNSEL NOT INEFFECTIVE FOR FAILING TO QUESTION POTENTIAL JURORS FULLY ABOUT POTENTIAL BIAS WHERE DEFENDANT FAILED TO PROVE AT POSTCONVICTION MOTION THAT JURORS WERE BIASED

FAILURE TO ARGUE FOR ACQUITTAL ALONG WITH SUGGESTION IN CLOSING ARGUMENT THAT THE JURY MIGHT FIND THE DEFENDANT GUILTY OF SOME BUT NOT ALL CHARGES WAS NOT INEFFECTIVE

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE, AS MULTIPLICITOUS, SEVERAL SEXUAL ASSAULT CHARGES

State v. Koller, 2001 WI App 253, No. 99-3084-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Peter M. Koneazny, Milwaukee; Mark G. Lipscomb, Jr., Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Daniel J. O'Brien, Madison

Koller was entitled to an unbiased jury, but "at the postconviction stage Koller needed to show that if his trial counsel had asked more or better questions, those questions would have resulted in the discovery of bias on the part of at least one of the jurors who actually decided his case. He might have done this by calling suspect jurors as witnesses at his postconviction hearing and asking them the questions his trial counsel should have asked."

Counsel was not ineffective for failure to ask for acquittal where the "powerful trial testimony overshadowed the arguments of the attorneys."

Given the fact that a timely challenge to multiplicity could have allowed the state to present additional evidence on the topic, counsel was not ineffective for failing to challenge multiplicity. A reasonably competent defense attorney, mindful of the pretrial record, would have considered a multiplicity challenge a "waste of time."

TRIAL COUNSEL NOT INEFFECTIVE FOR FAILURE TO OBJECT TO JURY INSTRUCTIONS WHERE INSTRUCTIONS DID NOT VIOLATE REQUIREMENT OF UNANIMITY

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ADMITTING, FOR TACTICAL REASONS, EVIDENCE THAT THE DEFENDANT'S SONS HAD SEXUALLY ASSAULTED THE VICTIM OR FOR FAILING TO OBJECT TO THE PROSECUTION'S USE OF THIS EVIDENCE IN CLOSING TO ARGUE THAT THE DEFENDANT WAS MANIPULATIVE

State v. Tulley, 2001 WI App 236 No. 00-3084-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Patrick M. Donnelly, Madison; William Flottmeyer, La Crosse
For Respondent: Robert E. Krambs, Viroqua; Diane M. Welsh, Madison

No unanimity violation occurred because "[t]he jury was presented with evidence of multiple crimes in the form of A.K.'s testimony. The instruction that the court gave required the jury to unanimously agree on Tulley's guilt or innocence for each count. The verdict forms properly specified the location of each alleged assault and whether sexual contact or sexual intercourse was alleged to have occurred at each location. This is not a case in which a juror reasonably could have doubted whether a particular charged activity at any location occurred while also being convinced that other charged activity did occur at the same location … because all of the assaults at all of the locations were described and supported by the same uncontradicted testimony."

While some might question the wisdom of allowing in evidence that the defendant's sons' had sexually assaulted the victim, the decision was a strategic one which, as a matter of law, did not fall below a standard of reasonableness.

COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO OBJECT TO JURY INSTRUCTION THAT INSTRUCTED JURY THAT A BAT IS A DANGEROUS WEAPON WHERE THE EVIDENCE WAS SO OVERWHELMING THAT THE DEFENDANT COULD NOT PROVE PREJUDICE

State v. Tomlinson, 2001 WI App 212, No. 00-3134-CR (Ct. App. Dist. I, 10-9-01)
For Appellant: John J. Grau, Waukesha; Richard J. Johnson, Racine
For Respondent: Robert D. Donohoo, Milwaukee; Christian R. Larsen, Madison

Where Tomlinson hit the victim in the head with a bat so hard that it eventually killed the victim, the result of the trial would not have been different even if counsel had objected to instructing the jury that a bat is a dangerous weapon.

INJUNCTIONS

PROSTITUTION ACTIVITIES IN SPECIFIED AREA CONSTITUTE A NUISANCE, AND

INJUNCTIVE RELIEF WAS REASONABLY RELATED TO ABATEMENT OF THE NUISANCE

City of Milwaukee, v. Burnett, et. al., No. 00-2308 (Ct. App. Dist. I, 10-9-01)
For Appellant: Jerome F. Buting, Brookfield; Pamela Moorshead, Brookfield
For Respondent: David R. Halbrooks, Milwaukee; Genevieve E. O'Sullivan-Crowley, Milwaukee

"Although it is true … that the infusion of prostitution in the affected areas can, on one level at least, be addressed by the enforcement of the laws making that related activity illegal, the difficulties and dangers inherent in that route make injunctive relief appropriate because enforcement of the injunction can be done by police officers in uniform with adequate self-protection. Additionally, although the individual appellants are but a small part of the problem, the same is true of all the persons prostituting themselves in the affected areas. A rule that prohibited injunctive relief against a person acting independently but whose independent acts when combined with the independent acts of others created a public nuisance, merely because the person was acting independently, would render this type of public nuisance immune to effective redress. Accordingly, the trial court had the authority to issue an injunction to abate the appellants' role in what the undisputed evidentiary submissions prove is a public nuisance."

JURIES

COURT MAY QUESTION JURORS ABOUT HARDSHIP AND INFIRMITY OUTSIDE OF PRESENCE OF DEFENDANT

State v. Gribble, 2001 WI App 227, No. 00-1821-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Charles B. Vetzner, Madison; Charles Giesen, Madison
For Respondent: Wm. Andrew Sharp, Richland Center; Sandra L. Nowack, Madison

Questioning jurors about whether they are able to serve on the jury due to undue hardship "does not implicate the purposes of voir dire that are the premise for a defendant's constitutional entitlement to be present with counsel." Since hardship questioning is not a part of voir dire but instead an administrative act, the defendant had no right to be present and the questioning did not have to be done on the record.

JURORS

COURT'S FINDING THAT JUROR UNDERSTOOD ENGLISH SUFFICIENTLY WELL THAT THE TRIAL WAS FAIR WAS NOT CLEARLY ERRONEOUS

State v. Carlson, 2001 WI App ____, No. 01-1136-CR (Ct. App. Dist. III, 11-13-01)
For Appellant: Steven L. Miller, River Falls; Stephen M. Glynn, Milwaukee
For Respondent: Eileen Pray, Madison; John F. Luetscher, Green Bay

Prior to trial one of the jurors responded on a jury form that he could not speak English. The clerk should have struck him from the jury pool but failed to do so. During jury deliberations the jury informed the court that they had reservations that the juror understood most of the trial proceedings. At the postconviction motion, the juror said that he did not understand English. The trial court, however, found that the juror did understand English sufficiently well. The court based its opinion on specific facts including the juror's ability to fill out the jury forms, his ability to obey orders in court and to respond to the court, and his study of English, and the facts that he had passed citizenship and drivers tests in English. According to the court of appeals, "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 [the juror's] ability to comprehend English, and found that he understood English well enough to fairly and impartially hear the case, regardless of [the juror's own] opinion. … Because credible evidence supports the trial court's finding, it was not clearly erroneous."

JURY INSTRUCTIONS

COURT PROPERLY DID NOT GIVE SELF-DEFENSE OF OTHERS INSTRUCTION TO JURY WHERE NO REASONABLE PERSON COULD HAVE OBJECTIVELY BELIEVED THAT

DEFENDANT HAD TO PREVENT ARMED ARREST OF HIS DAUGHTER WITH POTENTIALLY DEADLY FORCE

State v. Giminski, 2001 WI App 211, No. 00-3073-CR (Ct. App. Dist. I, 10-9-01)
For Appellant: Edward J. Hunt, Milwaukee; Nikola P. Kostich, Milwaukee
For Respondent: David J. Becker, Madison; Robert D. Donohoo, Milwaukee

Privilege of self defense of others, Wis. Stat. § 939.48(4), has two components: the defendant must subjectively believe that he is acting to prevent an unlawful interference with the person of another, and that belief must be objectively reasonable. Giminski knew that the agent was a federal agent executing a warrant and that the agent held a gun to the head of Giminski's daughter only after she tried to drive off in a van that the agent was trying to seize. No self-defense of others instruction was necessary in this case because even though Giminski subjectively believed he had to act to prevent his daughter from being harmed by the agent, that belief was not objectively reasonable. According to the court, "the general principles governing the law of self-defense and defense of others 'must accede to lawful government power and the special protection of federal officials discharging official duties.'"

