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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts eight new cases

Madison, Wis. (Jan. 16, 2018) – The Wisconsin Supreme Court has voted to accept eight new cases and acted to deny review in a number of other cases. The case numbers, issues, and counties of origin of granted cases are listed below, along with cases denied. The synopses provided are not complete analyses of the issues. More information about any particular case before the Supreme Court or Court of Appeals can be found on the Supreme Court and Court of Appeals Access website. The status of cases pending in the Supreme Court can be found here.

2016AP2483-CR State v. Patrick H. Dalton

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

Issues presented: A central issue in this drunken driving appeal is whether the Court of Appeals' decision conflicts with the recent United States Supreme Court case, Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). Birchfield held that, under Fourth Amendment principles, states may not criminalize a person's refusal to a blood draw.

More specifically, the Supreme Court reviews:

- Under Missouri v. McNeely, 133 S. Ct. 1552 (2013), and Birchfield may a circuit court impose a harsher criminal punishment because a defendant exercised his constitutional right to refuse a warrantless blood draw?
- Was Patrick H. Dalton denied the effective assistance of counsel where his attorney failed to move to suppress the blood evidence on grounds that police lacked exigent circumstances to forcibly draw his blood without a warrant?

Some background: Dalton was charged with operating a vehicle while intoxicated (OWI) and operating a vehicle with a prohibited alcohol concentration (PAC), both as second offenses, and operating a vehicle with a revoked driver's license (OAR).

The charges stemmed from a single car crash in the village of Richfield on Dec. 12, 2013, in which Dalton was the driver. Witnesses said that Dalton was driving nearly 100 miles per hour and was swerving the car back and forth; the car then went into a ditch, rolled over several times, and came to a rest on its roof. Both Dalton and his passenger were injured. Dalton was air-lifted

to a hospital in Milwaukee; there, two hours after the crash, a deputy sheriff had a nurse draw Dalton's blood without first obtaining a warrant. Prior to the blood draw, the deputy read the Informing the Accused form to Dalton; Dalton refused to consent. Dalton's blood alcohol content was 0.238 percent.

On the advice of counsel, Dalton decided not to file a motion to suppress the blood evidence. Instead, Dalton decided to plead no contest to OWI, as a second offense, and with a revoked driver's license. The charge for operating a vehicle with a PAC was dismissed and read in. The State recommended that the court impose 120 days in jail on the count charging OWI, to run consecutive to six months in jail on the count charging OAR.

Postconviction, Dalton moved to withdraw his plea because trial counsel was allegedly ineffective in: (1) not seeking suppression of the blood draw evidence that was obtained without a warrant; and (2) not seeking resentencing because the court punished him for exercising his constitutional right to refuse to consent to a blood draw.

The trial court denied Dalton's postconviction motion without an evidentiary hearing.

In a July 2016 decision, the Court of Appeals reversed and ordered the trial court: (1) to hold a Machner hearing (State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905) (Ct. App. 1979) on the ineffective assistance claim; and (2) to address Dalton's resentencing claim in light of the United States Supreme Court's decision in Birchfield. State v. Dalton, No. 2016AP6-CR.

Dalton's trial counsel testified at the Machner hearing that before taking the plea, Dalton expressed concerns that the police had taken his blood without a warrant. The lawyer said he considered whether there would be grounds to suppress the blood evidence, but concluded that there were exigent circumstances under McNeely that justified the withdrawal of Dalton's blood without a warrant.

The attorney advised Dalton that such a motion would lack merit, and Dalton decided to accept a plea. Dalton testified that if he thought there was a legal basis for a motion to suppress, he would have wanted the attorney to pursue it.

The trial court denied Dalton's motion to vacate the plea based on ineffective assistance of counsel. The trial court ruled that it would have denied a motion to suppress by Dalton because exigent circumstances existed that obviated the need to obtain a warrant.

The trial court held that with the passage of two hours, there was "a legitimate fear about the dissipation of alcohol in [Dalton's] system," which was an exigent circumstance to take into consideration.

The Court of Appeals affirmed, holding that Dalton's Fourth Amendment rights were not violated, as there were exigent circumstances that justified the warrantless draw of Dalton's blood.

Before the Supreme Court, Dalton argues, among other things, that the trial court erred when it considered his refusal to consent to the blood draw as an aggravating factor for sentencing. Dalton also argues that there were no exigent circumstances here that would justify the warrantless blood draw. He claims that the police had probable cause to get a warrant within minutes of arriving on scene, but they chose to prioritize other activities ahead of getting a warrant.

