Significant decisions of the Wisconsin Supreme Court and Court of Appeals

June 2015 to December 2016

Wisconsin Supreme Court

MIRANDA WAIVER SUFFICIENT TO WAIVE RIGHT TO COUNSEL

In *State v. Delebreau*, 2015 WI 55, 362 Wis. 2d 542, 864 N.W.2d 852, the supreme court held that a defendant's *Miranda* waiver was sufficient to waive the defendant's constitutional right to have counsel present during a custodial interrogation. The court also held that such a waiver will not be presumed invalid simply because the defendant was represented by counsel.

Jesse Delebreau was arrested for delivering heroin. Approximately two weeks later, he was formally charged and made his initial appearance in court where he was represented by a public defender. While he was still in custody, investigators questioned Delebreau twice at the jail. At each interview, Delebreau waived his *Miranda* rights and did not ask for counsel. Before trial, Delebreau moved to suppress incriminating statements he made during the interviews, claiming that police had violated his constitutional right to have counsel present during the questioning. The circuit court denied the motion, the statements were introduced at trial, and a jury found him guilty. The court of appeals affirmed in a published opinion.

The supreme court affirmed in an opinion written by Justice Prosser. The court noted that the Sixth Amendment to the U.S. Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense. Under prior Wisconsin Supreme Court precedent, if a defendant was formally charged with a crime and represented by counsel, the defendant was not required to affirmatively invoke his or her right to counsel. The court explained that the right to counsel arises when a defendant is charged with a crime and the defendant automatically invokes the right to counsel either by retaining counsel or by having counsel appointed. The court noted, however, that the legal landscape had changed.

In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the U.S. Supreme Court declared that a defendant's waiver of his or her *Miranda* rights was sufficient

to waive the defendant's Sixth Amendment right to counsel and that the waiver was not presumed invalid simply because the defendant was already represented by counsel. The Wisconsin Supreme Court concluded that *Montejo* effectively overruled prior Wisconsin precedent. Applying this new standard, the court found that Delebreau had given a valid *Miranda* waiver that also waived his right to have counsel present during the interrogation. Thus, Delebreau was not entitled to suppress his incriminating statements on Sixth Amendment grounds.

The court also interpreted the state analogue to the Sixth Amendment to determine whether it offered greater protections. The court found that, although the state constitution *may* provide a criminal defendant with rights beyond those afforded by the U.S. Constitution, in this case, the language of article I, section 7, of the Wisconsin Constitution did not differ so substantially from the federal Constitution so as to create a different right. Therefore, Delebreau also could not suppress his statements based on the Wisconsin Constitution.

Chief Justice Roggensack concurred and wrote separately because the majority opinion "overstated" the holding in *Montejo*. According to the concurrence, *Montejo* merely directs that a defendant must take affirmative action to invoke his or her Sixth Amendment right to have counsel present during police interrogation and that the right can be waived.

Justice Abrahamson dissented in an opinion joined by Justice A. W. Bradley. The dissent concluded that article I, section 7, of the Wisconsin Constitution stands apart from, and has meaning independent of, the Sixth Amendment to the U.S. Constitution. Although *Montej*o controls the interpretation of the Sixth Amendment, it does not control the interpretation of the Wisconsin Constitution. Thus, under prior Wisconsin Supreme Court precedent interpreting the Wisconsin Constitution, Delebreau's statements should have been suppressed.

WITHDRAWAL OF PLEA AGREEMENT BASED ON FAILURE TO WARN OF ADVERSE IMMIGRATION CONSEQUENCES

In three separate cases, the supreme court considered under what circumstances a noncitizen criminal defendant can withdraw a guilty plea because the defendant was not adequately warned about the immigration consequences of a conviction based on that plea. In the first two cases, the court considered what immigration information the *defendant's attorney* must provide to the defendant, and in the third case, the court considered what immigration information the *court* must provide to the defendant.

In *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717, the supreme court considered whether defense counsel provided ineffective assistance when counsel failed to advise Fernando Ortiz-Mondragon that pleading no contest to the crime of substantial battery was certain to result in his deportation.

Ortiz-Mondragon pled no contest to substantial battery committed as an act of domestic abuse and other charges. In connection with the plea, Ortiz-Mondragon's attorney advised him that his plea could result in deportation, the exclusion of admission into this country, or the denial of naturalization under federal law. After serving his four-month jail sentence, Ortiz-Mondragon was deported from the United States.

Ortiz-Mondragon filed a motion for post-conviction relief to withdraw his no-contest plea. He argued that, based on U.S. Supreme Court precedent, his defense counsel provided deficient representation by failing to inform him that his no-contest plea was certain to result in his deportation and permanent exclusion from the United States. He relied on *Padilla v. Kentucky*, 559 U.S. 356 (2010), in which the U.S. Supreme Court held that, when immigration consequences are clear, a criminal defense attorney must give correct advice regarding those consequences to a noncitizen defendant. If the law is not succinct and straightforward, the attorney only needs to advise that a criminal conviction may carry a risk of adverse immigration consequences.

Ortiz-Mondragon claimed that he was certain to be deported because substantial battery is a "crime involving moral turpitude" under federal immigration law. Therefore, under *Padilla*, his counsel was deficient for failing to advise him that, if he pled no contest to the charge, deportation was certain. The circuit court denied the motion, and the court of appeals affirmed in a published opinion.

In an opinion written by Justice Ziegler, the Wisconsin Supreme Court affirmed. The court held that federal immigration law is not "succinct, clear, and explicit" on the question of whether Ortiz-Mondragon's substantial battery is a crime involving moral turpitude. The methodology for determining whether a crime qualifies as a crime involving moral turpitude varies by jurisdiction and is in a state of flux. Therefore, Ortiz-Mondragon's defense counsel only needed to advise him that the pending criminal charges may carry a risk of adverse immigration consequences. Because the attorney gave that advice, the attorney was not deficient, and Ortiz-Mondragon could not withdraw his plea.

Justice A. W. Bradley dissented in an opinion joined by Justice Abrahamson. The dissent argued that the majority's analysis of what constitutes a "crime

involving moral turpitude" was unnecessary because a separate provision under federal immigration law clearly provides that a conviction of domestic violence renders a noncitizen deportable. Because the immigration consequences were clear, defense counsel's duty to give correct advice was likewise clear. The dissent concluded that the case should be remanded to the circuit court for a hearing to determine the nature and extent of the advice Ortiz-Mondragon's defense counsel gave him regarding the immigration consequences of his plea.

In *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, the supreme court considered whether defense counsel provided ineffective assistance when counsel failed to advise Shata that pleading guilty to a controlled substance offense would absolutely result in deportation.

Hatem Shata pled guilty to possession of marijuana with intent to deliver. In connection with the plea, Shata's attorney advised him that he faced a "strong chance" of deportation if convicted based on his plea. About four months after he was sentenced, Shata filed a post-conviction motion to withdraw his guilty plea. He argued that, under *Padilla*, his defense counsel provided deficient representation by failing to inform him that a conviction based on his guilty plea would absolutely result in deportation. He claimed that any noncitizen convicted of a controlled substance offense is automatically deportable, and therefore defense counsel should have advised him that deportation was absolutely certain. The circuit court denied the motion. The court of appeals reversed in an unpublished opinion.

