Criminal Procedure

Searches – DNA – Consent – Deceit

***State v. Vannieuwenhoven*, 2024 WI App 27 (filed April 30, 2024) (ordered published May 29, 2024)**

HOLDING: Law enforcement officers lawfully obtained a sample of the defendant's DNA from an envelope he voluntarily gave to officers.

SUMMARY: The defendant was convicted of murdering two people in 1976. He was identified through DNA that linked him to the offense. Law enforcement officers obtained his DNA under "false pretenses" when the defendant voluntarily licked an envelope in the presence of people that he knew were officers. The defendant voluntarily gave control of the envelope and its contents, including his saliva, to the officers. The circuit court upheld the seizure of the evidence.

The court of appeals affirmed in an opinion authored by Judge Gill. Officers used a ruse to obtain a saliva sample from the defendant. The ruse involved a fake survey about law enforcement in the area. After answering the questions, the defendant licked the envelope to seal it, thereby depositing his saliva (*see* ¶ 11). The defendant argued "that he had a reasonable expectation of privacy in his DNA profile procured from the envelope, even after he handed the envelope and its contents – including his saliva – to law enforcement" (¶ 17).

The court agreed with the parties that the police officers constitutionally seized the envelope and its contents. There was also no question that officers had engaged in a ruse to obtain the DNA sample. (*see* ¶¶ 18, 19). Case law, however, supported such ruses. The defendant voluntarily produced the saliva and placed it on the envelope. The police officers were not required to obtain a search warrant to extract and analyze the defendant's DNA (*see* ¶ 20).

"In this case, law enforcement was not required to obtain a warrant for each step of the noncoding DNA analysis – *i.e.*, extracting the DNA from the envelope, developing the DNA profile, and then comparing the DNA profile with that developed from the 1976 sample – because the saliva was collected by constitutional means – [the defendant] voluntarily handed the envelope to law enforcement with his saliva on it – and law enforcement used the sample solely to compare it with the DNA profile from the 1976 sample" (¶ 22).

The court also underscored that an extensive analysis of the defendant's DNA was not conducted; thus, privacy concerns raised in other cases were inapposite here (*see* ¶ 31). See also paragraph 34, which summarizes the court's analysis.

Speedy Trial – Application of *Barker v. Wingo* Factors

***State v. Ramirez*, 2024 WI App 28 (filed April 25, 2024) (ordered published May 29, 2024)**

HOLDING: The defendant was denied the constitutional right to a speedy trial.

SUMMARY: In February 2016, defendant Ramirez was charged with one count of battery by a prisoner and one count of disorderly conduct (both with repeater and use-of-a-dangerous-weapon enhancers) that stemmed from his alleged May 2015 assault of a prison guard at a state correctional institution where he was serving a lengthy sentence. He was finally tried for these offenses in December 2019 – 46 months after the charges were filed. He was convicted by a jury on both counts.

In postconviction motions, the defendant alleged that he was denied his constitutional right to a speedy trial based on the 46-month delay in bringing his case to trial. The circuit court denied the motions. In an opinion authored by Judge Graham, the court of appeals reversed.

To assess whether a defendant's constitutional right to a speedy trial has been violated, a court applies the four-part balancing test articulated in *Barker v. Wingo,* 407 U.S. 514 (1972). This test considers 1) the total length of the delay, 2) the reasons for the delay, 3) the defendant's assertion of speedy trial rights, and 4) the prejudice to the defendant as a result of the delay (*see* ¶ 18).

With regard to the prejudice factor, the court examines three interests that the speedy trial right protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment

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In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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of defense (*see* ¶ 84). None of the four *Barker* factors is either a necessary or sufficient condition; instead, the court balances these factors in light of the relevant circumstances of the case (*see* ¶ 18).

In this case, the court of appeals examined each of the four *Barker* factors, including a lengthy and fact-driven analysis of the reasons for the delay in each of eight periods into which the court divided the 46-month period between charging and trial. It also conducted a balancing of these factors.

The court agreed with Ramirez that his constitutional right to a speedy trial was violated. Said the court: "Although Ramirez has not demonstrated significant prejudice in fact from the delay, the total delay in this case was extreme – the longest of any published Wisconsin constitutional speedy trial case decided since *Barker* – and presumptively prejudicial. The vast majority of the delay [more than 31 months] was caused by government actors and is therefore attributable to the State. The State identifies neutral reasons for some of the delays, but it provides no explanation for other substantial portions of the delay, which may be taken as indicating a 'cavalier disregard' for Ramirez's speedy trial rights. Ramirez twice asserted his right to a speedy trial and was not promptly brought to trial following his assertions. There is no evidence that Ramirez deliberately sought to delay the trial, and the circuit court's finding that Ramirez's actions during the pretrial proceedings were inconsistent with a desire for prompt resolution of the matter is clearly erroneous" (¶ 2).

The remedy for a violation of the right to a speedy trial is dismissal of the charges. The court of appeals reversed Ramirez's judgment of conviction and remanded the case to the circuit court to dismiss the complaint (*see* ¶ 90).