2016AP537 Adams Outdoor Advertising Limited Partnership v. City of Madison

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Richard G. Niess, affirmed
Long caption: Adams Outdoor Advertising Limited Partnership, Plaintiff-Appellant-Petitioner, v. City of Madison, Defendant-Respondent

Issue presented: This case involves a dispute between the city of Madison and an advertising company that owns a legal non-conforming (grandfathered) billboard along the Beltline Highway. The billboard is two-sided. The city authorized construction of a pedestrian and bicycle bridge over the Beltline that blocks view of the sign from motorists traveling east. The Supreme Court reviews whether that obstruction constitutes a taking of a protected property interest of the property owner.

Some background: Adams Outdoor Advertising owns an irregularly shaped parcel next to the Beltline Frontage Road in Madison, just east of where the Cannon Ball Bicycle bridge was built across the Beltline Highway in 2013. Adams has a two-sided billboard on that property. No other building or structure is located on the parcel.

The billboard was constructed in 1995, and Adams bought the property with the existing billboard in 2007. Although the zoning regulations have changed over time, Adams' billboard is a legal non-conforming use, which means that Adams cannot change the billboard's height or location. The bridge is near, but not on Adams' property, and the city did not take any of Adams' land for the bridge.

Adams filed suit, alleging four grounds for relief: (1) the city's obstruction of the west-facing side of its billboard resulted in an unconstitutional taking requiring compensation as an inverse condemnation under Wis. Stat. § 32.10 (2015-16); (2) by allowing a nearby Culver's to move its sign but not allowing Adams to make any changes, the city violated Adams' constitutional right to equal protection; (3) Adams was denied procedural due process; and (4) the bridge is a private nuisance that the city must abate.

The trial court granted summary judgment to the city on all claims.

In its briefing to the Court of Appeals, Adams raised the same four arguments, which were rejected by the Court of Appeals.

Adams argued to the Court of Appeals that it is entitled to relief under the inverse condemnation procedure of Wis. Stat. § 32.10, which allows a landowner to recover just compensation for a taking of its private property. In order to be eligible for relief under Wis. Stat. § 32.10, Adams must first establish that the city has taken a protected property interest of Adams. *See* Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 74, 80, 284 N.W.2d 887 (1979). Adams argued that the facts demonstrate a taking because the west-facing side of its billboard has lost all economic value.

The city argued that Adams' claim of a taking requiring compensation under constitutional law was foreclosed by two Wisconsin Supreme Court decisions. Specifically, it argued that Randall v. City of Milwaukee, 212 Wis. 374, 249 N.W. 73 (1933) stands for the proposition that a property owner's right to an unobstructed view from the roadway is not a protected property interest. The city also argued that, under Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996), the fact that the east-facing side of the billboard is unaffected means that Adams cannot establish a taking because the property as a whole still retains some value.

Adams argued against this position on a variety of grounds.

Ultimately, the Court of Appeals held that in light of the Randall and Zealy decisions, the trial court properly granted the city summary judgment on Adams' inverse condemnation claim.

The city argues that these cases establish that: (1) Adams has no property interest in the continued visibility of its west-facing sign; and (2) in any event, Adams has not shown a taking (a deprivation of all or substantially all the beneficial use of the property) given that the east-facing panel of the sign remains fully visible, and Adams' own appraiser has valued the property, after the bridge construction, at $720,000.

2016AP2455-CR State v. Christopher John Kerr

Supreme Court case type: Bypass
Court of Appeals: District III
Circuit Court: Bayfield County, Judge John P. Anderson
Long caption: State of Wisconsin, Plaintiff-Appellant, v. Christopher John Kerr, Defendant-Respondent.

Issues presented: In this bypass of the Court of Appeals, the Supreme Court is asked to resolve two questions arising from a dispute over an arrest and drug possession charges:

- Was the Ashland County commitment order for the nonpayment of a city ordinance fine void *ab initio* (null from the beginning)?
- Does the good-faith exception to the exclusionary rule apply when there is no misconduct by an officer in arresting an individual on an active commitment order that is later revealed to be void *ab initio*?

Some background: Police were dispatched to Christopher John Kerr's home in Bayfield County in response to a 911 call that turned out not to be an emergency. During the 911 call, the dispatcher could hear a female yelling, and then the line went dead. The dispatcher called the number back; a man answered and said, "shut the fuck up." The dispatcher asked to whom he was talking, and the man said he was talking to his cat. The man denied that there was a female with him; said there was no problem; and said that the call was placed by accident.

While in route, the dispatcher notified the officers that Ashland County had an outstanding warrant for Kerr. The officers were not provided with any further details about the warrant.

When police arrived it was determined the 911 call was indeed made by mistake. Nevertheless, the officer told Kerr that there was an outstanding warrant for his arrest. The officer asked Kerr to step outside the residence, and placed him under arrest. During a pat-down, police found a rock-type substance Kerr's pants pocket. Kerr was charged with one count of possession of methamphetamine contrary to Wis. Stat. § 961.41(3g)(g).