In an opinion written by Justice Ziegler, the supreme court reversed the court of appeals. All parties agreed that Shata's controlled substance conviction made him "deportable." Nevertheless, the court found that deportation was not absolutely certain because the federal government has discretion in enforcing the nation's immigration laws, and executive action, including action by the U.S. Department of Homeland Security, could block deportation of a deportable noncitizen. In short, the advice given by Shata's attorney was correct—Shata's guilty plea carried a strong chance of deportation, but deportation was not absolutely certain.

Justice A. W. Bradley dissented in an opinion joined by Justice Abrahamson. The dissent argued that the case involved the same type of crime and the same immigration statute as in *Padilla*, and, therefore, the result should be the same. Defense counsel should have advised Shata that his conviction would make him "subject to automatic deportation." The dissent found that advising that "deportation is very likely" is not the same as advising that "deportation is presumptively mandatory," and, therefore, defense counsel's performance was deficient.

Finally, in *State v. Valadez*, 2016 WI 4, 366 Wis. 2d 332, 874 N.W.2d 514, the supreme court considered under what circumstances a criminal defendant can withdraw a guilty plea based on the circuit court's failure to provide statutory warnings regarding the immigration consequences of the plea.

Melisa Valadez became a lawful permanent resident (LPR) in 2001. In 2004 and 2005, she pled guilty to three separate charges related to possession of controlled substances. At her plea hearings, the circuit courts failed to warn Valadez, as required by statute, that her pleas may have immigration consequences. Valadez served jail time and completed all conditions of her probation. In 2013, Valadez filed a motion to withdraw her guilty pleas because, as a result of her convictions, she was unable to renew her LPR card and, if she left the country, she would likely be excluded from admission. The circuit court denied the motion, and the court of appeals certified the case to the supreme court.

In an opinion written by Justice Abrahamson, the supreme court reversed the circuit court's denial of the motion. The supreme court held that the relevant statute provides that, if the circuit court failed to properly advise a defendant regarding the immigration risks of a guilty plea, the court must allow the defendant to withdraw the plea if the defendant shows that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. In this case, there was no dispute that the circuit court did not provide the required warning. Therefore, the case centered on whether Valadez had shown that her plea was "likely" to result in adverse immigration consequences.

The court concluded that Valadez's convictions made her "inadmissible" under the immigration statutes. Thus, she had shown that she was "likely" to be excluded from admission, and it was not necessary for her to first leave the country and attempt to return so that the federal government actually took steps to exclude her. Therefore, the circuit court incorrectly denied Valadez's motion to withdraw her guilty pleas. The court declined to rule on whether the motion was timely because the parties agreed that it was.

Justice Ziegler concurred in part and dissented in part in an opinion joined by Justice Gableman. The opinion agreed that Valadez had proved that she was likely to be excluded from admission but dissented because there could be other impediments to withdrawal of her guilty pleas that the circuit court could address on remand, for example, arguments regarding any time limits applicable to the motion.

Justice Prosser dissented in an opinion joined by Chief Justice Roggensack. The dissent argued that the relevant statute does not grant an absolute right

to plea withdrawal. Rather, supreme court precedent establishes that the state may prove that, despite the defect in the plea colloquy, the plea was knowing, intelligent, and voluntary. The dissent also argued that a reasonable time limit should apply to these types of motions.

Justice R. G. Bradley did not participate.

REASONABLE MISTAKE OF LAW AND REASONABLE SUSPICION IN A TRAFFIC STOP

In *State v. Houghton*, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143, the supreme court held that a police officer's reasonable suspicion that a motorist has been or is violating a traffic law is sufficient for the officer to initiate a traffic stop, and held that an officer's objectively reasonable mistake of law may form the basis for the officer's reasonable suspicion.

In this case, an East Troy police officer pulled Richard Houghton over after observing Houghton's vehicle traveling without a front license plate and with an air freshener and GPS unit visible in the front windshield. Upon approaching the vehicle, the officer detected the odor of marijuana, which led him to conduct a search of the vehicle that resulted in the discovery of marijuana and associated paraphernalia. Houghton was charged with possession with intent to deliver and filed a motion to suppress evidence obtained during the search, arguing that the lack of a front license plate on his car and the items in his windshield were not violations of Wisconsin law, and consequently that the officer lacked a justification for the stop. The circuit court denied the motion, and Houghton was convicted. The court of appeals reversed.

The supreme court first addressed the general standard required for police to conduct stops related to traffic violations. The court noted that federal and Wisconsin cases have held that reasonable suspicion of a traffic violation provides the basis for a stop under certain circumstances. Furthermore, the court noted that reasonable suspicion is a lower standard for police to conduct a stop than is probable cause, requiring only specific and articulable facts that, when taken together with reasonable inferences from those facts, warrant intrusion. Houghton argued that, in a case in which the officer claims to have observed a traffic violation rather than to have merely suspected one, the stop must be based on probable cause. The court rejected this argument, concluding instead that police officers may initiate traffic stops whenever they have reasonable suspicion that a traffic law has been or will be violated.

The court next held that an objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop. Past Wisconsin cases had rejected this proposition. However, a recent

U.S. Supreme Court case, *Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530 (2014), held that an investigatory stop under these circumstances did not violate an individual's right to be free from unreasonable seizure under the Fourth Amendment to the U.S. Constitution. Noting that it had traditionally understood the Wisconsin Constitution's provision on search and seizure to have the same meaning as the Fourth Amendment, the court concluded that it would adopt the U.S. Supreme Court's reasoning.

Turning to the facts of the case, the court first determined that the presence of the air freshener and GPS unit attached to the front windshield of Houghton's vehicle did not violate any traffic laws. The court observed that the plain language of section 346.88 (3) (a) and (b) of the Wisconsin Statutes appeared to prohibit a driver from having almost any item attached to the front windshield of his or her vehicle. Nevertheless, the court interpreted these provisions to have a more narrow meaning. The court held that section 346.88 (3) (a), Wisconsin Statutes, prohibits only the attachment of signs, posters, and other items of a similar nature to the front windshield. The court held that section 346.88 (3) (b), Wisconsin Statutes, prohibits only objects that materially obstruct the driver's clear view through the windshield.

The court next concluded that the officer's interpretation that section 346.88, Wisconsin Statutes, prohibits the placement of any object on the front windshield was an objectively reasonable mistake of law. The court reasoned that the statute had never been interpreted before and that a reasonable judge could disagree with the court's construction of the statute. On the other hand, the court held that the officer's belief that Houghton violated the law by not having a front license plate displayed was an objectively unreasonable mistake of law or fact. Regardless, the court held that the officer had reasonable suspicion based on the officer's mistaken understanding of the statute. Consequently, the court determined that the traffic stop did not violate Houghton's rights under the Wisconsin Constitution.

Justice Abrahamson dissented, joined by Justice A. W. Bradley. Justice Abrahamson noted that past Wisconsin cases had rejected the idea that an officer's mistake of law can justify reasonable suspicion for a traffic stop. She disagreed with the majority's contention that the Wisconsin Constitution's provision on search and seizure has the same meaning as the U.S. Constitution's Fourth Amendment, asserting instead that the Wisconsin provision sets forth distinct rights. Moreover, Justice Abrahamson expressed concern that allowing a police officer's mistake of law to support a traffic stop would remove the incentive for officers to make certain that they properly understand the law.

Accordingly, she concluded that the stop in question was unlawful and that Houghton's conviction should be reversed.