DEFENDANT WAIVED OBJECTION TO INSTRUCTION THAT SAID THAT "DANGEROUS WEAPON MEANS A BAT"

State v. Tomlinson, 2001 WI App 212, No. 00-3134-CR (Ct. App. Dist. I, 10-9-01)
For Appellant: John J. Grau, Waukesha; Richard J. Johnson, Racine
For Respondent: Robert D. Donohoo, Milwaukee; Christian R. Larsen, Madison

At the time the instruction was given, the prosecutor told the court that the whether a dangerous bat is a dangerous weapon should be left to the jury. The defendant and his counsel said they wanted the instruction to remain as the court had read it. The court of appeals finds that Tomlinson waived any error. This was merely a concession to an element and therefore didn't require the more complete waiver colloquy required for waiver of a jury.

MENTAL COMMITMENT

THE TRIAL COURT'S ORDER DENYING A REQUEST FOR CONDITIONAL RELEASE IS DISCRETIONARY

A TRIAL COURT HAS THE DISCRETION TO DENY A REQUEST FOR CONDITIONAL RELEASE EVEN WHERE THE EXPERT OPINIONS FIND THAT THE PERSON COULD BE RELEASED UNDER CERTAIN CONDITIONS

State v. Wenk, No. 00-3334 –CR (Ct. App. Dist. I, 10-2-01)
For Appellant: Michael K. Gould, Milwaukee; Melissa Fitzsimmons, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Eileen W. Pray, Madison

When reviewing a trial court's decision to grant or deny a request for discretionary release, several standards could apply, but the court applies the same standard of review, review for an erroneous exercise of discretion, as used when reviewing denials of conditional release under Ch. 980. *See*, *State v. Seibert*, 220 Wis. 2d 308, 582 N.W.2d 745 (Ct. App. 1998).

Although the state expressed doubt that it had met its burden of proof, the trial court was free to disregard that view. And, although the experts recommended release upon certain conditions, the trial court was free to reject those opinions, especially given that "the reasons underlying their opinions that Wenk could be released despite [drug addiction] were either wrong or based on shaky grounds." The trial court's concern, that a pattern of drug use when unconfined posed too great a danger, was supported by the record, and the court therefore sustains the order denying conditional release.

OWI

THE STATE DOES NOT NEED A SEPARATE WARRANT TO TEST BLOOD ONCE THE BLOOD HAS BEEN SEIZED PURSUANT TO THE IMPLIED CONSENT LAW

State v. VanLaarhoven, No. 01-0222-CR (Ct. App. Dist. II, 10-10-01)
For Appellant: Michele Anne Tjader, Madison

For Respondent: Jennifer E. Nashold, Madison; Bradley J. Priebe, Oshkosh

Examination of evidence seized pursuant to an exception to the warrant requirement "is an essential part of the seizure and does not require a judicially authorized warrant." Therefore, the fact that seizure of an Implied Consent Law blood sample falls under the exigency exception to the warrant requirement does not mean that the state must get a separate warrant to test the blood once the exigency no longer exists.

PLEAS

DEFENDANT MADE A PRIMA FACIE SHOWING THAT THE PLEA COLLOQUY WAS INADEQUATE WHERE HE ALLEGED THAT HE DID NOT UNDERSTAND ONE OF THE ELEMENTS

PLEA WITHDRAWAL IS THE PROPER REMEDY WHERE THE RECORD DOES NOT ESTABLISH THAT THE PLEA WAS KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY ENTERED

State v. Lopez, No. 00-3070-CR (Ct. App. Dist. II, 10-24-01)
For Appellant: Margaret A. Maroney, Madison; Jerold W. Breitenbach, Kenosha
For Respondent: Robert J. Jambois, Kenosha; Brett A. Balinsky, Madison

Lopez is Spanish speaking, and he had problems communicating through his interpreter. This required a second plea hearing. At neither hearing did the court establish that Lopez understood the nature of the charge. On postconviction motion Lopez asserted that he did not understand one of the elements, that sexual contact had to be for the purpose of gratification. The trial court found that the defendant had not established a prima facie case that the plea colloquy was inadequate. This was error for two reasons. First, the court never discussed the element at the final plea hearing and it could not rely on the colloquy of the first hearing because at the time the trial court gave that attempted colloquy no credence. Second, the court could not rely on the plea questionnaire because had not been translated into English. According to the court, "We cannot determine whether a defendant has made a knowing and voluntary waiver of rights from a record that does not provide an English translation of what was provided to the defendant." The trial court therefore erred when it assigned to Lopez the burden of showing by clear and convincing evidence the grounds for withdrawal of his plea.

Since the state did not make any attempts at the postconviction motion hearing to make a record that the plea was in fact voluntarily entered, the court does not remand for a rehearing but instead allows Lopez to withdraw his plea. *See State v. Nichelson*, 202 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998).

A CHARGE MAY BE AMENDED TO INCLUDE REPEATER ALLEGATIONS, OTHERWISE UNTIMELY UNDER § 973.12(1), AS PART OF A PLEA AGREEMENT

State v. Peterson, 2001 WI App 220, No. 01-0116-CR (Ct. App. Dist. IV, 10-9-01)
For Appellant: William E. Schmaal, Madison; Robert W. McKinley, Chippewa Falls
For Respondent: James C. Babler, Barron; Sally L. Wellman, Madison

Wis. Stat. § 973.12(1) prohibits the state from amending a charging document after entry of a not guilty plea entered at arraignment. However, the statute does not unambiguously prohibit amendment of the charging document at a guilty plea to include repeater allegations as part of the plea agreement. Since a defendant need not agree to such an amendment, presumably the defendant will agree only when he or she perceives doing so to be in his or her interest to do so.

POSTCONVICTION AND APPELLATE PROCEEDINGS

sUCCESSIVE APPEAL DISMISSED UNDER *ESCALONA-NARANJO* EVEN THOUGH STATE FAILED TO ARGUE IN THE TRIAL COURT THAT *ESCALONA-NARANJO* BARRED THE NEW CLAIMS

State v. Crockett, 2001 WI App 235, No. 00-3053 (Ct. App. Dist. IV, 11-13-01)
For Appellant: David D. Cook, Monroe
For Respondent: Jeffrey J. Kassel, Madison

The court dismissed multiple claims of error that all were raised directly or could have been raised in one of Crockett's three previous appeals. Although the state failed to claim in the trial court that *Escalona-Naranjo*, 185 Wis.2d 168 (1994), barred the claims raised in this claim, the court applies the waiver doctrine. The court does not exercise its discretion to decide Crockett's claims because Crockett can cite no good reason why these issues were not previously raised before, and in fact he has merely rephrased his prior claims in slightly different terms.

RESTITUTION OBJECTION FIRST MADE AT POSTCONVICTION MOTION HEARING NOT WAIVED IN COURT'S DISCRETION

State v. Ortiz, 2001 WI App 215, No. 00-3390-CR (Ct. App. Dist. II, 10-9-01)
For Appellant: Eileen Hirsch, Madison; Joe E. Kremkoski, Racine
For Respondent: Daniel J. O'Brien, Madison; Robert S. Repischak, Racine

Although Ortiz first claimed that the state had no authority to order restitution in this case at the postconviction motion hearing, waiver is inappropriate for several reasons. The claim is of statewide interest, the state never argued waiver in the trial court, and the issue is one purely of law.

A STATUTE MAY BE UNAMBIGUOUS IN ONE FACTUAL SETTING BUT AMBIGUOUS IN ANOTHER

State v. Peterson*,* 2001 WI App 220, No. 01-0116-CR (Ct. App. Dist. IV, 10-9-01)
For Appellant: William E. Schmaal, Madison; Robert McKinley, Chippewa Falls
For Respondent: James C. Babler, Barron; Sally L. Wellman, Madison

The fact that Wis. Stat. § 971.12(1) unambiguously precludes amendment of the charge over defendant's objection following entry of a not guilty plea at an arraignment does not unambiguously preclude amendment to include repeater allegations as part of a plea agreement. According to the court, "a statute may be ambiguous in one factual setting and unambiguous in another."

PRETRIAL PROCEEDINGS

SPEEDY TRIAL VIOLATION CANNOT OCCUR UNTIL FORMAL ACCUSATION HAS BEEN LODGED

6-1/2 YEAR DELAY IN CHARGING DEFENDANT DID NOT VIOLATE DUE PROCESS WHERE DEFENDANT COULD ESTABLISH NEITHER PREJUDICE NOR THAT STATE INTENTIONALLY DELAYED IN ORDER TO GAIN AN ADVANTAGE

State v. Blanck, 2001 WI App ____, No. 01-0282-CR (Ct. App. Dist. II, 11-21-01)
For Appellant: Michael Backes, Milwaukee; Bradley Bloch, Waukesha
For Respondent: Paul E. Bucher, Waukesha; William C. Wolford, Madison

1n October 1990, Blanck kidnapped and sexually assaulted a woman in Wisconsin. He was arrested in Illinois with the woman in the trunk of his car. Illinois convicted him of several offenses, but part of the conviction was subsequently reversed on grounds of jurisdiction. In March of 1997, Wisconsin charged Blanck with crimes stemming from the same events. The delay in charging Blanck did not violate the Sixth Amendment right to a speedy trial because that right only applies when there has been a formal accusation, and Blanck was not formally accused in Wisconsin until 1997.