Kerr moved the Bayfield County trial court to suppress the evidence, arguing that his arrest was unlawful because the arrest warrant from Ashland County was issued in violation of his due process rights.

The "arrest warrant" from Ashland County turned out to be a commitment order for an unpaid fine. On June 15, 2015, Kerr had been issued a citation for violating a City of Ashland ordinance prohibiting disorderly conduct. Kerr failed to appear for his court date, so the trial court issued a default judgment and gave Kerr 60 days to pay the civil forfeiture of $263.50, which he did not accomplish on time.

On Sept. 22, 2015, the Ashland County Clerk of Court certified the unpaid forfeiture to the Wisconsin Department of Revenue, and the trial court issued a "Commitment Order for Non-Payment of Fine/Forfeiture," which ordered "any law enforcement officer [to] arrest and detain [Kerr] in custody for 90 [d]ays or until $298.50 is paid, or until the person is discharged by due course of law."

The Bayfield County trial court ruled that the Ashland County commitment order was not valid because: (1) it was unclear whether Kerr received notice of the default judgment; and (2) the Ashland County trial court failed to offer an indigency hearing or determine Kerr's ability to pay.

The Bayfield County trial court held that the Ashland County commitment order "circumvented the notice and right to hearing provisions necessary before issuing a commitment order," including Wis. Stat. § 800.095(1)(b)2 (providing, generally, that no defendant may be imprisoned for failing to pay a monetary judgment ordered by the court unless the defendant has an opportunity to be heard on the issue of the ability to pay).

The Bayfield County trial court additionally noted that there was "no legal authority" for the Ashland County trial court "to summarily issue commitment orders as it did in this case."

At the same time, however, the Bayfield County trial court noted that "neither the defendant nor the state alleges even the slightest hint of misconduct or wrongdoing by law enforcement in this matter."

The Bayfield County trial court indicated that, based on previous court decisions, there was some confusion about the state of the law as it relates to good-faith exception to the exclusionary rule.

The trial court wrote that if the analysis stopped at State v. Hess, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568, the answer to the question in the case at bar would be relatively easy – the evidence from the search incident to the arrest, predicated upon a warrant that did not comply with statutory requirements, should be suppressed.

The trial court said that clearly State v. Scull, 2015 WI 22, 361 Wis. 2d 288, 862 N.W.2d 562 calls into question the Hess court's decision, but it is unclear if Hess has been overruled.

The trial court determined that Hess represents the law in Wisconsin, and as such, Kerr's suppression motion should be granted.

The state, which submitted the bypass petition, urges the Supreme Court to overrule Hess and hold that exclusion is not appropriate if there is no police misconduct to deter – even if the police are acting upon a void warrant.

Kerr argues that Hess stands for the proposition that evidence must be excluded if it flows from a warrant that was invalid when issued, regardless of whether the police relied on the warrant in good faith.

A decision by the Supreme Court is expected to clarify the law in this area.

2014AP2187-CR State v. Kyle Lee Monahan

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Lafayette County, Judge William D. Johnston, judgment affirmed; order reversed and causes remanded with directions
Long caption: State of Wisconsin, Plaintiff-Respondent-Cross-Appellant, v. Kyle Lee Monahan, Defendant-Appellant-Cross-Respondent-Petitioner

Issue presented: May a reviewing court find a trial error harmless by examining the evidence and drawing inferences in the light most favorable to the state? More specifically here, the Supreme Court reviews whether the Court of Appeals properly found that a guilty verdict in a homicide by intoxicated use of a motor vehicle case was not attributable to an admitted error.

Some background: The event at issue in this case is an August 2011, single-car accident outside Shullsburg involving Kyle Lee Monahan and his girlfriend, Rebecca Cushman. Both were thrown considerable distances from the car in which they were the sole occupants. Neither was wearing a seat belt. Cushman died; Monahan was seriously injured and had to be flown from the scene to a hospital for emergency surgery. Blood tests showed that both Monahan and Cushman

were intoxicated; Monahan had a 0.14 Blood-alcohol content (BAC) and Cushman had a 0.112 BAC. According to a GPS evidence admitted at trial, the car was speeding at close to 100 miles per hour at the time of the accident.

Monahan's defense at trial was that Cushman had been driving. He and two other witnesses testified that Cushman had been driving when they left a party north of Shullsburg. Monahan also presented the testimony of a crash reconstruction expert who opined that, based on his investigation, it was possible that either Monahan or Cushman was the driver.

Monahan told first responders at the scene that he "guessed" he was driving or that he "probably" was driving and explained how he lost control of the vehicle. Monahan told a med-flight medic and nurse that he was the driver and, incorrectly, that he was wearing his seat belt.

Following emergency surgery, he informed a hospital nurse that he had gone too fast over a hill and lost control of the car. The state also presented testimony from a crash reconstruction expert whose investigation showed that Monahan was the driver. The state also introduced evidence that Monahan's DNA was found on the driver's side air bag.