JOHN DOE INVESTIGATIONS

After a John Doe proceeding was initiated in Milwaukee County, the investigation subsequently expanded to Columbia, Dane, Dodge, and Iowa counties. Although not consolidated, the proceedings were handled by a single special prosecutor and a single John Doe judge. In *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, the supreme court consolidated and addressed three cases arising from that investigation. In a subsequent decision, *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49, the supreme court denied a motion for reconsideration of its decision in *Two Unnamed Petitioner*s, while also denying a motion for stay and clarifying the court's mandate. The John Doe special prosecutor's investigation centered on allegedly illegal coordination between an unnamed candidate's campaign committee and issue advocacy organizations during the 2012 Wisconsin recall elections. Appeals on various issues ensued after the John Doe judge granted motions to quash the subpoenas and search warrants related to the investigation.

In the first of the three cases addressed in *Two Unnamed Petitioner*s, the court considered an original action by certain targets of the John Doe investigation (the Unnamed Movants) seeking a declaration that the special prosecutor's theory of the case was invalid under Wisconsin law. The special prosecutor alleged two theories of illegal coordination as the bases for the litigation. First, the special prosecutor alleged that the issue advocacy organizations and the candidate's campaign committee worked "hand in glove," such that the organizations became mere subcommittees of the candidate's campaign committee. Section 11.10 (4), 2011–12 Wisconsin Statutes, provides that a committee that acts with the cooperation of a candidate is deemed a subcommittee of the candidate's personal campaign committee. Second, the special prosecutor alleged that the coordinated issue advocacy in question amounted to in-kind contributions because the issue advocacy was done for the benefit of the candidate. Under the special prosecutor's theory of the case, both of these provisions triggered campaign finance reporting requirements that were not met.

In an opinion written by Justice Gableman, the court granted the Unnamed Movants' request for a declaration finding the special prosecutor's theory of the case invalid and unsupported in law. The majority concluded that the

definition of "political purposes" found in section 11.01 (16), 2011–12 Wisconsin Statutes, is unconstitutionally overbroad and vague under the U.S. and Wisconsin Constitutions because the language "is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." The court held that a limiting construction should be applied, specifically, that "political purposes" must be limited to express advocacy and its functional equivalent. The court noted that express advocacy is speech that is clearly election related, whereas issue advocacy refers to "ordinary political speech about issues, policy, and public officials."

Because the court determined that the special prosecutor alleged only coordinated issue advocacy between the organizations and the candidate's campaign committee, the majority found that the alleged conduct was beyond the scope of Wisconsin campaign finance regulation. Accordingly, the majority held that the special prosecutor's theory of the case was invalid and ordered the John Doe investigation closed.

In the second case before the court in *Two Unnamed Petitioners*, the court held that the special prosecutor failed to prove that the reserve judge overseeing the John Doe investigation violated a plain legal duty when he exercised his discretion to quash the subpoenas and search warrants and ordered the return of all property seized by the special prosecutor. The court held that the reserve judge exercised his discretion under the John Doe statute, section 968.26, 2011–12 Wisconsin Statutes, to determine the extent of a John Doe investigation and further, that it is within the discretion of a trial court to quash subpoenas. The court found that supervisory writs (the relief requested) are not "appropriate vehicles" to review a judge's discretionary acts, and as such, the special prosecutor failed to show that the reserve judge violated a plain legal duty. Accordingly, the court denied the supervisory writ and affirmed the reserve judge's order.

In the third consolidated case before the court in *Two Unnamed Petitioners*, the court affirmed a court of appeals decision denying the Unnamed Movants' request for a supervisory writ. The court held that the Unnamed Movants failed to prove that either reserve judge involved violated a plain legal duty by 1) accepting an appointment as a reserve judge; 2) convening a multi-county John Doe proceeding; or 3) appointing a special prosecutor. Specifically, the court found that a judge's obligation to correctly find facts and apply the law is not the type of duty to be addressed through a supervisory writ procedure "as it would extend supervisory jurisdiction to a virtually unlimited range of decisions involving the finding of facts and application

of law." The court found the judges did not violate any plain duty in accepting their appointments or their subsequent assignment to handle the John Doe proceeding. The court further found that the Wisconsin Statutes are silent regarding whether one judge can convene a multi-county John Doe proceeding and that, therefore, there is no prohibition nor violation of any plain legal duty. Finally, the court found that although the appointment of the special prosecutor may have been improper, the Unnamed Movants failed to prove a violation of any plain legal duty. Given the procedural posture of the case, the court did not need to reach the issue of the effect of an unlawful appointment; rather, it simply held that the requirements for issuance of a supervisory writ were not met.

Justice Prosser concurred, finding the subpoenas and search warrants were invalid because the subpoenas and search warrants were unconstitutionally overbroad and, further, that the special prosecutor's appointment was invalid. Justice Prosser's concurrence was joined in part by Justice Roggensack, and Justices Roggensack, Gableman, and Ziegler joined Justice Prosser in finding that the order appointing the special prosecutor lacked validity as a judge only has authority to appoint a special prosecutor if at least one of the nine conditions set forth in section 978.045 (1r), 2011–12 Wisconsin Statutes, is satisfied. The four concurring justices found that none of the conditions were satisfied.

Justice Ziegler also wrote a separate concurrence, writing to emphasize that, even if the search warrants issued by the John Doe judge were lawfully issued, their execution could be subject to a reasonableness analysis under the Fourth Amendment to the U.S. Constitution and the Wisconsin Constitution's counterpart.

Justice Abrahamson also wrote separately concurring in part and dissenting in part, finding that the majority "adopts an unprecedented and faulty interpretation of Wisconsin's campaign finance law and of the First Amendment." Among other things, Justice Abrahamson found that chapter 11, Wisconsin Statutes, does not regulate disbursements for issue advocacy made by independent political organizations, but that chapter 11 does require a candidate's campaign committee to report coordinated disbursements for issue advocacy as contributions received by the candidate or the candidate's campaign committee. Justice Crooks also wrote separately, concurring in part and dissenting in part. He disagreed with the majority opinion that section 11.06, 2011–12 Wisconsin Statutes, was unconstitutionally broad and vague in requiring reporting of in-kind contributions, including coordinated spending on issue advocacy.

He further noted that the special prosecutor had, in fact, alleged express advocacy as a secondary theory of criminal activity. Both Justice Abrahamson and Justice Crooks found the reporting requirement consistent with the U.S. and Wisconsin Constitutions and that the John Doe investigation should not have been terminated.

In the follow up *per curiam* opinion, *Three Unnamed Petitioners*, issued in December 2015, the court denied a motion for reconsideration, denied a motion for stay, but modified and clarified the order from *Two Unnamed Petitioners*. The court held that a majority of the court had ruled in *Two Unnamed Petitioner*s that the special prosecutor's appointment was invalid. However, because neither the majority opinion nor the concurrence included a mandate regarding the effect of the determination that the appointment was invalid, there was no legal ruling on the issue of the special prosecutor's authority as of the issuance of *Two Unnamed Petitioner*s. Because a majority of the court found the appointment invalid, the court ruled that the special prosecutor's authority to litigate the case terminated as of the date of the court's *per curiam* ruling in *Three Unnamed Petitioner*s, except for the limited actions ordered by the court. The court noted that because the special prosecutor could no longer represent the prosecution, the court would be open to prompt review of motions to intervene by one or more of the district attorneys from the counties involved. The court denied reconsideration on whether the John Doe investigation should have been allowed to continue regarding coordination related to express advocacy, finding that the special prosecutor failed to raise the issue before the John Doe judge and therefore could not meet the standard for a supervisory writ to reverse the John Doe judge's order. Finally, the court modified its instructions regarding return of property seized in the investigation and the destruction of copies of documents and other materials relating to the investigation, delaying action until after the completion of proceedings in the U.S. Supreme Court or after the deadline for filing the petition for certiorari review, if no petition was filed.