Statutes of limitation are the normal protection of a defendant against an unfair delay in charging. The Due Process Clause can however, prohibit delayed charging where the defendant can prove "substantial prejudice to his or her right to a fair trial and that the delay was an intentional device of the government to gain a tactical advantage over him or her." In this case, Blanck could not prevail on either prong. The delay also did not require a new trial in the interests of justice nor did it constitute plain error.

THE STATE MAY CURE FAILURE IN THE INFORMATION TO ADEQUATELY ALLEGE A REPEATER ENHANCER BY FILING A CERTIFIED COPY OF THE DEFENDANT'S PRIOR CONVICTIONS PRIOR TO THE COURT'S ACCEPTANCE OF THE DEFENDANT'S PLEA

State v. Fields*,* 2001 WI App ____, No. 01-1177-CR

(Ct. App. Dist. II, 11-14-01)
For Appellant: Martha K. Askins, Madison; Wilfred de Junco, Port Washington
For Respondent: Jeffrey A. Sisley, Port Washington; Susan M. Crawford, Madison

The information in this case failed to provide any details about prior convictions and therefore failed to properly allege the prior convictions for purposes of the repeater statute. Wis. Stat. § 973.12(1). However, in conjunction with the information's general allegation of prior convictions, the state's pre-plea submission of a certified copy of prior convictions constituted a tacit 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." Although a repeater allegation may not be added after an arraignment, it is proper to amend such a charge by "providing details of the date and nature of the prior offenses."

FAILURE OF TRIAL COURT TO CONDUCT IN CAMERA QUESTIONING OF CONFIDENTIAL INFORMANTS PURSUANT TO WIS. STAT. § 905.10 REQUIRES REVERSAL AND REMAND OF ALL COUNTS INVOLVING A CONFIDENTIAL INFORMANT

DEFENDANT'S FAILURE TO OBJECT TO USE OF UNSWORN EVIDENCE DID NOT WAIVE HIS RIGHT TO APPEAL THE COURT'S IMPROPER DENIAL OF HIS MOTION FOR DISCOVERY OF THE IDENTITIES OF INFORMANTS

State v. Vanmanivong, No. 00-3257-CR (Ct. App. Dist. II, 10-24-01)
For Appellant: John J. Grau, Waukesha; George Limbeck, Sheboygan
For Respondent: Robert J. Wells, Jr., Sheboygan; Christian R. Larsen, Madison

Where the state conceded that the defendant had met his burden sufficient to require an in camera inspection of confidential informants, the court erred when it deviated from the procedures established in Wis. Stat. § 905.10(3)(b). The informants provided interrogation-style affidavits to the court, which on its own initiative asked the police for two unsworn memos explaining the affidavits. This was error, for Wis. Stat. § 905.10(3)(b) provides that "the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit." Once the court found that the affidavits were unsatisfactory, the court could not ask for more information *ex parte* but should have conducted an *in camera* examination of the confidential informants. Therefore the court reverses and remands the five counts where a confidential informant had been present at the time of the offense, but the court affirms the remaining three counts.

Defendant's failure to object to use of the unsworn memos did not waive his right to appeal the court's failure to properly consider whether to divulge the identity of confidential informants for two reasons. First, the trial court's ruling makes clear that any objection would have failed. Second, the defendant "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."

DEFENDANT'S FAILURE TO TURN OVER WITNESS'S STATEMENT IN VIOLATION OF WIS. STAT. 971.23(2)(AM) JUSTIFIED COURT'S RULING BARRING TESTIMONY CONCERNING STATEMENT

State v. Gribble, 2001 WI App 227, No. 00-1821-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Charles B. Vetzner, Madison; Charles Giesen, Madison
For Respondent: Wm. Andrew Sharp, Richland Center; Sandra L. Nowack, Madison

Gribble did not turn over to the prosecution the statement of one of his witnesses as requested by the prosecution's discovery request because Gribble intended to use the statement only on rebuttal. According to the court, since Gribble listed the witness on his witness list, he was obligated under Wis. Stat. § 971.23(2)(am) to provide the prosecutor with a copy of the witness' statement. The trial court therefore did not err when it excluded testimony on the statement.

THE COURT MUST CONDUCT AN *IN CAMERA* INSPECTION OF CLOSED RECORDS UNDER *SHIFFRA* EVEN WHERE THE STATE DOES NOT POSSESS THE RECORDS AND THE RECORDS ARE NOT PSYCHIATRIC RECORDS

State v. Navarro, 2001 WI App 225 No. 00-0795-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Joseph M. Moore, Juneau
For Respondent: William F. Bedker, Juneau; Diane M. Welsh, Madison

Navarro was charged with battery-by-prisoner and he sought an *in camera* inspection of the prison guard's personnel file under *State v. Shiffra*, 175 Wis. 2d 391, 499 N.W.2d 719 (Ct. App. 1993) to bolster his self-defense claim. The court remands for an evidentiary hearing permitting Navarro to demonstrate that the records he seeks are material to his self-defense claim. *Shiffra* applies even though the state does not possess the records and the records are not psychiatric. Exculpatory evidence analysis under Wis. Stat. § 971.23(1) also is not relevant to whether the records are material to Navarro's claim of self-defense.

PRISONER RIGHTS

THE THIRTY DAY STATUTE OF LIMITATIONS IS TOLLED ON THE DATE THAT A PRO SE PRISONER DELIVERS A CORRECTLY ADDRESSED PETITION FOR REVIEW TO THE PROPER PRISON AUTHORITIES FOR MAILING

State of Wisconsin ex rel. Eugene Nichols v. Litscher, Wis. Dept. of Corrections, 2001 WI 119, No. 00-0853-W (S. Ct. 11-6-01)
For Appellant: Jeffrey O. Davis, Daniel J. La Fave, Milwaukee
For Respondent: James M. Freimuth, James E. Doyle, Madison

The court does not accept that the mailbox rule applies when a prisoner deposits his or her pro se petition for review in a prison mailbox. However, "the 30-day deadline for receipt of a petition for review is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing." In order to trigger tolling, the prisoner must follow prison rules or practices for sending outgoing mail, including placing the mail in the hands of the proper person or in a designated receptacle depending on the rules of the particular prison.

WHILE PERSONS DETAINED UNDER CH. 980 ARE "PATIENTS" TO WHOM THE PATIENTS' RIGHTS LAW APPLIES, SUCH PERSONS ARE NOT ENTITLED TO THE PROTECTION OF THAT LAW WHILE IN THE TEMPORARY CUSTODY OF THE SHERIFF

Volden v. Koenig, et al. 2001 WI App ____, No. 01-0433 (Ct. App. Dist. 2, 11-14-01)
For Appellant: Kenneth A. Volden, Mauston
For Respondent: Carl K. Buesing, Sheboygan

The patients' rights law, § 51.61, applies to ch. 980 detainees while in a treatment facility. However, "an individual institutionalized under the care of DHFS is not entitled to the protections of the patients' rights law while in the temporary custody of the sheriff." Therefore, Volden, who was temporarily held in the county jail awaiting court proceedings, was not entitled to injunctive relief and could not sue the sheriff for not providing a vegetarian diet as requested under the patients' rights law.

PROBATION AND PAROLE

UPON RECONSIDERATION, COURT FIXES FACTUAL ERRORS IN ITS PRIOR DECISION BY DELETING FINDINGS THAT DEFENDANT HAD ABUSED HIS OWN CHILDREN

State v. Oakley, 2001 WI 123. No. 99-3328-CR (S. Ct. 11-23-01, per curiam)

The Supreme Court removes language from its prior opinion finding that Oakley had abused his children. The concurring Justices, Abrahamson, C.J., and Bradley and Sykes, J.'s, who dissented from the original opinion, would have this per curiam decision go farther and also consider the fact that Oakley has made some support payments. Even given the court's new findings, the trial court properly precluded Oakley from fathering new children until he can prove that he is making his support payments as this case presents "exceptional circumstances."