GPS showed that the car travelled from the party to Shullsburg, where it stopped for two minutes. The car then drove east of Shullsburg for four minutes until the accident occurred. Monahan wanted to introduce GPS evidence about the drive from the party to Shullsburg because he said it would reveal patterns that showed Cushman was driving the vehicle when the crash occurred. However, the trial court agreed with the state and allowed GPS evidence only for the Shullsburg-to-accident leg of the trip, indicating other data was inadmissible because it was "propensity evidence, you are having character, habit evidence, other acts evidence."

On appeal, Monahan argued that the trial court erred in excluding the GPS data of the car's high speed during the party-to-Shullsburg leg of the trip. The state conceded error. It wrote in its appellate response brief that it "agrees with Monahan that the trial court erred when it excluded the [party-to-Shullsburg] speed evidence as inadmissible other acts evidence. The vehicle's speed after it left the [party] was not other acts evidence but part of the continuum of facts relevant to the crime."

Monahan argued that the prosecutor during closing arguments gave the jury the false impression that Cushman was not the at-fault driver because she would never have driven so fast given her unfamiliarity with the roads. Monahan considers this a misleading assertion given that the prosecutor knew: (1) that several witnesses testified that Cushman had driven away from the party; and (2) that the excluded GPS data showed high-speed driving had occurred during the party-to-Shullsburg leg of the trip. The Court of Appeals ruled that the exclusion of the party-to-Shullsburg GPS data was error, but it was harmless error.

Before the Supreme Court, Monahan argues, among other things, that a reviewing court cannot use a jury's credibility determination as proof that an error is harmless when the error at issue is that the jury did not hear evidence it should have heard.

2016AP1608 Richard Forshee v. Lee Neuschwander

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Sawyer County, Judge John M. Yackel, reversed and cause remanded with directions
Long caption: Richard Forshee, Judith Timmerman, Verlan E. Edwards, Robert R. Olson, Mary L. Edwards on behalf of Verlan & Mary Edwards LLP and Jean Forshee, Janet A. Olson, Plaintiffs-Respondents-Petitioners, v. Lee Neuschwander and Mary Jo Neuschwander, Defendants-Appellants.

Issue presented: This case examines whether operating a home as a vacation rental is: (1) a single family use of real property, permitted by residential zoning ordinances and protected by the public policy preference for the free and unrestricted use of property; or (2) a business enterprise, a form of "commercial activity" appropriately prohibited by residential zoning ordinances.

Some background: Lee and Mary Jo Neuschwander own waterfront property on Sorenson Drive, a private, dead-end road in Hayward. The Neuschwanders acquired the house as part of a tax-deferred "1031 exchange," which means that: (1) they transferred one property in exchange for the Sorenson Drive property; and (2) in order for the exchange to remain tax-deferred, the Neuschwanders are required to hold the Sorenson Drive property "for productive use in a trade or business or for investment." *See* 26 U.S.C. § 1031(a)(1).

Starting in 2014, the Neuschwanders began renting out the house as a short-term vacation rental. They advertised the house both in printed media and online as "Lake Point Lodge." A listing for the property on the vacation rental website vrbo.com specified it was available for minimum stays of two to seven nights, for a maximum of 15 overnight guests.

In 2015, the Neuschwanders rented their property to over 170 people. They received $55,784.93 in rent, including taxes, and they paid the City of Hayward $4,973.81 in room tax.

The Neuschwanders' neighbors (Richard and Jean Forshee, Judith Timmerman, Verlan Edwards, Mary Edwards on behalf of Verlan & Mary Edwards LLP, and Robert and Janet Olson (collectively, the neighbors) filed a lawsuit, which noted that both the Neuschwanders' property and the neighbors' properties are subject to the following restrictive covenants:

- No dwelling can be erected on said property with a living space of less than 1,000 square feet.
- There shall be no subdivision of the existing lots.
- There shall be no commercial activity allowed on any of said lots.

The trial court agreed with the neighbors' argument that the Neuschwanders' short-term rentals violated the restrictive covenant; in particular, its prohibition against "commercial activity." The trial court issued an injunction prohibiting the Neuschwanders from renting their property on a short-term basis except during the weekend of the American Birkebeiner cross country ski race.

The Neuschwanders appealed. The Court of Appeals, in a published decision, reversed.

The Court of Appeals noted Wisconsin's public policy favors the free and unrestricted use of property. Crowley v. Knapp, 94 Wis. 2d 421, 434, 288 N.W.2d 815 (1980). "Accordingly, restrictions contained in deeds . . . must be strictly construed to favor unencumbered and free use of property." In order to be enforceable, deed restrictions must therefore be expressed "in clear, unambiguous, and peremptory terms." When the meaning of language in a restrictive covenant is doubtful, all doubt should be resolved in favor of the property owner's free use. Zinda v. Krause, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995).