Justice Abrahamson wrote separately in *Three Unnamed Petitioners*, concurring in part and dissenting in part, noting that the majority opinion in *Two Unnamed Petitioners* was flawed and that she therefore agreed it should be modified. However, she disagreed with the denial of the motion for reconsideration.

Justice A. W. Bradley did not participate in *Two Unnamed Petitioners*. Justice A. W. Bradley and Justice R. G. Bradley did not participate in *Three Unnamed Petitioners*, and Justice Crooks passed away while *Three Unnamed Petitioners* was pending and before final resolution by the court.

TRAFFIC STOPS BASED ON NON-CRIMINAL, NON-TRAFFIC OFFENSES

In *State v. Iverson*, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661, the supreme court held that a law enforcement officer may conduct a warrantless traffic stop based on the officer's reasonable suspicion that an occupant of a vehicle has committed a non-traffic civil forfeiture offense.

In this case, a state patrol trooper observed a car drift within its lane and then stop at two different intersections with flashing yellow lights even though there was no traffic. The trooper then observed a lit cigarette being thrown from the vehicle and landing on the road, scattering its ashes. The trooper initiated a traffic stop based on the littering statute, section 287.81 (2) (a) and (b), Wisconsin Statutes, which establishes a $500 forfeiture for anyone who deposits or discharges solid waste on a highway or permits solid waste to be thrown from a vehicle operated by the person. A passenger in the car admitted discarding the cigarette, but the trooper ultimately cited the driver, Daniel Iverson, for drunk driving. After pleading not guilty, Iverson filed a motion to suppress evidence obtained following the traffic stop. The circuit court granted the motion and dismissed the case. The court of appeals affirmed, concluding that a non-traffic civil forfeiture does not provide a sufficient basis for a warrantless traffic stop.

In its reversal of the court of appeals decision, the supreme court addressed four issues: 1) whether throwing a cigarette butt onto a highway constitutes a violation of the littering statute; 2) whether the trooper had statutory authority to conduct a warrantless traffic stop in order to enforce the littering statute; 3) whether a state traffic patrol officer may conduct a warrantless traffic stop based on probable cause or reasonable suspicion that a violation of a non-traffic civil forfeiture law has occurred; and 4) whether, in this case, the trooper possessed probable cause or reasonable suspicion that a littering violation had occurred.

Addressing the first issue, the court held that a cigarette butt falls under the definition of "solid waste" in the littering statute because the definition includes the broad language "other discarded . . . materials." Addressing the second issue, the court held that a number of statutes provide a state trooper explicit authority to conduct traffic stops in order to investigate violations of the littering statute and to arrest violators under certain conditions.

The supreme court then addressed the issue of whether it is reasonable under the Fourth Amendment to the U.S. Constitution to conduct a traffic stop based on a non-traffic civil forfeiture offense. In a previous case, the supreme court stated that "[e]ven if no probable cause exist[s], a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she

has grounds to reasonably suspect that a crime or traffic violation has been or will be committed." *State v. Popke*, 2009 WI 37, ¶ 23, 317 Wis. 2d 118, 765 N.W.2d 569. Relying on this, the court of appeals had concluded that an officer may only conduct a traffic stop if granted explicit authority under section 345.22 or 968.24, Wisconsin Statutes, which authorizes temporary questioning to investigate suspected criminal activity and warrantless arrest for traffic violations, respectively. The supreme court noted that this conclusion ignored other statutes (sections 23.58 and 110.07, Wisconsin Statutes) that explicitly authorize officers to investigate suspected violations of certain statutes, including the littering statute. The court also noted that *Popke* addressed a factual situation based only on criminal and traffic violations and, therefore, that its holding was limited to those issues.

The court also rejected the argument that the statutory categorization of civil forfeitures into traffic-related and non-traffic-related limits the authority of troopers to enforce non-traffic laws. The court held that, regardless of how it is categorized, the littering statute's language is broad enough to apply to highways, and the state traffic patrol has statutory authority to enforce it. Addressing the final question, the court held that, because the trooper testified that he saw a cigarette being ejected from the car and land on the highway, he had probable cause to believe someone in the car had violated the littering statute.

Justice Abrahamson, joined by Justice A. W. Bradley, concurred but objected to the majority's decision not to use a totality-of-the-circumstances test when analyzing the reasonableness of the traffic stop under the Fourth Amendment, and its use, instead, of a more abstract test looking at whether it is ever reasonable to conduct a traffic stop for littering.

Justice R. G. Bradley did not participate.

EMPLOYEES MUST BE PAID FOR TIME SPENT DONNING AND DOFFING

In *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, 367 Wis. 2d 131, 876 N.W.2d 99, the supreme court considered whether Hormel violated Wisconsin wage and hour laws by failing to pay its employees for the time they spent putting on (donning) and taking off (doffing) required clothing and equipment before and after their work shifts and unpaid lunch breaks.

Hormel operated a canning facility in Beloit, where employees prepared, cooked, and canned various food products. Federal regulations required Hormel to meet certain standards of cleanliness, quality, and safety including, for example, requiring employees to protect against food contamination by

washing their hands and wearing clean clothing. Hormel's own rules required employees to wear hard hats, hearing protection, eye protection, hair nets, sanitary footwear, and clean clothing. The clothing and equipment was provided by Hormel and could not be worn outside the facility.

The circuit court found that the donning and doffing of the required clothing and equipment at the beginning and end of every work shift and during lunch breaks was integral and indispensable to the performance of the Hormel employees' principal activity of producing canned food products and awarded damages. Hormel appealed, and the court of appeals certified the appeal to the supreme court.

In an opinion written by Justice Abrahamson and joined by Justice A. W. Bradley, the court first agreed with the circuit court that the required donning and doffing was integral and indispensable.

The Wisconsin Administrative Code requires an employee to be paid for all time spent in activities that are integral and indispensable to the performance of the employee's principal work activity. The supreme court looked to section DWD 272.12 (2) (e) 1. c., Wisconsin Administrative Code, which provides an example of an integral part of a principal activity that justifies compensation: if an employee at a chemical plant cannot perform his or her principal activities without putting on certain clothes, then donning and doffing those clothes at the beginning and end of a workday would be an integral part of the employee's principal activity; however, if changing clothes is simply a convenience to the employee, it would not be an integral part of the employee's principal activity.

The supreme court also looked to *Weissman v. Tyson Prepared Goods, Inc.*, 2013 WI App 109, 350 Wis. 2d 380, 838 N.W.2d 502 (*Tyson Foods*), in which the court of appeals relied on the chemical plant example in section DWD 272.12 (2) (e), Wisconsin Administrative Code, to determine that the need to avoid food contamination at a meat processing plant made the donning and doffing of the clothing and equipment indispensable to the Tyson employees' principal work activities of manufacturing food and that the time spent donning and doffing was therefore compensable work time.