SEARCH AND SEIZURE

POLICE COULD REASONABLY STOP A DRIVER ON SUSPICION THAT SHE MAY HAVE COMMITTED A BURGLARY TWO DAYS BEFORE

State v. Olson, 2001 WI App ____, No. 00-3383-CR

(Ct. App. Dist. II, 11-28-01)
For Appellant: Daniel P. Fay, Pewaukee; Elizabeth A. Cavendish-Sosinski, Pewaukee
For Respondent: Paul E. Bucher, Waukesha; James M. Freimuth, Madison

The court upholds a traffic stop to investigate a burglary that had occurred two days before: "In the present case, we find sufficient facts to give rise to a reasonable suspicion that Olson had committed a crime. The Waukesha County Sheriff's Department did not pull Olson's name out of a hat. An anonymous caller to We Tip first made it suspect Olson. However, the two calls to the hotline were not the only facts stacking up against Olson. While talking to her mother, the officers discovered that Olson had the opportunity to commit the burglary. Finally, Olson's purposeful avoidance of the officers evidenced at least a guilty conscience. Although avoidance of the police and refusal to cooperate may be founded in wholly innocent intentions and without more do not create reasonable suspicion, *Florida v. Bostick,* 501 U.S. 429, 437 (1991), 'cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion….'" When the police stop to investigate past illegal behavior, reasonable suspicion alone may not be enough. The courts must also balance the need to search or seize against the invasion entailed by the search or seizure. In this case, it was not unreasonable to wait outside of Olson's house and stop her when she got in her car and started driving away. According to the court, "Given her penchant for stonewalling, we cannot say that this was an unreasonable action."

HANDCUFFING SUSPECT AFTER SHE GAVE STATEMENTS DID NOT MEAN THAT SUSPECT WAS IN CUSTODY AT THE TIME SHE MADE HER STATEMENTS

State v. Goetz, 2001 WI App ____, No. 01-0954-CR (Ct. App. Dist. III, 11-27-01)
For Appellant: David J. Becker, Madison; Jay N. Conley, Oconto
For Respondent: Nila J. Robinson, Appleton

Handcuffing a person after she gave statements to the police did not mean that she had been arrested at the time she gave the statements. According to the court, "Handcuffing cannot operate retroactively to create custody for purposes of Miranda because a reasonable person's perception at the time of questioning cannot be affected by later police activity." The dissent, Hoover, P.J., would reject federal precedent and find that Goetz was in custody under the Wisconsin Constitution. According to him, the problem with the federal cases, *Michigan v. Summers*, 452 U.S. 692 (1981) and *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994), is that those cases depart from the factors that they claim to acknowledge such as freedom to leave and purpose, place and length of interrogation and instead focus on irrelevant factors such as the nonthreatening nature of the detention, intrusiveness relative to the search itself, and minimal public stigma. According the dissent, "these factors merely rationalize the fiction that reasonable people in Goetz's position would not perceive themselves to be in custody … they are easily discerned as a lapse in analytical honesty, a legal shunt."

EVIDENCE SEIZED PURSUANT TO A WARRANT THAT IS NOT SUPPORTED BY A STATEMENT UNDER OATH OR AFFIRMATION MUST BE SUPPRESSED

State v. Tye, 2001 WI 123, No. 99-3331-CR (S. Ct. 11-27-01)
For Appellant: William L. Gansner, Madison
For Respondent: Mark D. Richards, Christy M. Hall, Racine

The warrant in this case was facially defective because the officer requesting the warrant failed to sign an affidavit in support of the warrant. The failure to swear out an oath in support of the warrant violated the Fourth Amendment to the United States Constitution and Article 1, sec. 11 of the Wisconsin Constitution., and this defect requires suppression of the evidence subsequently discovered. In reaching this opinion, the court rejects 4 possible theories suggested for why the evidence need not be suppressed. The court concludes that: (1) Wis. Stat. § 968.22 does not preclude suppression because the failure to swear out an oath is not a technical irregularity; (2) a second sworn statement made after the search does not fix the constitutional error, for an after-the-fact oath "disregards the historical importance of the oath or affirmation as the basis upon which a neutral magistrate issues a warrant;" (3) *State v. Nicholson*, 174 Wis. 2d 542, which did

not require suppression where the warrant listed the wrong address, does not apply, for "[i]n the present case the warrant was invalid when issued"; and (4) no good faith exception applies. The exclusionary rule applies when it is plainly evident, as in this case, that the judge or magistrate "had no business issuing a warrant." The concurrence, Crooks, Wilcox, and Bablitch, J.'s, would affirm suppression but would not so summarily dismiss the good faith exception on other facts.

WHERE OFFICER COULD HAVE ARRESTED DRUNK DRIVER BUT DID NOT, SEARCH OF DRUNK DRIVER PRIOR TO TRANSPORTING HIM WAS NOT INCIDENT TO ARREST AND THEREFORE FRUITS OF THE SEARCH MUST BE SUPPRESSED

NEED TO TRANSPORT DRUNK DRIVER IN A PATROL CAR DID NOT CREATE AN EXIGENCY JUSTIFYING A SEARCH

SUSPECT THREW POT PIPE TO GROUND IN RESPONSE TO ILLEGAL SEARCH AND THEREFORE THE PIPE MUST BE SUPPRESSED

ALTHOUGH POLICE DECIDED TO ARREST DEFENDANT ON OWI CHARGE ONLY AFTER THE ILLEGAL SEARCH, THE BLOOD DRAWN AFTER ARREST NEED NOT BE SUPPRESSED BECAUSE THE POLICE HAD INDEPENDENT EVIDENCE SUPPORTING THE ARREST AT THE TIME THAT THEY ARRESTED THE DEFENDANT FOR OWI

State v. Hart, 2001 WI App ____, No. 00-1444-CR (Ct. App. Dist. II, 11-21-01)
For Appellant: John Dietrich, Milwaukee
For Respondent: Kathleen M. Ptacek, Madison; Mark A. Langholz, Waukesha

Although the police may have had probable cause to arrest Hart for drunk driving, they told him that they were not going to arrest him. Instead they patted him down prior to transporting to the police station where he could call for a ride home. As a result of the search Hart removed a pot pipe from his pocket and threw it to the ground. The court suppresses the pot pipe because "it is clear there was no intent on the part of the police officer to search Hart incident to the formal arrest for OWI. Indeed, although there may have been probable cause, both parties were operating under the assumption that no arrest would occur. Therefore, none of the concerns that justify prearrest searches would come into play. The officer had no reasonable belief that Hart would be motivated to conceal evidence or harm the officer."

The court reads *In Interest of Kelsey C.R.*, 2001 WI 54, 243 Wis. 2d 5422, 626 N.W.2d 777, as providing that "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 justified a search for weapons." The police must still have specific and articulable facts supporting the frisk. It might be reasonable to search under these circumstances, but the evidence cannot be admitted in court.

Hart threw the pot pipe to the ground in response to the illegal pat-down, and there was no separate crime or intervening illegality. Therefore the abandonment is not attenuated from the illegal search and the pipe must be suppressed.

While the court suppresses the evidence stemming from the illegal search, it does not suppress the blood drawn after arrest. The court holds "that the chemical evidence was gained as a result of evidence standing apart from the illegal conduct. Therefore, to exclude it would go beyond the deterrence principle discussed in *Wong Sun*."

PROBABLE CAUSE TO ARREST CAN BE BASED ON HEARSAY EVIDENCE THAT IS RELIABLE AND IS PROVIDED BY A CREDIBLE SOURCE

THE PROBABLE CAUSE DETERMINATION AUTHORIZING THE DEFENDANT'S CONTINUED DETENTION WAS NOT IMPROPER WHERE ANY POLICE MISSTATEMENT WAS NOT CALCULATED TO MISLEAD

State v. McAttee, No. 00-2803 (Ct. App. Dist. I, 10-9-01)
For Appellant: Russell D. Bohach, Milwaukee; Thomas J. Erickson, Milwaukee
For Respondent: James M. Freimuth, Madison

The police could reasonably rely on hearsay information from a known and reliable informant

without independently determining the reliability of the informant's source of information. In addition, an officer is entitled to rely on another officer's knowledge of a confidential informant, and here the information disclosed by the informant provided probable cause to arrest.

At the probable cause hearing, the police alleged that a coconspirator had implicated McAttee in the victim's murder. That allegation was "legally inexact" because the persons who implicated McAttee were his girlfriend who told the informant that the defendant had confessed and the girlfriend's sister who told the informant that the girlfriend claimed to have witnessed the murder. They were not coconspirators The court finds no reversible error because the police made no misrepresentation that undermined the integrity of the probable cause determination. The statement was not calculated to mislead but may have "accurately conveyed the police's understanding, at least in the vernacular."