Having concluded that reasonable minds could differ as to whether the restrictive covenant prohibits short-term rentals, the Court of Appeals deemed the covenant to be ambiguous. The Court of Appeals held that the provisions do not clearly indicate any purpose or intent that would allow the court to conclude the prohibition of "commercial activity" on the subject lots was intended to preclude short-term rentals. The Court of Appeals also held that the trial court erred by going beyond the text of the Neuschwanders' restrictive covenant and considering extrinsic evidence to determine the covenant's intent. The Court of Appeals also

noted that several other state appellate courts have concluded restrictions similar to the one at issue in this case unambiguously do not prohibit short-term rentals.

Before this court, the neighbors argue that "the short-term rental business is commerce, regardless of how the renters make use of the property." The neighbors question how the Neuschwanders' use of their property differs from a hotel that rents its rooms online; both are undisputedly commercial activities, the neighbors say.

The neighbors also take issue with the Court of Appeals' determination that the fact that no money changes hands on the Neuschwanders' lot is a sign that the Neuschwanders were not engaged in commercial activity. This determination does not square with the reality that many customers rent hotel rooms online, with no money actually changing hands at the hotel itself.

The neighbors also point out that the Neuschwanders acquired the Lake Point Lodge under a "1031 tax exchange," a tax status requires that the property be held for use in a trade or business or for investment.

The neighbors essentially wonder how the Neuschwanders could be viewed as engaging in anything other than commercial activity given that they are holding the Lake Point Lodge for trade or business purposes; they are advertising for its rental online; they collected over $55,000 in rent in 2015; and they paid the City of Hayward a room tax, just as hotels do.

Finally, the neighbors point out that various jurisdictions around the country have held that short-term rentals violate restrictions against commercial use.

2016AP740-CR State v. DeAnthony K. Muldrow

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Manitowoc County, Judge James L. Fox, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. DeAnthony K. Muldrow, Defendant-Appellant

Issue presented: This case examines whether lifetime GPS monitoring is a "penalty" that a trial court must cover during a plea colloquy. More specifically, here, whether defendant DeAnthony K. Muldrow was entitled to withdraw his not guilty plea to one count because neither the court nor his attorney advised him that his plea would subject him to lifetime GPS.

Some background: Muldrow pled guilty to third-degree sexual assault and sexual assault of a child under 16 years of age. He has not yet been released on extended supervision, but when that occurs, he will be subject to lifetime GPS monitoring under Wis. Stat. § 301.48.

Postconviction, the trial court concluded that lifetime GPS monitoring was not punishment, and therefore was not a direct consequence of Muldrow's plea. Thus, the trial court denied Muldrow's motion to withdraw his plea.

Muldrow appealed, unsuccessfully. The Court of Appeals noted that due process requires that a court should only accept a guilty plea made knowingly, intelligently, and voluntarily. Brady v. United States, 397 U.S. 742, 748 (1970). This requirement in turn calls for the defendant to be advised of the direct consequences of the plea. State v. Bollig, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199.

A direct consequence is "one that has a definite, immediate, and largely automatic effect on the range of [a] defendant's punishment." Comparatively, a collateral consequence is "indirect" and does "not flow from the conviction." State v. Byrge, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. "The distinction between direct and collateral consequences

essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea."

The Court of Appeals held that, whether one looks to the purpose alone, or at both the intent and effects, lifetime GPS monitoring is not punishment, and therefore, not a direct consequence that Muldrow had to be informed of prior to his plea. Accordingly, the Court of Appeals said Muldrow failed to make a prima facie case that the trial court failed to comply with Wis. Stat. § 971.08 or other court mandated plea colloquy procedures, and he is not entitled to withdraw his plea.

Before this court, Muldrow points out that various courts have come to conflicting conclusions as to whether lifetime GPS statutes are punitive, including the Eastern District of Wisconsin and the Seventh Circuit.

2016AP1745-CR State v. Michael L. Cox

Supreme Court case type: Certification
Court of Appeals: District I (District III judges)
Circuit Court: Milwaukee County, Judge William W. Brash III and Judge T. Christopher Dee
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Michael L. Cox, Defendant-Appellant.

Issue(s) presented: This certification examines whether a sentencing court retains any discretion under Wis. Stat. § 973.046 (2015-16) to waive DNA surcharges for crimes committed after Jan. 1, 2014.

Some background: The state charged Michael L. Cox with one count of second-degree recklessly endangering safety and one count of possession of tetrahydrocannabinols (THC), second or subsequent offense. The charges came after a March 14, 2015 incident in which Cox drove intoxicated against oncoming freeway traffic for more than three miles.