The supreme court noted that both in the chemical plant example in section DWD 272.12 (2) (e), Wisconsin Administrative Code, and in *Tyson Foods*, safety laws, rules of the employer, and the nature of the employees' work all required the employees to change clothes in order to do their jobs and that cleanliness and food safety were intrinsic elements of preparing and canning food at the Hormel facility.

The court disagreed with the argument that *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. ___, 135 S. Ct. 513 (2014), overturned *Tyson Foods*. In *Integrity Staffing*, the U.S. Supreme Court held that employees' time spent waiting in line to undergo and undergoing security screenings to check for stolen merchandise was not integral and indispensable to the employees' principal work activity of retrieving and packaging products, because the screenings could have been eliminated without affecting the employees' ability to retrieve and package products. The Wisconsin Supreme Court held that *Integrity Staffing* was consistent with *Tyson Foods* even though the two cases reached different conclusions.

The court also disagreed that the compensation for the time spent donning and doffing the required clothing and equipment was not too minimal to merit compensation (*de minimis*). The *de minimis* rule allows employers to disregard otherwise compensable work when it concerns only a few seconds or minutes of work beyond scheduled work hours. The court found that the unpaid compensation of more than $500 for each employee, based on 24 hours per year of unpaid work time, was a substantial sum both for the employees and for Hormel.

Finally, Justices Abrahamson and A. W. Bradley declined to rule on whether employees' time spent donning and doffing required clothing and equipment during their lunch hours was compensable work time due to a lack of argument on appeal and instead simply accepted the circuit court's award of damages on this issue.

Chief Justice Roggensack concurred with the majority that the donning and doffing at the beginning and end of a workday was compensable work time and that the *de minimis* rule did not prevent compensation for that time but dissented on the issue of whether donning and doffing during lunch hours was compensable work time. The chief justice argued that leaving during a lunch break served no interest of Hormel and was not an integral part of the employees' principal work activities and that this time was therefore not compensable work time.

Justice Gableman, joined by Justice Ziegler, dissented, arguing that the donning and doffing of the required clothing and equipment was not integral and indispensable to the Hormel employees' principal activity of canning food.

GRANDPARENT VISITATION RIGHTS

In *S.A.M. v. Meister*, 2016 WI 22, 367 Wis. 2d 447, 876 N.W.2d 746, the supreme court considered grandparent visitation rights, specifically, the proper interpretation of section 767.43 (1), Wisconsin Statutes, and whether that statute unconstitutionally infringes on parents' due process rights. The court held that

the statute does not require a grandparent, greatgrandparent, or stepparent who files a motion for visitation rights under that subsection to prove that he or she has maintained a relationship similar to a parent-child relationship with the child. The court further held that the statute does not unconstitutionally infringe on parents' constitutional rights.

Under section 767.43 (1), Wisconsin Statutes, a "grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child" may file a petition for visitation rights, which a court may grant "if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child."

This statutory construction case arose from a petition by a paternal grandparent, Carol Meister, for visitation rights to her grandchildren following her son's divorce from the children's mother. A family court commissioner found that section 767.43 (1), Wisconsin Statutes, requires a grandparent to have a relationship similar to a parent-child relationship and, finding that such a relationship existed between Meister and her grandchildren, granted Meister visitation. The children's mother sought review of the commissioner's order. The circuit court also found that the statute requires a grandparent to have a relationship similar to a parent-child relationship but issued an order reversing the decision of the commissioner on the grounds that Meister did not have such a relationship with her grandchildren.

The children, represented by a guardian ad litem, appealed the circuit court's ruling. The court of appeals, relying on its own precedent, *Rogers v. Rogers*, 2007 WI App 50, 300 Wis. 2d 532, 731 N.W.2d 347, for interpreting the language now in section 767.43 (1), Wisconsin Statutes, affirmed the circuit court's ruling, holding that the statute requires that "'grandparents must have a parent-like relationship with the child' in order to qualify for visitation rights" and that Meister had not demonstrated that she maintained such a relationship with her grandchildren. The children then appealed, filing a petition for review with the supreme court, which was granted.

The supreme court, in a majority opinion by Justice Prosser, reversed the court of appeals. After examining the statute's history and the statutory language on its own and in the context of related statutory language in section 767.43 (3), Wisconsin Statutes, the court found that a "grandparent, greatgrandparent, or stepparent need not prove a parent-child relationship to succeed on a petition for visitation" and that the "parent-child relationship element applies only to a 'person' seeking visitation who is not a grandparent, greatgrandparent, or stepparent." The court also noted that, while its decision "eliminates one

unintended impediment for grandparents," it does not guarantee grandparents will prevail on petitions for visitation, as a court must still consider the constitutional rights of the parents and determine, in its discretion, whether the facts and circumstances "warrant granting, modifying, or denying a visitation petition in the best interest of the child."

The court also held that its finding that the phrase "who has maintained a relationship similar to a parent-child relationship with the child" is inapplicable to grandparents, greatgrandparents, or stepparents does not conflict with parental constitutional rights because any court considering a petition under section 767.43 (1), Wisconsin Statutes, must, as part of making the necessary "best interest of the child" determination, "give special weight to a fit parent's opinions regarding the child's best interest."

Justice Abrahamson concurred, agreeing with the court's interpretation of section 767.43 (1), Wisconsin Statutes, but concluding that the court should not have ruled in the case, because review was sought by the children (through their guardian ad litem), and the statutory language limits the right to petition to grandparents, greatgrandparents, stepparents, and others who have maintained a relationship similar to a parent-child relationship with the child. As such, Justice Abrahamson concluded that the court did not have a statutory or other basis for considering the petition for review. Justice Abrahamson further stated that the majority's opinion could put the constitutionality of section 767.43 (3), Wisconsin Statutes, in doubt, due to the higher burden imposed upon grandparents of children born to unmarried parents than grandparents of those born to married parents.

Justice Ziegler, joined by Justice Gableman, also concurred, agreeing with the interpretation of section 767.43 (1), Wisconsin Statutes, and the outcome but finding that the statute is unambiguous and therefore disagreeing with the majority opinion to the extent that it acknowledges the statutory language is not "wholly unambiguous."

Justice R. G. Bradley did not participate.

SUPREMACY OF RULEMAKING POWERS FOR STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, the supreme court addressed whether provisions enacted by 2011 Wisconsin Act 21 that gave the governor and the state secretary of administration certain authority over agency rulemaking were unconstitutional as applied to rules promulgated by the state superintendent of public instruction (SPI), a constitutional

office established by article X, section 1, of the Wisconsin Constitution. Article X, section 1, establishes the SPI and provides that the "supervision of public instruction" shall be vested in the SPI and "such other officers as the legislature shall direct." One of the primary issues in the case was whether rulemaking is a "supervisory" power under article X, section 1, and, if so, whether the Act 21 provisions violate the constitutional provision by giving the governor and secretary of administration a superior power over rulemaking conducted by the SPI.