AN OFFICER MAY ARREST A DRIVER IN ANOTHER JURISDICTION PURSUANT TO THE DOCTRINE OF FRESH PURSUIT

State v. Haynes, No. 00-3083-CR (Ct. App. Dist. II, 10-3-01)
For Appellant: Gerard Kuchlar, Waukesha
For Respondent: Kathleen Ptacek, Madison

Officers may arrest outside their jurisdiction under certain circumstances, including "fresh pursuit." Here, the officer observed Haynes commit a traffic violation, and there was no delay between the officer's observation and his decision to act, so that the extra-jurisdictional stop was proper. After having made this legal stop, the officer observed signs of intoxication, which allowed him to continue the stop and broaden his investigation, to include field sobriety tests. The officer was therefore acting in his official capacity when Haynes resisted. Haynes bit another officer called in for assistance; because that officer was responding to a request authorized by § 66.0313, she was acting within her lawful authority so as to support a charge of battery to officer, even though the officer was outside her jurisdiction at the time.

DEFENDANT REASONABLY BELIEVED THAT HE WAS DETAINED WHERE OFFICER ASKED INCRIMINATING QUESTIONS AND ASKED PERMISSION TO SEARCH IMMEDIATELY AFTER TRAFFIC STOP ENDED

State v. Williams, 2001 WI App 249, No. 01-0463-CR (Ct. App. Dist. III, 9-25-01)
For Appellant: Stephen W. Kleinmaier, Madison; Jennifer R. Agner, Eau Claire
For Respondent: Carl T. Bahnson, Altoona

The court affirms suppression of evidence found following a consent search because Williams was wrongly seized at the time he consented to the search. The court finds that "[a] reasonable person would not have detected the nearly seamless transition from the conclusion of the traffic stop to the questioning," and therefore Williams reasonably believed he was still seized. The court finds that the late hour, the rural and isolated location, standing outside of the vehicle, flashing emergency lights, initial detention, questions starting almost immediately after the initial detention, tone, volume and nature of the questions, and the presence and stance of the second officer all support this conclusion.

EXIGENT CIRCUMSTANCES ALLOWED OFFICERS TO ENTER APARTMENT AFTER THEY SAW THE RESIDENT RETREAT INTO THE APARTMENT WHILE APPARENTLY HOLDING DRUGS

OFFICERS HAD REASONABLE SUSPICION JUSTIFYING A PROTECTIVE SWEEP OF LIVING ROOM CLOSET FOLLOWING ARREST OF THE DEFENDANT IN HIS BEDROOM

State v. Garrett, 2001 WI App 240, No. 00-3183-CR (Ct. App. Dist. I, 11-13-01)
For Appellant: Michael P. Sessa, Milwaukee; Chris Bailey, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; David H. Perlman, Madison

The court found the following facts to create exigent circumstances justifying a warrantless entry: "The detective's observation of Garrett with what appeared to be cocaine, coupled with Garrett's flight into the apartment, his failure to answer the door, and the surrounding drug activity created a reasonable belief that Garrett was in the process of destroying

evidence."

The officers arrested Garrett in his bedroom that was thirty-two to forty feet away from the living room closet where the police found a short-barreled shotgun. Since the search did not occur in the same vicinity as the arrest, the police needed reasonable suspicion to suspect that the closet could be harboring a person before they could search it. Here, they suspected Garrett of drug dealing; the closet was big enough to conceal someone and was ajar; Garrett had fled from the living room; and there was sufficient space between the door and the sofa in front of it for a person to get into the closet. Given these facts, the police had a reasonable suspicion justifying the search of the closet.

DEFENDANT'S DISAPPEARANCE FOLLOWING THE DEATH OF HIS MOTHER DID NOT CREATE PROBABLE CAUSE SUPPORTING A WARRANTING TO SEARCH HIS HOME

SINCE WARRANT WAS NOT PROPER COURT REMANDS FOR A DETERMINATION OF WHETHER POLICE RELIANCE ON THE WARRANT WAS IN GOOD FAITH

AUTOMOBILE EXCEPTION ALLOWED WARRANTLESS SEARCH OF DEFENDANT'S CAR THAT WAS PARKED IN HIS DRIVEWAY EVEN THOUGH DEFENDANT WAS ALREADY IN CUSTODY

State v. Marquardt, 2001 WI App 219, No. 01-0065-CR (Ct. App. Dist. III, 10-9-01)
For Appellant: James B. Connell, Wausau
For Respondent: Timothy F. Scobie, Chippewa Falls; James Freimuth, Madison

Facts that defendant had not been heard from after his mother's murder, that the murder did not involve evidence of burglary or theft, that footprints were found at the murder scene, the mother was shot and stabbed, and that the mother's phone had been taken off of the hook did not support probable cause to issue a search warrant. According to the court, "there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime."

The court remands for a hearing under *State v. Eason*, 2001 WI 98, to determine whether the police relied on the warrant in good faith.

A warrantless search of a vehicle requires showings of probable cause and the "ready" mobility of the vehicle. The defendant failed to deny probable cause timely (until his reply brief) and the Wisconsin Constitution, mirroring federal law, does not limit the automobile exception to public places. Therefore it does not matter that the car was in a private driveway or that the defendant had been arrested. The state could search it pursuant to the automobile exception to the Fourth Amendment.

WARRANTLESS POLICE ENTRY OF A RESIDENCE IS NOT JUSTIFIABLE AS HOT PURSUIT OR EXIGENT CIRCUMSTANCES WHERE THE POLICE HAD AT MOST REASONABLE SUSPICION OF A CRIME BUT NOT PROBABLE CAUSE TO BELIEVE THAT ONE HAD BEEN ADMITTED

State v. Rodriquez, 2001 WI App 206, No. 00-2546-CR (Ct. App. Dist. I, 8-21-01)
For Appellant: Diana M. Felsman, Milwaukee; Paige Styler, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee, Lara M. Herman, Madison

Police entry of a residence was not justifiable on the following facts: the house was subject to observation as a "hot spot", i.e. one with many visitors unknown to the neighbors; the officers saw three people enter and leave shortly thereafter; drug arrests had been made at the home two months earlier; and defendant fled into his home when undercover officers approached and asked, "What's up?" The state failed to prove both probable cause to believe that the house contained drugs and also the existence of exigent circumstances. Flight establishes reasonable suspicion but not probable cause, and the officers neither observed drug dealing nor knew anything about the defendant sufficient to establish probable cause. The state can not rely on hot pursuit because "hot pursuit" is an immediate or continuous pursuit from the scene of a crime. Here no crime occurred. According to the court, the search was unreasonable, for "if an officer is going to enter a private residence without a warrant, the exigency factors must rise well above the facts and circumstances presented here. If we sanction a warrantless entry based upon bicycle riding, three visitors in and out of the home, and

Rodriquez retreating into the home when asked, 'What's up?' by strangers in an unmarked police car, we may as well grab a toboggan and start sliding because the revered privacy of an individual in his/her own home will become a slippery hill."

TEENAGER HAS AUTHORITY TO CONSENT TO SEARCH OF SUSPECT'S HOME

State v. Tomlinson, 2001 WI App 212, No. 00-3134-CR (Ct. App. Dist. I, 10-9-01)
For Appellant: John J. Grau, Waukesha; Richard J. Johnson, Racine
For Respondent: Robert D. Donohoo, Milwaukee; Christian R. Larsen, Madison

The court is persuaded by cases from other jurisdictions that a 14 or 15 year old daughter has authority to consent to search of her parent's home. The court looks to two factors: (1) the age of the child; and (2) the scope of the consent and whether the entry was to a common area or a more private area. Here the police reasonably believed that the teenage girl lived at the residence and "had mutual use of the property, sufficient to consent to the entry."

SELF-INCRIMINATION

A DEFENDANT WHO PRESENTS PSYCHIATRIC PSYCHOLOGICAL EVIDENCE ON THE ISSUE OF WHETHER HE OR SHE HAS A SEXUAL DISORDER WAIVES THE RIGHT AGAINST SELF INCRIMINATION AND MUST SUBMIT TO A PSYCHIATRIC EVALUATION BY AN EXPERT CHOSEN BY THE STATE FOR THE PURPOSES OF REBUTTAL

State v. Davis, 2001 WI App 210, No. 00-2916-CR (Ct. App. Dist. II, 10-9-01)
For Appellant: Marguerite Moeller, Madison; Sandy A. Williams, Port Washington
For Respondent: James M. Shellow Milwaukee; Catherine E. Levinson, Milwaukee

In *State v. Richard A.P.*, 223 Wis. 2d 777 (Ct. App. 1998), the court held that a defendant may present expert psychological testimony as to his or her character in order to show the defendant lacks the psychological profile of a sex offender and therefore is unlikely to have committed the crime. However, "a defendant who presents such expert testimony puts his or her mental status in issue and thereby waives the right against self-incrimination. Because fundamental fairness in the criminal process dictates that the State have access to the same quality of psychiatric evidence … we conclude that a defendant who manifests the intent to introduce *Richard A.P.* testimony may be ordered to submit to a psychiatric evaluation by an expert chosen by the State. Of course, the State's use of its psychiatric testimony is for the sole purpose of rebutting the defendant's presentation of psychiatric character evidence."

FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES AT MENTAL RESPONSIBILITY STAGE OF A BIFURCATED (NGI) CRIMINAL TRIAL; THE STATE CANNOT CALL DEFENDANT AS AN ADVERSE WITNESS

State v. Langenbach, 2001 WI App 222, No. 01-0851-CR (Ct. App. Dist. II, 10-9-01)
For Appellant: Robert J. Jambois, Kenosha; Sally L. Wellman, Madison
For Respondent: Patrick M. Donnelly, Madison; David E. Sloan, Kenosha

Langenbach entered no contest pleas but contested whether he was not guilty for reasons of insanity. The state sought to call him as an adverse witness at the hearing to determine whether he was mentally responsible for his acts. The court holds that the Fifth Amendment privilege against self-incrimination applies. While the determination of mental responsibility is not criminal in nature, the determination remains part of the criminal appeal allowing the defendant to claim the privilege: "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' … The privilege is not only intended to protect a defendant when his answers would lead to a conviction ... but is intended to protect a defendant when the defendant 'apprehends a danger from a direct answer.'" Here, there is a legitimate impending threat of the deprivation of Langenbach's liberty, either through commitment to a mental hospital or imprisonment."

SENTENCING

COURT MAY NOT ORDER DEFENDANT TO PAY RESTITUTION FOR UNRELATED CASES AS A CONDITION OF PROBATION

State v. Torpen, No. 01-0182-CR (Ct. App. Dist. III, 10-16-01)
For Appellant: William E. Schmaal, Madison; John Hinde, Rice Lake
For Respondent: James C. Babler, Barron; Mary E. Burke, Madison

The probation statutes under Wis. Stat. § 973.09 "cannot authorize the circuit court to order the payment of outstanding restitution obligations for unrelated cases, even if the court characterizes the requirement as a general condition of probation rather than as restitution ordered as a condition of probation pursuant to Wis. Stat. § 973.20." While the condition might be reasonable, the probation statute, Wis. Stat. § 973.09, expressly requires the court to order restitution under the procedures in Wis. Stat. § 973.20, and that restitution statute only allows restitution to the victim of any crime considered at sentencing.

SENTENCING COURT DID NOT PUNISH THE DEFENDANT FOR GOING TO TRIAL

THE MOTHER OF A SEXUAL ASSAULT VICTIM IS A "VICTIM" BUT THE VICTIM'S AUNT IS NOT A "VICTIM" FOR WHOM THE COURT CAN ORDER COUNSELING COSTS

State v. Gribble, 2001 WI App 227, No. 00-1821-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Charles B. Vetzner, Madison; Charles Giesen, Madison
For Respondent: Wm. Andrew Sharp, Richland Center; Sandra L. Nowack, Madison

At sentencing the trial court listed as an aggravating factor the fact that Gribble had pursued a defense theory putting the victim's mother on trial and asserting that she killed her child. The court of appeals finds no sentencing error because it is satisfied that "the court properly considered Gribble's testimony, and considered the defense strategy only insofar as it was based on that testimony, which was within Gribble's control and which the court believed to be false." The court considered the proper factors and could properly consider whether the defendant had made willful and material falsehoods.

A victim under Wis. Stat. § 973.20(1r) has the same meaning as victim in Wis. Stat § 950.02(4)(a), and a mother is a "family member" and therefore a "victim." An aunt is not a "family member" and therefore not a "victim."

REVOCATION OF SENTENCE IS A NEW FACTOR WHERE THE COURT ENTERED ITS SENTENCE IN THE BELIEF THAT THE DEFENDANT WOULD NOT BE REVOKED AND IMPOSED A SENTENCE ALLOWING FOR SUFFICIENT TIME TO COMPLETE DRUG TREATMENT

State v. Norton, 2001 WI App 245; No. 00-3538-CR (Ct. App. Dist. I, 11-13-01)
For Appellant: Peter M. Koneazny, Milwaukee; Lisa Lawrence, Milwaukee
For Respondent: Maura F.J. Whelan, Madison

Normally revocation of sentence is not a new factor entitling the defendant to resentencing. However, where the court is told that the defendant would not be revoked and the purpose for the sentence is to give the defendant sufficient time to beat his drug habit, the fact that the defendant was revoked is a new factor entitling him to resentencing. Here the probation officer told the court that the defendant would not be resentenced. Following sentencing she revoked defendant's probation on the belief that the sentence could be served concurrently. However, the court's original sentence required that the sentence be consecutive to any other sentence. The court of appeals finds that "whether or not the defendant will be exposed to the sentence underlying the probation is significant. A criminal sentence should represent the minimum amount of custody consistent with the factors of the gravity of the offense, the character of the offender, and the need to protect the public."

RESTITUTION NOT PROPERLY ORDERED TO CITY TO RECOVER FOR SWAT TEAM OVERTIME EXPENSES

State v. Ortiz, 2001 WI App 215, No. 00-3390-CR (Ct. App. Dist. II, 10-9-01)
For Appellant: Eileen Hirsch, Madison; Joe E. Kremkoski, Racine

For Respondent: Daniel J. O'Brien, Madison; Robert S. Repischak, Racine

The court summarizes the law thusly, "A government entity can, in the appropriate case, be a victim entitled to restitution. (*Howard-Hastings*). Where the defendant's conduct indirectly causes damage or loss to the governmental entity, the entity is a passive, not a direct, victim and is not entitled to restitution. (*Schmaling*). Conversely, where the defendant's conduct directly causes damage or loss to the governmental entity, the entity is a direct or actual victim and entitled to restitution." This case falls in the middle because the Ortiz's conduct (obstructing, disorderly conduct while armed, threatening to injure another while armed) was targeted at the police who were the direct victims. However, since the police were not directly injured, they cannot claim financial damages, and the city, which had to pay overtime wages, is not entitled to recovery because it is not a direct victim. "As such, the city cannot recoup its collateral expenses in apprehending Ortiz." The court also rejects the idea that the restitution could be ordered as an item of cost, § 973.06(1)(a). The expenses were incurred in the normal course of a police operation, and thus were mere "general internal operating expenses," which cannot support a cost order. The court also declines to consider whether the restitution could have been ordered as a condition of probation because that issue was not addressed by the trial court.

SEXUALLY VIOLENT PERSONS

NEW SEXUAL ASSAULT CREATES EXTRAORDINARY CIRCUMSTANCES UNDER WIS. STAT. § 806.07 ALLOWING THE COURT TO GRANT THE STATE RELIEF FROM ITS PRIOR ORDER PLACING A SEXUALLY VIOLENT PERSON ON SUPERVISED RELIEF

AN EXPERT LICENSED IN ILLINOIS COULD TESTIFY BECAUSE WIS. STAT. § 908.04(3) IS NOT A RULE REGARDING THE ADMISSIBILITY OF EXPERT EVIDENCE

TRIAL COURT ERRED WHEN IT DISALLOWED PERSON WITH EXPERTISE IN TREATING SEXUAL OFFENDERS FROM GIVING HER OPINION ON THE PERSON'S LIKELIHOOD OF REOFFENDING

FACT THAT EXPERT ALTERED HIS REPORTS AND GAVE INACCURATE TESTIMONY REGARDING HIS JOB TITLES AND LENGTH OF SERVICE FOR PARTICULAR EMPLOYERS DID NOT REQUIRE COURT TO STRIKE EXPERT'S TESTIMONY

State v. Sprosty, 2001 WI App 231, No. 00-2404 (Ct. App. Dist. IV, 11-13-01)

For Appellant: Jack E. Schairer, Madison; Roseann T. Oliveto, Lancaster

For Respondent: Warren D. Weinstein, Madison

In 1996 the trial court granted Sprosty supervised release. When the county could not find a placement, the court reversed itself. The appellate courts reversed holding that the circuit court was required to ensure placement in a supervised release placement. Sprosty was never released. The county dragged its feet, and the court extended the time for releasing Sprosty to April 1, 2000. While awaiting release, Sprosty made a sexual advance to a 17-year-old in the jail. In the trial court, the experts then disagreed whether the advance meant Sprosty was likely to sexually violently reoffend. The trial court granted the state relief from its previous release order under a finding that the new sexual advance was an "extraordinary circumstance[]" under Wis. Stat. § 806.07(1)(h). The court of appeals affirms saying, "We cannot conclude that the trial court improperly exercised its discretion" when it looked to the need to protect society.

One of the psychological experts relied upon by the state was licensed in Illinois and not Wisconsin. Sprosty argued that this violated the rule in Wis. Stat. § 980.04(3) which provides that a person conducting an evaluation be a licensed psychologist or psychiatrist. Wis. Stat. § 980.04(3) is not a rule regarding the admissibility of expert testimony. Rather it provides the procedures to be used when the court determines that there probable cause to believe that someone is a sexually violent person. The standard for determining expert testimony was a general one—whether the testimony of a trained expert would assist the trier of fact.