Cox pled guilty to the one count of second-degree recklessly endangering safety, and the other charge was dismissed and read in. At the sentencing hearing, the Milwaukee County Circuit Court, Judge William W. Brash III presiding, ordered Cox to submit a DNA sample only if he had not previously done so, on the assumption that he had provided a DNA sample in a prior case cited by the state. Judge Brash also ordered that he was "going to waive the imposition of the DNA surcharge with regards to this matter."

The written judgment of conviction prepared by the clerk, however, stated in the comments that Cox was to pay the DNA surcharge, as well as court costs and the victim/witness surcharge.

Cox filed a post-conviction motion to amend the written judgment of conviction, arguing that the requirement of paying the DNA surcharge was a clerical error that contradicted the oral judgment imposed by the court at the sentencing hearing.

The circuit court, Judge T. Christopher Dee now presiding, denied the motion. Dee ruled that even if Brash believed he could waive the DNA surcharge, that was incorrect. Dee ruled that the circuit court was required under Wis. Stat. § 973.046 to impose the DNA surcharge because the sentencing had occurred after Jan. 1, 2014, the effective date of 2013 Wis. Act 20 (Act 20), the 2013-14 state budget act.

Cox appealed, leading to this certification. The Supreme Court reviews the issues in light of Act 20, which revised the statutes regarding the imposition of the DNA surcharge and the imposition of the Crime Victim and Witness Assistance Surcharge (the victim/witness surcharge).

Prior to the effective date of the relevant provisions in Act 20, there were two operative subsections of Wis. Stat. § 973.046 that addressed the imposition of a DNA surcharge, which is intended to fund the collection of DNA samples, the maintenance of a DNA databank, and the analysis of DNA evidence collected from crime scenes:

> *(1g) Except as provided in sub. (1r), if a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a deoxyribonucleic acid analysis surcharge of $250.*
>
> *(1r) If a court imposes a sentence or places a person on probation for a violation of s. 940.225, 948.02(1) or (2), [or] 948.085, the court shall impose a deoxyribonucleic acid analysis surcharge of $250. Wis. Stat. § 973.046 (2011-12).*

Thus, for certain sexual offenses, the statute said that the sentencing court "shall impose" a single DNA surcharge, and that for all other felony offenses, the court "may impose" a single DNA surcharge. There were no DNA surcharges for misdemeanor offenses.

Act 20 changed the DNA surcharge statute (now renumbered to Wis. Stat. § 973.046(1r)) as follows: "(1r)(intro.) If a court imposes a sentence or places a person on probation ~~for a violation of s. 940.225, 948.02(1)(or (2), 948.225 948.085~~, the court shall impose a deoxyribonucleic acid analysis surcharge ~~of $250.~~, calculated as follows:…" 2013 Wis. Act 20, § 2354 (renumbering and amending Wis. Stat. § 973.046(1r)).

Subsection (a) that followed specified that the DNA surcharge was now $250 for each felony conviction, and subsection (b) specified that the surcharge was now $200 for each misdemeanor conviction. Thus, the new statute now states that a sentencing court "shall impose" a DNA surcharge for each conviction, and it now includes misdemeanors as convictions for which DNA surcharges are required (although at a slightly lower rate). The statute no longer uses the phrase "may impose" for any DNA surcharge.

At the same time, the Legislature also made changes to the language of the statute governing victim/witness surcharges. Until the effective date of Act 20, the relevant statute simply stated that "[i]f the court imposes a sentence or places a person on probation, the court shall impose a crime victim and witness assistance surcharge . . . ." Former Wis. Stat. § 973.045(1).

The Legislature retained the "shall impose" language in the version of Wis. Stat. § 973.045(1) revised by Act 20, but it now also added a sentence that expressly stated that a victim/witness surcharge "may not be waived, reduced, or forgiven for any reason." This language prohibiting a victim/witness surcharge from being waived, reduced, or forgiven is not found in the revised statute governing DNA surcharges.

Cox relies, in part, on the difference in the language between the revised version of the DNA surcharge statute and the revised version of the victim/witness surcharge statute. He emphasizes that the Legislature did not include a sentence forbidding circuit courts to "waive, reduce, or forgive" the DNA surcharge, as it had done for the victim/witness surcharge statute. Cox believes this difference in treatment evinces a legislative intent to treat the DNA surcharge differently – namely, to leave discretion in the circuit courts to waive or reduce the DNA surcharge in appropriate cases.

The state argues that Cox's statutory interpretation argument ignores several points. First, the state notes that a series of decisions has already treated the "shall impose" language in the revised DNA surcharge statute as mandatory. See, e.g., State v. Hill, 2016 WI App 29, ¶27, 368 Wis. 2d 243, 878 N.W.2d 709; State v. Scruggs, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146; State v. Elward, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756; State v. Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. The argument in those cases that

the statute was being applied in an improper ex post facto manner relied on the fact that the change in the statute effected by Act 20 made the imposition of the DNA surcharge mandatory.