In May 2011, Governor Scott Walker signed 2011 Wisconsin Act 21 into law. Act 21 made numerous changes to provisions in chapter 227 of the Wisconsin Statutes that delineate the process for state agencies to promulgate administrative rules. Among the changes in Act 21 were requirements that the governor approve agencies' initial "statements of scope" for proposed rulemaking and that the governor approve agencies' final drafts of proposed administrative rules. Another provision in Act 21 required certain rules to have the approval of the secretary of administration in order to proceed. Later in 2011, a number of parties (Coyne) filed suit, arguing that the provisions gave the governor and the secretary of administration equal or superior authority over the SPI and were therefore unconstitutional. The SPI sided with Coyne throughout the litigation.

The circuit court granted summary judgment to Coyne. Reasoning that the provisions could place the governor and the secretary of administration in a superior position over the SPI, the circuit court concluded that the provisions were unconstitutional as applied to the SPI. The court of appeals affirmed, citing language in the seminal case *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996), for the proposition that rulemaking is a "supervisory power." Because the Act 21 provisions could allow the governor to withhold approval of a rule as a means of affecting the rule content, the court of appeals found that the Act 21 provisions were unconstitutional as applied to the SPI. The governor appealed the court of appeals ruling, and the supreme court granted review.

Five separate opinions were issued by members of the supreme court, with sharp disagreement among the justices about whether the case was ripe for adjudication as well as about the underlying merits. Justice Gableman, writing alone, authored the lead opinion. He concluded that the case was properly before the court as a declaratory action despite the Act 21 provisions not having yet been enforced against the SPI. As to the merits, Justice Gableman concluded that, although rulemaking is a power delegated to the SPI by the legislature, because rulemaking is the only means that is prescribed for the SPI and the Department of Public Instruction (DPI) to carry out their powers

of supervision, it is therefore a "supervisory power" under article X, section 1. He then undertook a review of the history and text of the constitutional provision and the *Thompson* case, concluding that, under article X, section 1, other officers in whom the legislature may vest the supervision of public instruction must be other officers devoted to the supervision of public instruction who are supervised by the SPI. The governor and the secretary of administration, he concluded, would not qualify to serve as such other officers. Finally, Justice Gableman concluded that the Act 21 provisions gave the governor and secretary of administration unchecked power to stop a rule of the SPI. Based upon these conclusions, Justice Gableman concluded that the Act 21 provisions unconstitutionally vested the supervision of public instruction in the governor and the secretary of administration.

Justice Abrahamson, joined by Justice A. W. Bradley, wrote separately in concurrence. While she agreed that the provisions in Act 21 were unconstitutional as applied to the SPI, she took issue with the lead opinion's discussion of *Thompson* and the extent to which the legislature could reduce the role and duties of the SPI. Justice Prosser also wrote a concurring opinion. He agreed that the provisions were unconstitutional as giving the governor an absolute veto power over the SPI that would obstruct the SPI's ability to perform its constitutional duties but wrote separately to express his view that the holding in *Thompson* was unwarranted as it limited the legislature's ability to vest other officers with authority over education.

Chief Justice Roggensack dissented, joined by Justices R. G. Bradley and Ziegler. She concluded that rulemaking power exercised by the SPI and DPI was delegated by the legislature under article IV, section 1, of the Wisconsin Constitution and did not come from article X, section 1, and that the Act 21 provisions were therefore valid limitations on that legislatively delegated power. She also found there to be a lack of proof that the provisions had been unconstitutionally enforced against the SPI. Justice Ziegler also wrote separately, joined by Justice R. G. Bradley, to further detail her disagreement with the reasoning of the lead opinion. In her view, the legislature had broad authority to determine what it means to supervise public instruction and that this left the SPI "subject to the changing whims of the legislature."

WITHDRAWAL OF PLEA AGREEMENT BASED ON FAILURE TO WARN OF RISK OF CHAPTER 980 CIVIL COMMITMENT

In *State v. LeMere*, 2016 WI 41, 368 Wis. 2d 624, 879 N.W.2d 580, the supreme court concluded that the Sixth Amendment to the U.S. Constitution does not

require defense counsel to inform a criminal defendant about the possibility of civil commitment under chapter 980, Wisconsin Statutes, when the defendant enters a plea to a sexually violent offense.

Stephen LeMere pled guilty to first-degree sexual assault of a child under the age of 13, and he was sentenced to 30 years of initial confinement followed by 15 years of extended supervision. After sentencing, LeMere filed a motion to withdraw his guilty plea, arguing that defense counsel was constitutionally deficient for failing to advise LeMere that he could be subject to lifetime commitment as a sexually violent person under chapter 980, Wisconsin Statutes. LeMere claimed that he would not have pled guilty if he had known of that risk. The circuit court denied the motion, and the court of appeals affirmed in an unpublished opinion.

The supreme court affirmed in an opinion written by Justice Prosser. The supreme court concluded that the Sixth Amendment does not require defense counsel to inform a criminal defendant about the possibility of future civil commitment under chapter 980, Wisconsin Statutes, when the defendant enters a plea to a sexually violent offense.

The Sixth Amendment guarantees a criminal defendant the right to have effective assistance of counsel for his or her defense, including during the plea bargaining process. Generally, defense counsel must advise the defendant of direct consequences of conviction, but not of collateral consequences. However, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court found that deportation is uniquely difficult to classify as either a direct or collateral consequence. Thus, the court established an exception to the general rule by declaring that defense counsel must advise defendants regarding potential immigration consequences of conviction.

The Wisconsin Supreme Court declined to create a similar exception for the risk of a civil commitment under chapter 980, Wisconsin Statutes. In reaching that decision, the court examined the differences between deportation and civil commitment and concluded that the "unique confluence of factors" that led the *Padilla* court to make an exception for deportation do not apply to civil commitment. Specifically, the court found that 1) deportation's unique nature weighs against creating an exception for civil commitment; 2) the consequences of a civil commitment are not as severe as deportation; 3) civil commitment is not penal in nature; 4) civil commitment is not an automatic result of the underlying conviction; 5) civil commitment is not enmeshed in the criminal process; and 6) no special vulnerability or class status warrants particularized consideration for persons convicted of sexually violent offenses.

Nevertheless, the court concluded that, although defense counsel is not required to advise a criminal defendant of the possibility of civil commitment, best practice is for defense counsel to discuss with the defendant any consequences of a plea that will have a meaningful impact on the defendant's decision to accept or reject a plea agreement.

Justice A. W. Bradley dissented in an opinion joined by Justice Abrahamson. The dissent concluded that, like deportation, a chapter 980 commitment is "a particularly severe and automatic penalty of a guilty plea that is closely connected to the criminal process." Thus, the dissent found that the Sixth Amendment requires defense counsel to advise a criminal defendant regarding the consequence of a chapter 980 commitment.

Justice R. G. Bradley did not participate.

HOME RULE

In *Black v. City of Milwaukee*, 2016 WI 47, 369 Wis. 2d 272, 882 N.W.2d 333, the Wisconsin Supreme Court held that the City of Milwaukee cannot require its employees to live within city limits.

Since 1938, Milwaukee's city charter required city employees to reside within city limits or face termination. In 2013, the Wisconsin legislature created section 66.0502 of the Wisconsin Statutes, which prohibited any city, village, town, county, or school district from requiring an employee to live within any jurisdictional limit. The Milwaukee Police Association sued the City of Milwaukee, arguing that the city was violating the statute by continuing to enforce its residency requirement, and sought money damages. The city argued that its residency requirement trumped the state statute based on the city's home rule authority under the Wisconsin Constitution.