The trial court erred when it prohibited one of Sprosty's experts from giving her opinion on whether Sprosty was likely to reoffend if placed on

supervised release. Like the state's expert, Sprosty's expert was not a registered psychologist or psychotherapist under Wis. Admin Code § HFS 99.04, but she does provide treatment for sexual offenders and therefore was qualified by knowledge, skill, experience, training, or education. However, given the fact that the court knew the witness' opinion, the error was harmless.

The trial court did not err when it refused to strike the testimony of a state's witness who had misrepresented his credentials and altered two reexamination reports. According to the court, "While Thomalla's past misconduct and misleading testimony may have impaired his credibility, it does not make his testimony incredible as a matter of law."

INCREASE OF INITIAL PERIOD OF COMMITMENT FROM 6 TO 18 MONTHS UNDER WIS. STAT. § 980.08(1) DOES NOT VIOLATE DUE PROCESS

INCREASE OF INITIAL PERIOD OF COMMITMENT FROM 6 TO 18 MONTHS UNDER WIS. STAT. § 980.08(1) DOES NOT VIOLATE EQUAL PROTECTION

THE EXTENDED PERIOD OF COMMITMENT IS NOT APPLIED RETROACTIVELY

In re the Commitment of Isaac H. Williams, No. 00-2899 (Ct. App. Dist. I, 10-23-01)
For Appellant: Donald T. Lang, Madison; Melissa Fitzsimmons, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Diane M. Welsh, Madison

The initial 18 month commitment period for before a person committed under Ch. 980 does not violate substantive due process because persons committed under the chapter are necessarily sexually violent, and multiple alternative ways exist that a committed person can be released earlier if appropriate. "In light of all the safeguards and alternative methods by which a person committed under Wis. Stat. ch. 980 can obtain supervised release, we cannot say that Hogan and Williams have carried their burden of showing beyond a reasonable doubt that the marginal impediment to supervised release created by the amendment to Wis. Stat. § 980.08(1) (1997-1998) violates their right to substantive due process because § 980.08(a) now requires an additional twelve months before they may formally file a petition for supervised release."

The increase of the time period before a person committed under ch. 980 may petition for supervised release does not violate equal protection when compared with the classes of persons committed under ch. 51 or persons committed pursuant to Wis. Stat. § 971.17 (NGI). The court finds that sexually violent persons are "more dangerous as a class" than either persons committed under ch. 51 or pursuant to § 971.17. In addition it is more difficult to commit a person under ch. 980 than under ch. 51, and a person committed under ch. 51 may be committed the first time they have shown any sign that they are dangerous. Persons committed under § 971.17 are not found, as with ch. 980 committees, to necessarily pose a threat of future dangerousness. Rather they are currently mentally ill. Given these differences, the court finds no equal protection violations.

Even though the petitions in these joined cases were filed before the new rules were entered into law, the appellants were found to be sexually violent after the new procedural rules went into effect. Therefore, the new rules are not being applied retroactively to them.

ISSUE PRECLUSION CAN PRECLUDE PERSON SUBJECT TO COMMITMENT FROM RELITIGATING UNDERLYING CONVICTION AT A CH. 980 TRIAL

WHETHER ISSUE PRECLUSION APPLIES IN THIS CASE IS REMANDED TO TRIAL COURT TO DETERMINE WHETHER IT WOULD BE FUNDAMENTALLY UNFAIR TO APPLY ISSUE PRECLUSION TO PRIOR CONVICTION WHICH WAS NEGOTIATED TO A LESSER SENTENCE FOLLOWING RECANTATION OF THE VICTIM

In Re: the Commitment of Ronald G. Sorensen
2001 WI App 251, No. 98-3107 (Ct. App. Dist. IV, 11-13-01)
For Appellant: T. Christopher Kelly, Madison; Randall M. Holtz, Baraboo
For Respondent: Dennis C. Schuh, Madison; Warren D. Weinstein, Madison

"When a respondent was previously convicted of a

sexually violent offense in a trial, issue preclusion may be used to prevent the respondent from offering evidence to show that he or she did not commit the prior offense."

The court remands to the trial court to determine whether issue preclusion should apply in this case. Issue preclusion requires first a determination of whether the parties are so similarly situated to apply the doctrine, and second a discretionary decision involving several factors. One factor requires a determination of whether application of the doctrine would be unfair because of an inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Here Sorensen dropped an appeal of his prior conviction following recantation by the victim when the state agreed to reduce his sentence and therefore the court remands. Dykman, J., concurring would remand for a trial at which Sorensen could introduce evidence of the victim's recantation.

INITIAL COMMITMENT OF SEXUALLY VIOLENT PERSONS UNDER WIS. STAT. § 980.06 DOES NOT VIOLATE DUE PROCESS

State v. Ransdell, 2001 WI App 202 No. 00-2224 (Ct. App. Dist. I, 10-9-01)
For Appellant: Ellen Henak, Milwaukee; Thomas H. Reed, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Warren D. Weinstein, Madison

The legislature's amendment to Ch. 980 automatically committing all persons determined to be sexually violent persons does not violate due process. Ransdell cannot carry his heavy burden of proving that the statute as amended violates due process because: "there are many safeguards against arbitrary confinement" including the possibility of a petition for release made by the director of the housing facility; the possibility of an initial petition for discharge or reexamination of the person at "any time;" and the mandatory reexamination of the person after 6 months. Judge Schudson dissents finding that the Wisconsin Supreme Court found Ch. 980 to be constitutional in *State v. Post*, 197 Wis. 2d 279 (1995) only because there was no automatic confinement and because confinement could only be ordered by a court.

TRIAL PROCEEDINGS

TRIAL COURT PROPERLY AMENDED THE INFORMATION AT THE CLOSE OF EVIDENCE TO ADD A SECOND AND DIFFERENT CHARGE UNDER WIS. STAT. § 961.42(1)

State v. Malcom, 2001 WI App ____, No. 01-0506-CR (Ct. App. Dist. II, 11-28-01)
For Appellant: John D. Lubarsky, Madison; Domingo Cruz, Racine
For Respondent: Karla Z. Keckhaver, Madison; Robert S. Flancher, Racine

At the close of the evidence phase of Malcom's trial, the court allowed amendment of the information 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 are alternatives under Wis. Stat. § 961.42(1). Amendment must satisfy two tests: it must not be "wholly unrelated" to the facts at the preliminary hearing; and it must not violate the right to notice of the charge. The court finds both tests met here: "the added charge was covered by the very statute underlying the original charge, Wis. Stat. § 961.42. In addition, Malcom was not caught unaware of the facts underlying the added charge since his statement to the police largely supported the charge. Moreover, the evidence relied upon by the State in an attempt to prove the original charge was the same evidence that supported the added charge. Both charges covered the same time period, the same witnesses, the same location, and the same physical evidence. Finally, the evidence does not show that Malcom would have presented different witnesses in defense of the amended charge."

COURT'S RESPONSE TO JURY REQUESTS WITHOUT PARTIES BEING PRESENT WAS HARMLESS ERROR WHERE THE EVIDENCE THAT THE JURY REQUESTED PERMISSION TO SEE HAD NEVER BEEN ADMITTED INTO EVIDENCE

State v. Koller, 2001 WI App 253, No. 99-3084-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Peter M. Koneazny, Milwaukee; Mark G. Lipscomb, Jr., Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee;

Daniel J. O'Brien, Madison

The court responded to the jury's request to see a doctor's report without notifying the parties of the request. Although this was probably error, there was no prejudice because the doctor's report had never been admitted into evidence.

COURT DID NOT VIOLATE DEFENDANT'S RIGHTS WHEN IT ENTERED JUDGMENT ON VERDICT EVEN WHERE THE JURY RETURNED VERDICTS FOR POSSESSION OF DRUGS AND FOR POSSESSION OF DRUGS WITH INTENT TO SELL CONTRARY TO THE COURT'S INSTRUCTIONS

State v. Hughes, 2001 WI App 239, No. 00-3176-CR (Ct. App. Dist. I, 11-13-01)
For Appellant: Ann Auberry, Milwaukee; James A. Rebholz, Milwaukee; Martin E. Love, Milwaukee
For Respondent: Robert D. Donohoo, Milwaukee; Lara M. Herman, Madison

The court instructed the jury to find the defendant guilty, if at all, of not more than one offense. The jury returned guilty verdicts of possession of cocaine and possession of cocaine with the intent to deliver. The court entered judgment on the greater charge. According to the court of appeals, "We are satisfied that although a better practice might have been to have asked the jury to continue its deliberation and return only one verdict in connection with the cocaine charge … the trial court did not deprive Hughes of any of his rights in proceeding as it did."