The state also points to the presumption that the use of the word "shall" means that the Legislature intended a mandatory requirement. Bank of New York Mellon, 361 Wis. 2d 23, ¶21. Moreover, in this instance, the Legislature changed the operative language from "may impose" to "shall impose," which supports the use of the presumption and the mandatory nature of the revised statute.

A decision by the Supreme Court could provide guidance on the proper interpretation of the revised DNA surcharge statute as to whether sentencing judges now have any discretion to waive DNA surcharges for crimes that occurred after the effective date of Act 20.
There are two other cases involving related issues concerning the revised DNA surcharge statute that are currently pending before the Wisconsin Supreme Court, State v. Odom, 2015AP2525-CR and State v. Williams, 2016AP883-CR.

2016AP883-CR State v. Jamal L. Williams

Supreme Court case type: Petitions for Review
Court of Appeals: District I (Dist. II judges)
Circuit Court: Milwaukee County, Judge Timothy J. Dugan and Ellen R. Brostrom, Judgment affirmed in part, reversed in part; order reversed and cause remanded for further proceedings.
Long caption: State of Wisconsin, Plaintiff-Respondent-Petitioner, v. Jamal L. Williams, Defendant-Appellant-Petitioner

Issue(s) presented: In this case, the Supreme Court examines issues related to DNA surcharges and whether a court may consider refusal to agree to restitution in fashioning a sentence.

As presented by the parties:
The state's petition

1. Is the imposition of a single mandatory $250 DNA surcharge an ex post facto violation with respect to a defendant who committed his offense when the surcharge was discretionary and who previously had provided a DNA sample in another case?
2. Should this Court overrule the Court of Appeals' decisions in [State v. Radaj, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758] and [State v. Elward, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756]?

Defendant Jamal Williams' cross-petition

Is Jamal Williams entitled to resentencing because the circuit court sentenced him based on an improper factor, namely, the fact that Williams refused to stipulate to restitution for which he was not legally responsible?

Some background:

Williams reached a plea agreement with the state whereby he pled guilty to a reduced charge of attempted armed robbery, as a party to the crime. At the plea hearing Williams agreed with the central facts alleged in the complaint. The complaint alleged that Williams and his brother, Tousani Tatum, arranged a drug deal with a victim and then attempted to rob him. As a second victim, who had arrived with the first victim tried to drive away from the attempted robbery, Tatum shot him. The second victim's three-year-old daughter was in the vehicle during the shooting.

Williams and Tatum drove away from the scene while the second victim was still alive but did not seek to help him or call for aid.

In preparing a pre-sentence investigative report, a parole agent indicated that Williams showed "an atrocious lack of remorse" and minimized the wrongfulness of his lengthy history of criminal behavior. The court at sentencing noted the report's comments about Williams being proud of his crimes and how he had essentially beaten the criminal justice system over the years.

The circuit court ultimately sentenced Williams to 10 years of initial confinement and seven and a half years of extended supervision. It also ordered Williams to "submit the mandatory DNA sample" and imposed "the mandatory surcharge." The court indicated it did not have authority to require restitution to the family of the victim who had been shot because Williams had pled guilty only to the attempted armed robbery. Nonetheless, the court commented that Williams' unwillingness to pay any restitution reflected his lack of remorse, which the court was considering in its sentencing analysis.

After the circuit court denied a postconviction motion, the Court of Appeals rejected Williams' claim that he had been sentenced based on an improper factor. It concluded that Williams had not established that the sentencing court had relied on his refusal to stipulate to pay restitution to form part of the basis for the sentence it had imposed.

With respect to Williams' challenge to the DNA surcharge, the Court of Appeals agreed with Williams that application of the new mandatory DNA surcharge violated the ex post facto clause, and it remanded the case to the circuit court with directions to apply the discretionary DNA surcharge statute that had been in effect at the time of Williams' crime.

The Court of Appeals determined itself bound by its decisions in Elward and Radaj to find that the application of the mandatory DNA surcharge requirement to Williams violated the ex post facto clause. Specifically, the Court of Appeals reasoned that because Williams had provided a DNA sample in connection with an earlier case and the state conceded that no DNA-analysis-related activity had occurred or would occur in relation to Williams' attempted armed robbery, the state was receiving money for doing nothing, which constituted punishment in violation of the ex post facto clause.

The state contends in the Supreme Court that both Radaj and Elward need to be revisited because the reasoning of those decisions conflicts with the Supreme Court's reasoning in State v. Scruggs, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. Both Radaj and Elward looked for a rational connection between the imposition of a mandatory, per count surcharge and the DNA collection and analysis costs incurred by the state in connection with that particular crime and defendant.