Article XI, section 3 (1), of the Wisconsin Constitution, known as the home rule amendment, gives cities and villages the ability to determine their local affairs and government, subject only to other provisions in the state constitution and to "such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village."

The court of appeals held that section 66.0502, Wisconsin Statutes, did not involve a matter of statewide concern and did not affect all municipalities uniformly, and that it therefore did not trump Milwaukee's residency requirement. According to the court, the facts in the record showed that only Milwaukee would be heavily affected by the statute and that the goal of enacting the statute was to target Milwaukee. The court of appeals also denied the police association's request for damages.

The supreme court, in an opinion by Justice Gableman, first looked to the court's prior home rule decisions to determine that a state statute can trump a municipal ordinance either when the statute addresses a matter of statewide concern or when the statute with uniformity affects every city or every village. The court went on to note that section 66.0502, Wisconsin Statutes, was a "mixed bag" of statewide and local interests: on the one hand, the legislature had an interest in allowing public employees the right to choose where they live; on the other hand, Milwaukee had an interest in maintaining its tax base, in efficiently delivering city services, and in having its employees share in a common community investment as city residents. However, the court stated that it would assume, without deciding, that the statute was a matter of local concern.

As to uniformity, the court held that a "statute satisfies the home rule amendment's uniformity requirement if it is, on its face, uniformly applicable to every city or village." The court found that, because the plain language of section 66.0502, Wisconsin Statutes, applies to all cities, villages, towns, counties, and school districts, the statute uniformly banned residency requirements. The court held that the statute satisfied the home rule amendment's uniformity requirement and, therefore, trumped Milwaukee's residency requirement. However, the court agreed with the court of appeals that the police association was not entitled to damages.

Justice R. G. Bradley wrote a separate concurrence, disagreeing with the majority's holding that a state statute can trump a municipal ordinance *either* when the statute addresses a matter of statewide concern or when the statute with uniformity affects every city or every village. Justice R. G. Bradley looked to the plain language of the amendment as well as the historical context, statements of the drafters, newspaper articles, and other documents surrounding the amendment's adoption to determine that, under the home rule amendment, a state statute can trump a municipal ordinance only when the statute *both* addresses a matter of statewide concern *and* with uniformity affects every city or village. However, Justice R. G. Bradley found that section 66.0502, Wisconsin Statutes, was a matter of statewide concern and was, on its face, uniformly applicable to every city or village, and therefore agreed with the majority that the statute barred Milwaukee from enforcing its residency requirement.

Justice A. W. Bradley, joined by Justice Abrahamson, concurred and dissented. The justices agreed that the police association was not entitled to damages, but found that Milwaukee should be able to enforce its residency requirement under the home rule amendment. The justices, like Justice R. G.

Bradley, disagreed with the majority's reading of the home rule amendment and determined that, to trump a municipal ordinance, a state statute must *both* address a matter of statewide concern *and* uniformly affect every city or village. The justices also disagreed with the majority's conclusion that a state statute may satisfy the uniformity requirement by being uniform on its face, and agreed with the court of appeals' findings that section 66.0502, Wisconsin Statutes, would have an outsize effect on Milwaukee, including a projected $649 million loss from the city's tax base.

BAR ON LICENSING FOR CHILD CARE PROVIDERS WITH HISTORY OF PUBLIC ASSISTANCE FRAUD

In *Blake v. Jossart*, 2016 WI 57, 370 Wis. 2d 1, 884 N.W.2d 484, Sonja Blake challenged a provision that permanently bars an individual who has been convicted of public assistance fraud from obtaining a child care license as unconstitutional. The supreme court upheld the law, finding that Blake failed to establish that the law violated equal protection or substantive due process or created an unconstitutional irrebuttable presumption.

Under Wisconsin law, any person providing child care to four or more children under the age of seven must obtain a child care center license and child care provider certification from the state. In addition, the Wisconsin Shares program provides child care subsidies to families meeting certain financial eligibility requirements who receive child care services from a child care provider certified by the Department of Children and Families. In 2009, following extensive reporting on widespread fraud within the Wisconsin Shares program, the legislature passed 2009 Wisconsin Act 76, which substantially changed the requirements for child care licensing and certification. Relevant to *Blake*, the new law created section 48.685 (5) (br) 5., Wisconsin Statutes, to impose a permanent bar prohibiting the state from licensing a child care center or certifying a child care provider if that individual had ever been convicted of an offense involving fraudulent activity as a participant of Wisconsin Shares or a number of other state and federal public assistance programs, including welfare.

Blake was a certified child care provider in Racine County from 2001 to 2006 and in 2008 received a new certification valid to June 2010. After Act 76 was passed, Racine County revoked Blake's child care certification because her criminal background check revealed a 1986 conviction of misdemeanor welfare fraud. Blake challenged the revocation, arguing that the permanent bar on her certification unconstitutionally violated her right to equal protection

and due process, and created an impermissible irrebuttable presumption. Both the circuit court and the court of appeals upheld the statute as constitutional.

The supreme court also upheld the statute as constitutional, holding that the prohibition on licensing and certification for an individual with a conviction of public assistance fraud does not violate equal protection or substantive due process because Blake is not part of a suspect class, child care licensing and certification is not a fundamental right, and the legislation rationally advanced the state's interest in preventing fraud under Wisconsin Shares.

The court also considered the question of whether the statute violates the irrebuttable presumption doctrine. Under the irrebuttable presumption doctrine, if a statute creates a presumption that denies a person a fair opportunity to rebut, it violates the due process clause of the Fourteenth Amendment. Following precedent establishing an alternative standard for government benefits classification from the U.S. Supreme Court, the court held that the statute's requirements did not constitute an irrebuttable presumption but in this case rather were merely an application of an objective fact to Blake's eligibility.

Justices Abrahamson and A. W. Bradley dissented, opining that the sweeping nature of the permanent bar to child care licensing and certification based on welfare fraud was not rationally related to the purposes of preventing fraud against Wisconsin Shares or protecting children, families, and private employers in childcare, as stated by the majority. The dissent further argued that the consequence for Blake's 30-year old misdemeanor charge and $294 restitution was so disproportionate and overly harsh as to "shock the conscience" and therefore the statute violated substantive due process. The dissent also raised a concern that the retroactive and permanent effect of the statute violated the ex post facto clause of the constitution, which prohibits laws imposing an overly punitive after the fact penalty for a crime that has already been committed.

Wisconsin Court of Appeals

UNCONSTITUTIONALLY OVERBROAD STATUTE INVALIDATED

In *State v. Oatman*, 2015 WI App 76, 365 Wis. 2d 242, 871 N.W.2d 513, the court of appeals invalidated a statute, in its entirety, that prohibited a sex offender from photographing or otherwise recording an image of a child without the written consent of the child's parent or guardian.

Christopher Oatman was charged with 16 counts of violating section 948.14, Wisconsin Statutes, which prohibits a person who has a prior conviction for

committing certain sex offenses from "intentionally [capturing] a representation of any minor without the written consent of the minor's parent, legal custodian, or guardian." The statute requires that the written consent state that the person seeking the consent is required to register as a sex offender. None of the images Oatman was charged with taking involved obscenity, child pornography, or nudity.