IMPROPER VOIR DIRE OF POTENTIAL JURORS OUTSIDE OF PRESENCE OF ATTORNEYS AND DEFENDANT WAS HARMLESS ERROR WHERE NONE OF THE POTENTIAL JURORS SERVED ON THE JURY

State v. Tulley, 2001 WI App 236, No. 00-3084-CR (Ct. App. Dist. IV, 11-13-01)
For Appellant: Patrick M. Donnelly, Madison; William Flottmeyer, La Crosse
For Respondent: Robert E. Krambs, Viroqua; Diane M. Welsh, Madison

TRIAL COURT PROPERLY AMENDED THE INFORMATION AT THE CLOSE OF EVIDENCE

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Review Granted in the Wisconsin Supreme Court

(August 25, 2001 through December 14, 2001)

State v. M. Veach 98-2387-CR
REVW 08/27/01
District 4/Waushara County
Issues: Was the defendant's trial counsel ineffective for failing to discuss the use of a conditional stipulation, as set forth under *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 668, with his client that may have precluded the admission of other acts evidence?

State v. V. Noble 99-3271-CR
REVW 09/24/01
District 4/Crawford County
Issues: Was a state narcotics enforcement agent, a non-lawyer, engaged in the unauthorized practice of law contrary to Wis. Stat. § 757.30(1) when, at the request of the district attorney and with permission of the judge, he questioned the defendant during a John Doe proceeding? If so, whether exclusion of the John Doe transcripts was the appropriate remedy?

State v. J. Green 00-1392-CR
REVW 09/21/02
District 2/Winnebago County
Issues: What are the standards that must be followed to establish that an *in camera* review of a third party's medical records satisfy the preliminary materiality requirement? Is a circuit court's determination concerning the preliminary showing of materiality reviewed by an appellate court under a de novo or discretionary standard of review? Does a prosecutor violate a sequestration order by communicating information to a state's witness during a break in trial proceedings?

State v. D. Polashek 00-1570-CR
REVW 09/19/01
District 3/Oconto County
Issues: Whether disclosure of confidential child abuse information violates Wis. Stat. § 48.981(7) when the defendant did not provide new information to the parent of a child suspected to be the victim of child abuse but only repeated what the parent already knew and had discussed with others? Must the state prove that the information disclosed was previously unknown in order to obtain a conviction?

State ex rel. G. Tate v D. Schwarz 00-1635
REVW 09/21/01
District 2/Washington County
Issues: Does a defendant on probation for child sexual assault whose probation is revoked solely for refusing to admit guilt in treatment while his direct appeal is pending, waive the right to challenge the refusal issue by failing to also separately appeal the circuit court's denial of his motion to delay treatment?

State v. A. Leitner 00-1718-CR
REVW 09/19/01
District 4/LaCrosse County
Issues: Does the expungement statute, Wis. Stat. § 973.015, apply to the district attorney's office?

State v. J. Multaler 00-1846-CR
REVW 09/19/01
District 1/Milwaukee County
Issues: Was there probable cause to issue a search warrant of the defendant's home in order to uncover evidence of four murders that occurred more than 20 years ago? Were the 28 counts of possession of child pornography multiplicitous?

State v. C. Grovogel 00-2170-CR
CERT 11/27/01
District 3/Brown County
Issues: Can the defendant collaterally attack his 1990 Georgia conviction for second-offense drunk driving by a motion in the Wisconsin court hearing his fifth-offense drunk driving case? If so, what are the procedures for challenging the 1990 Georgia conviction?

State v. J. Trochinski, Jr. 00-2545-CR
REVW 09/19/01
District 4/Waushara County
Issues: Should the defendant be permitted to withdraw his plea because he allegedly did not understand the "harmful to children" element of the crime? Is the statute under which the defendant was convicted, Wis. Stat. § 948.11(2), facially unconstitutional because it lacks a scienter requirement that the offender know the victim's age?

State v. B. St. George 00-2830-CR
REVW 09/19/01
District 3/Ashland County
Issues: Was the defendant denied his due process right to a defense when the circuit court excluded testimony from an expert witness offered by the defense to refute testimony presented by the prosecution? Did the defendant's proposed evidence of prior sexual knowledge underlying the child's accusations meet the test of sufficient offer of proof as set forth in *State v. Pulizzano* 155 Wis. 2d 456, 456 N.W.2d 325?

State v. B. Robins 00-2841-CR
BYPA 08/27/01 Oral Arg 01/11/02

District 3/Outagamie County
Issues: Is the child enticement statute, Wis. Stat. § 948.07, unconstitutional as applied to Internet communications where there is no face-to-face contact between the accused and the alleged child?

State v. G. Davis 00-2916-CR
REVW 11/27/01
District 2/Ozaukee County
Issues: Whether the introduction of psychiatric testimony concerning the defendant's character in the guilt phase of a trial derived from a compelled examination of the defendant violates the defendant's rights against self incrimination under the Fifth Amendment to the United States Constitution and § 8, article I of the Wisconsin Constitution?

State v. L. Williams, III 00-3065-CR
CERT 09/19/01
District 2/Racine County
Issues: Does the admission of a crime lab report into evidence as a Wis. Stat. § 908.03(6)(1999-2000) hearsay exception (business record of a regularly conducted activity) to prove the existence of cocaine violate the constitutional right to confront witnesses when a crime lab supervisor testifies in lieu of the technician who performed the actual lab tests?

State v. J. Tomlinson, Jr 00-3134-CR
REVW 11/27/01
District 1/Milwaukee County
Issues: Whether a minor has the authority to allow the police to enter a family residence? Did the admission, under Wis. Stat. § 908.45(1), of the preliminary hearing testimony of a witness determined to be unavailable violate the defendant's right to confrontation? What is the extent of the colloquy required of a circuit court before accepting a defendant's stipulation regarding what constitutes a dangerous weapon?

Dunn County v. Judy K. 00-3135
CERT 10/23/01
District 3/Dunn County
Issues: Whether the placement and expenditure limitations of Chapter 55 created by 1995 Wis. Act 92 are unconstitutional?

State v. Douangmala 00-3292-CR
REVW 10/23/01
District 3/Brown County
Issues: Was the defendant entitled to withdraw his plea of no-contest based on a claim that he was not advised by the trial court and did not know or understand that a plea of no-contest could result in his deportation?

State v. Gonzales 01-0224-CR
CERT 11/27/01
District 2/Kenosha County
Issues: Is the prohibition against carrying a concealed weapon as set forth in Wis. Stat. § 941.23 unconstitutional in light of article I, section 25 of the Wisconsin Constitution, which confers the right to keep and bear arms to Wisconsin citizens?

State v. P. Saunders 01-0271
REVW 11/27/01
District 2/Kenosha County
Issues: Does the state absolutely have to file a certified copy of a defendant's prior judgment of conviction in order to establish the defendant's status as a repeat offender for sentence enhancement purposes?

State v. P. Cole 01-0350-CR
CERT 11/27/01
District 1/Milwaukee County
Issues: Is the prohibition against carrying a concealed weapon as set forth in Wis. Stat. § 941.23 unconstitutional in light of article I, section 25 of the Wisconsin Constitution, which confers the right to keep and bear arms to Wisconsin citizens?

State v. Dennis H. 01-0374
CERT 11/27/01
District 1/Milwaukee County
Issues: Whether the fifth standard found in the involuntary civil commitment statute, Wis. Stat. § 51.20(1)(a)2.e, is unconstitutional?

Sheboygan Cty. Dept of Health & Human Srvcs v. Julie A.B. 01-1692
REVW 11/27/01
District 2/Sheboygan County
Issues: Whether the circuit court is required to make specific findings as to a child's best interests, pursuant to Wis. Stats. §§ 38.426 and 48.43, before dismissing a petition to terminate parental rights? ■

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TO ADD A SECOND AND DIFFERENT CHARGE

At the close of the evidence phase of Malcom's trial, the court allowed amendment of the information 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 are alternatives under Wis. Stat. § 961.42(1). Amendment must satisfy two tests: it must not be

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"wholly unrelated" to the facts at the preliminary hearing; and it must not violate the right to notice of the charge. The court finds both tests met here: "the added charge was covered by the very statute underlying the original charge, Wis. Stat. § 961.42. In addition, Malcom was not caught unaware of the facts underlying the added charge since his statement to the police largely supported the charge. Moreover, the evidence relied upon by the State in an attempt to prove the original charge was the same evidence that supported the added charge. Both charges covered the same time period, the same witnesses, the same location, and the same physical evidence. Finally, the evidence does not show that Malcom would have presented different witnesses in defense of the amended charge." ■