In Scruggs, however, the Supreme Court stated that the purpose of the new mandatory, per-count surcharge was "to offset the increase burden on the DOJ in collecting, analyzing, and maintaining the additional DNA samples" that resulted from the other provisions of 2013 Wis. Act 20, which revised the DNA surcharge statute. 373 Wis. 2d 312, ¶47. In other words the Supreme Court did not focus solely on the state's DNA-related costs connected to the particular offense and prosecution.

Regarding the issue he raises in the Supreme Court, Williams argues that a defendant has a statutory right to contest restitution claims and that many defendants choose to exercise that right. He contends that if sentencing courts may properly consider a defendant's objection to restitution as an aggravating factor, this will have a chilling effect on defendants' exercise of that statutory right.

A decision in this case is expected to determine whether there is an actual conflict between the Supreme Court's decision in Scruggs and the Court of Appeals' decisions in Elward and Radaj, and to consider whether a sentencing judge may consider a defendant's refusal to pay restitution is a permissible sentencing consideration, whether by itself or in the context of the larger issue of a lack of remorse.

Chief Justice Patience Drake Roggensack and Justice Ann Walsh Bradley did not participate.

Review denied: The Supreme Court denied review in the following cases. As the state's law-developing court, the Supreme Court exercises its discretion to select for review only those cases that fit certain statutory criteria (see Wis. Stat. § 809.62). Except where indicated, these cases came to the Court via petition for review by the party who lost in the lower court:

Brown County

2016AP2330-CR/ State v. Potter

2016AP2331-CR

Columbia County

2017AP390-W Jacobs v. Cir. Ct. for Columbia Cty.

Dane County

2016AP920 Bukstein v. Dean Health Systems, Inc.

2016AP1761 Haynes v. Thousand

2015AP2278 Kreger v. Flores

2016AP213-CR State v. Cardenas

Dodge County

2016AP2053-CR State v. Ryckman

Eau Claire County

2016AP141 State v. Gallentine

2016AP1786-W Gaston v. Tegels

Fond du Lac County

2017AP2211-W Wortman v. Fink

Jackson County

2016AP1572-CR State v. Rupnow

Jefferson County

2016AP250-CR State v. Forney
Justice Shirley S. Abrahamson dissents.

2016AP1569-CR State v. Johnson

Kenosha County

2016AP224-CR State v. Nesbit

2016AP2254-CR State v. Glover

La Crosse County

2016AP314 State v. Shaw

Langlade County

2016AP839-CR State v. Fleming

Marathon County

2016AP1758-CR State v. Thao

Milwaukee County

2014AP2644/
2014AP2645/
2014AP2646 State v. Sanders

2015AP1643-CR
2015AP1644-CR State v. Dunbar

2015AP2637-CR State v. Lellie

2016AP738 Przytarski v. Vallejos

2016AP780/2016AP781 State v. Campos

2016AP957 State v. Walker

2016AP1275-CR State v. Echols

2016AP1386 LIR Investments v. Stokelbusch

2016AP1464-CR State v. Silverstein
Chief Justice Patience Drake Roggensack did not participate.

2016AP1509-CR/
2016AP1510-CR State v. Allen

2016AP1564-CR State v. Hollis

2016AP1712 Uptgrow v. Hayes

2016AP1790 State v. Lewis

2017AP1825 Uko v. IRIS Program

2016AP1613-CR State v. Hicks
Justice Shirley S. Abrahamson dissents.

2017AP1784-W Shelton v. Dept. of Corrections

2016AP240-CR State v. Taylor
Chief Justice Patience Drake Roggensack did not participate.

2016AP2134 State v. Hardison

2016AP377-CR State v. Stroyier

2016AP1263-CR State v. Cotton

2016AP1355-CR State v. Slater

2016AP1598 Manney v. Bd. of Fire & Police Commissioners

2016AP1893-CR/
2016AP1894-CR/
2016AP1895-CR State v. Ealy

2016AP2186 State v. A.O.

2017AP915-W Tatum v. Eckstein

Monroe County

2017AP875/2017AP876 Monroe County DHS v. T.M.

Outagamie County

2016AP1910-CR State v. Mattingly

2016AP916 Burt-Redding v. LIRC

2016AP465 Lauer v. Lipp

2017AP1680-OA Gross v. Cir. Ct. for Outagamie County

Pepin County

2016AP1671-CR State v. Ewers

Racine County

2016AP1812 Johnson Bank v. French Family Trust

2016AP701-CR State v. Patterson

Rock County

2015AP2205-CR State v. Cooper

Washington County

2016AP1311 Olson v. Integrity Insurance Company

Waukesha County

2015AP50-CR State v. Asunto

2016AP2386-CR State v. Coutino
Justice Ann Walsh Bradley dissents.

2016AP1033-CR/ State v. Jones
2016AP1034-CR

Winnebago County

2016AP1955 Winnebago County v. C.S.

2016AP1173 State v. Boyd