Substitution of Judge – Timeliness

***State v. Larson*, 2024 WI App 31 (filed April 24, 2024) (ordered published May 29, 2024)**

HOLDING: The defendant filed a timely request for substitution of judge.

SUMMARY: Before the scheduled start of the preliminary hearing in this felony prosecution, the defendant filed a written request for substitution of Kenosha County Judge Angelina Gabriele, who was named on the face of the criminal complaint as the judge assigned to this case. After a waiver of the preliminary hearing and after the presiding court commissioner confirmed with the defendant that she wished to pursue the judicial substitution, the commissioner bound the case over to a different judge and immediately conducted an arraignment.

Several days later, Judge Gabriele signed an order denying the substitution request. The chief judge sustained this order. As it pertains to the issue on appeal, the chief judge concluded that the substitution request was untimely because it was filed "prior to the bindover and assignment of the case to Judge Gabriele" (¶ 6). The court of appeals granted interlocutory review of the chief judge's order and, in an opinion authored by Judge Gundrum, reversed the chief judge's decision.

The court of appeals concluded that the defendant's request for judicial substitution pursuant to Wis. Stat. section 971.20(4) was timely filed (*see* ¶ 15). This statute provides that "[a] written request

for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment." Nothing in this statute precludes the filing of a written request for judicial substitution before bindover, even though the supreme court has held that the "trial" judge is not technically assigned until that time. *See State ex rel. Mace v. Circuit Court for Green Lake Cnty,* 193 Wis. 2d 208, 532 N.W.2d 720 (1995) (*see* ¶ 10).

The defendant "had filed a written request for substitution of Judge Gabriele in proper form 'before making any motions to the trial court and before arraignment,' as required by the statute. She satisfied the only time restriction in Wis. Stat. § 971.20(4)" (¶ 11). The chief judge therefore erred in denying her substitution request on the basis that it was untimely (*see* ¶ 14).

Insurance

Commercial General Liability Insurance – "Occurrence" – Coverage – Exclusions

***McLaughlin v. Gaslight Pointe Condo. Ass'n*, 2024 WI App 30 (filed 17 April 2024) (ordered published 29 May 2024)**

HOLDING: Water damage was a covered "occurrence" under a commercial general liability (CGL) policy; exclusions did not bar coverage.

SUMMARY: Owners living in a condominium development sued the condominium association (Gaslight) for extensive property damage to their units (*see* ¶ 8). Gaslight had a CGL policy with Auto-Owners, which intervened and argued that it had no duty to defend or indemnify Gaslight. The policy also contained a directors and officers errors and omissions (E&O) coverage endorsement, which Gaslight contended also covered the claims.

The circuit court ruled that Auto-Owners had no duty to defend or indemnify under either the CGL coverage or the E&O endorsement. The court of appeals reversed in part and affirmed in part in an opinion authored by Judge Neubauer.

Case law requires a three-step analysis: 1) Does the policy provide an initial grant of coverage? 2) If so, do any exclusions preclude coverage? 3) And if so, do any exceptions to the exclusion apply? (*see* ¶ 23)

The court held that the property damage – serious and continued water damage – was caused by an "occurrence" within the policy's meaning. Occurrences are "accidents." That the condominium association made "reasoned decisions" about trying to fix the water problems did not preclude coverage.

"Wisconsin courts have explained that although an insured's deliberate or intentional conduct may not itself constitute an occurrence, it may 'set in motion a chain of events that includes an accident, a covered occurrence, causing property damage'" (¶ 27). "The fact pattern in the present case follows the same path as the cases [previously discussed in the opinion]: (1) an insured's conduct leads to (2) an event that (3) causes damage" (¶ 29).

After discussing recent case law, the court said that "[t]he continued water intrusion is akin to the events that were occurrences in our prior cases – the water intrusion in *Kalchthaler*, the soil settlement in *American Girl*, the cracking and leaking of the pool in *5 Walworth*, and the magnesium deficiency in *Riverback Farms*" (¶ 30). A reasonable jury could conclude that Gaslight "neither foresaw nor expected the damage to the Owners' units that followed its attempts to repair its building" (¶ 31).

Nor did several policy exclusions, including one that involved a "scrivener's error," block coverage. The condominium owners were not insureds under the policy (¶ 38). The court declined to consider an exclusion for "fungi or bacteria" as premature (*see* ¶ 39).

Finally, coverage was not available under the E&O endorsement, which limited the range of compensatory damage and excluded "property damage."

Motor Vehicle Law

Multiple Wis. Stat. Section 346.63(1) Offenses Arising Out of Same Incident – "Single-Conviction Provision"

***State v. McAdory*, 2024 WI App 29 (filed April 11, 2024) (ordered published May 29, 2024)**

HOLDING: On the facts of this case, the circuit court did not err when it reinstated a Wis. Stat. section 346.63(1) count that it had previously dismissed under the "single-conviction provision" of Wis. Stat. section 346.63(1)(c).

SUMMARY: A jury found the defendant guilty of two Wis. Stat. section 346.63(1) offenses for acts arising out of the same incident: 1) operating a motor vehicle while under the influence of one or more controlled substances (the "OWI" offense), and 2) operating a motor vehicle with a restricted controlled substance (the "RCS" offense).

The state then moved the circuit court to enter a conviction and to sentence the defendant on the OWI count and to dismiss the RCS count. The prosecutor did this because Wis. Stat. section 346.63(1)(c), which the court of appeals called the "single-conviction provision," requires that when the prosecutor charges multiple offenses defined in Wis. Stat. section 346.63(1) that arise out of the same incident and when the defendant is found guilty of more than one offense, "there shall be a single conviction for purposes of sentencing...."

The defendant appealed the OWI conviction. The court of appeals reversed that conviction and remanded the matter for a new trial on the OWI count. However, no retrial ever occurred.

Following remittitur, the state asked the circuit court to reopen the judgment of conviction (which reflected a conviction on the OWI count and the dismissal of the RCS count), dismiss the OWI count and reinstate the RCS count, enter a conviction based on the RCS guilty verdict, and resentence the defendant on the RCS count. The circuit court granted the state's request. In an opinion authored by Judge Blanchard, the court of appeals affirmed.

The court of appeals concluded that the circuit court had the authority to take, and was not barred from taking, the post-remittitur steps requested by the state (*see* ¶ 5). The court of appeals held that under the circumstances in this case, "the single-conviction provision implicitly authorizes a circuit court, after remittitur, to grant the State's motion to shift the single conviction from one charge to another" (¶ 31). "It would be unreasonable to interpret the single-conviction provision to mean, as [the defendant] contends, that the court's post-trial dismissal of the guilty verdict on the RCS count in order to satisfy the provision was necessarily permanent, regardless of subsequent events in the case" (¶ 18).

Lastly, the court of appeals concluded that the defendant did not have a viable double jeopardy claim (*see* ¶ 5). The defendant failed to identify how the events in this case involving conviction and sentencing on a charge for which the jury returned a guilty verdict could fit within the three categories of prohibited practices under the Double Jeopardy Clause, that is, a second prosecution

for the same offense after acquittal, a second prosecution for the same offense after conviction, or multiple punishments for the same offense (*see* ¶ 39).

Real Property

Residential Leases – Wisconsin Consumer Act – Wis. Stat. Section 704.44(1) – Attorney Fees

***Koble Investments v. Marquardt*, 2024 WI App 26 (filed April 23, 2024) (ordered published May 29, 2024)**

HOLDINGS: 1) A tenant's residential lease was governed by the Wisconsin Consumer Act (WCA) and was void and unenforceable because it violated Wis. Stat. section 704.44(1). 2) The tenant was entitled to double damages and the tenant's lawyer was entitled to an award of attorney fees.

SUMMARY: Koble Investments started an eviction action against the defendant tenant, which it later dismissed because the action was erroneously filed in violation of the governor's moratorium on evictions during the COVID-19 pandemic. Proceedings then focused on the defendant's counterclaims, which asserted her rights under the WCA. She also sought attorney fees under the WCA and Koble's alleged violation of Wis. Stat. section 704.44(10) and related administrative rules.

A court commissioner ruled against the defendant. The circuit court also denied her motion for attorney fees and her attorney's motion to intervene.

The court of appeals reversed and remanded in an opinion authored by Judge Gill. First, the WCA did apply to this residential lease. Koble's attempt to collect the debt owed to it violated Wis. Stat. section 427.104(1)(j). The defendant as a tenant was a "customer" for purposes of the WCA (¶ 16), and her lease was a "consumer transaction," which, the court explained, was a deferred payment agreement (¶¶ 18, 21). Also, Koble served as a "debt collector" within the meaning of the WCA (¶ 24). Thus, the circuit court erred in concluding that the statute was inapplicable to residential leases. The undisputed facts showed that Koble violated Wis. Stat. section 427.104(1).

The residential lease was also void and unenforceable under Wis. Stat. section 704.44(10) and Wis. Admin. Code section ATCP 134.08(10). The lease did not include notice of the domestic abuse protections required by Wis. Stat. section 704.14, and it permitted Koble to terminate the tenancy "for a crime committed in relation to the rental property," also in violation of the statute. Under the lease "any tenant who committed or allowed a crime to be committed on the premises could be evicted because he or she necessarily would have made use of the premises for an unlawful purpose" (¶ 37).

"[A] rental agreement is void and unenforceable if it: (1) allows the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property; and (2) does not include the notice required by Wis. Stat. § 704.14. *See* § 704.44(10); § ATCP 134.08(10). Because Marquardt's lease satisfied both of these criteria, it was void and unenforceable, regardless of whether it would have allowed the termination of Marquardt's tenancy based on the commission of a crime of which Marquardt was the victim" (¶ 41).

Finally, the tenant was entitled to double damages under Wis. Stat. section 100.20(5) and her attorney was entitled to reasonable attorney fees and costs. The case was remanded for a determination of those amounts. **WL**