Oatman and the state entered into a stipulated agreement, wherein Oatman stipulated to the evidence of his guilt on eight charges, and the state agreed not to argue that Oatman had forfeited his right to challenge the constitutionality of section 948.14, Wisconsin Statutes. After being sentenced on the eight counts, Oatman appealed, arguing that the statute was overbroad and as such violated his First Amendment rights, as applied to him, and on its face.

The court of appeals noted that the constitutionality of a statute presents a question of law and is reviewed de novo. The court stated that, while statutes generally benefit from a presumption of constitutionality, when "the statute implicates the exercise of First Amendment rights, the burden shifts to the government to prove beyond a reasonable doubt that the statute passes constitutional muster."

Although Oatman challenged section 948.14, Wisconsin Statutes, on its face and as applied to the facts of his case, the court did not need to determine whether the statute was constitutional as applied to Oatman because it found that the statute was unconstitutional on its face.

The court quoted the state's brief as acknowledging that, if "the taking of photographs and video recordings for purely personal use were protected by the First Amendment, the State would concede that Wis. Stat. § 948.14 is overly broad." The court rejected the state's argument that First Amendment protections apply only to photographs that are created with an expressive or communicative intent and held that, even if the photographs were taken for purely personal use, the First Amendment analysis applies. The state also acknowledged, and the court found, that because the statute only regulates images of children, it is not content neutral, but is content-based. Content-based regulations are presumptively invalid and, in order to pass constitutional muster, must be the least restrictive means of achieving a compelling state interest.

The court found that, while the state "undeniably has a compelling interest in protecting children[,] Wis. Stat. § 948.14 does little, if anything, to further that interest." In addition to subjecting a child to inquiries by sex offenders as to whether the child has a parent or guardian available to consent to the capture of the child's image, the statute prohibits acts that are not harmful to children.

The court cited federal cases that determined that children are not harmed by nonobscene, nonpornographic photographs taken in public places and found that "[a]ccordingly, while we may dislike the fact that someone might have objectionable thoughts when viewing ordinary images of children, the State is constitutionally prohibited from precluding citizens from creating such images." Thus, the court concluded that section 948.14, Wisconsin Statutes, does little to further any compelling state interest, and, in banning the capture of any and all images of children, regardless of content, the statute was not narrowly tailored. The court stated that "it is difficult to imagine a content-based regulation that would be more *broadly* tailored."

Having determined that section 948.14, Wisconsin Statutes, was unconstitutionally broad on its face, the court considered the alternate remedies at hand. Generally, courts have three options: apply a limiting construction to rehabilitate the statute; sever the unconstitutional portions of a statute while leaving constitutional provisions intact; or invalidate the entire statute.

In this case, the state acknowledged, and the court held, that section 948.14, Wisconsin Statutes, was not amenable to a limiting construction or severance. The court thus invalidated the statute in its entirety and instructed the circuit court to dismiss the charges against Oatman.

CRIMINAL LAW PROCEDURE VIOLATIONS; EXCLUSION OF WITNESS AS REMEDY

In *State v. Prieto*, 2016 WI App 15, 366 Wis. 2d 794, 876 N.W.2d 154, the court of appeals upheld the circuit court's decision to exclude almost all of the state's witnesses after the prosecuting district attorney's persistent failure to respond to the defendant's requests for the names of the witnesses.

In May 2012, Caroline Prieto was charged with causing great bodily harm to a child. She made a prompt discovery demand for the district attorney to disclose all witnesses that the district attorney intended to call at trial. The district attorney ignored the discovery demand. More than a year and a half after Prieto was charged, the circuit court ordered the district attorney to provide its witness list within 60 days and scheduled the matter for trial in June 2014. The district attorney ignored the court order and did not provide its list of witnesses.

The trial was postponed and, at a hearing in August 2014, the court again ordered the district attorney to provide a list of witnesses. The district attorney did not do so.

In January 2015, with fewer than 20 days left before the scheduled trial date, Prieto moved the court to exclude any witness not already named by the state. The court granted the motion, excluding all witnesses but one expert witness

the district attorney had identified. Fourteen days before trial, the district attorney submitted a list of witnesses and a motion for reconsideration of the court's exclusion order. The court denied the motion, and the state appealed.

The court of appeals noted that the state did not have, and did not offer, any good cause for its failure to submit a witness list. The state argued, however, that even absent good cause for its failure, the circuit court erred in imposing the strict remedy of excluding all but one of the named witnesses.

The court of appeals looked to statutory discovery provisions for its de novo determination of whether the district attorney violated the discovery statute, and, if it had, whether the circuit court erred in its imposition of a remedy. The court of appeals cited section 971.23 (1) (d), Wisconsin Statutes, which requires the district attorney, upon demand and "within a reasonable time before trial," to disclose a list of all witnesses and their addresses the district attorney intends to call at trial.

The court of appeals next cited section 971.23 (7m) (a), Wisconsin Statutes, which states in relevant part that "[t]he court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply." The court did note that, under section 971.23 (7m) (a) and (b), Wisconsin Statutes, the court could, in appropriate cases, grant a recess or a continuance or advise the jury of the state's failure to identify the witnesses.

The court of appeals acknowledged the state's contention that the remedy of exclusion is discretionary, not mandatory, but determined that it need not decide whether the statute requires exclusion because, even if the statute does allow for other remedies, the circuit court exercised proper discretion in excluding all unnamed witnesses.

The state argued, first, that it did not violate the discovery statute at all, because it listed its witnesses "within a reasonable time before trial." The court of appeals flatly rejected this argument, noting that the state had, over the course of years, ignored several circuit court orders and only offered up a witness list after the circuit court had entered its exclusion order. The court of appeals found that that was a violation of the discovery statute.

Turning next to the proper remedy, the state argued that exclusion should not be permitted in this case because Prieto could not prove that she was prejudiced by the district attorney's failure to identify the witnesses sooner. The court rejected this as well, noting that under the clear statutory language, the "burden was on the district attorney's office to show that it has good cause for this violation, not on Prieto to show that she was prejudiced."

The court acknowledged that exclusion was a severe sanction and stated that it "[shares] the circuit court's regret that the actions of the district attorney may prevent the merits of this case from being fully tried." However, the court reminded the district attorney that, ultimately, the extent of any sanctions brought to bear for discovery violations are within its own control and that it ignored repeated court orders and the statutory discovery mandates "at its peril."

In a concurring opinion, Judge Hagedorn agreed that the circuit court appropriately excluded the witnesses but stated that he would have affirmed that decision as a proper exercise of the judge's discretion to sanction the district attorney's violation of two court orders.

APPLICATION OF THE FEDERAL DRIVER'S PRIVACY PROTECTION ACT (DPPA) TO STATE PUBLIC RECORDS LAW

In *New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W.2d 339, the court of appeals addressed the interaction between provisions in the federal Driver's Privacy Protection Act (DPPA) and provisions under Wisconsin law that provide for access to governmental records. The Wisconsin public records law generally provides for access to records of state and local governments and includes a policy statement containing a strong presumption in favor of access, though it allows records to be withheld pursuant to exceptions in state or federal law. Another state statute outside of the public records law specifically provides for access to traffic accident reports. The DPPA was enacted in 1994 to restrict the release of an individual's personal information contained in state motor vehicle records without his or her consent, applying a two-tier system prohibiting disclosure of certain types of personal identifying information. The provisions in the DPPA, however, contain a number of exceptions where disclosures are permitted. One such exception allows for disclosure for use by a governmental agency "in carrying out its functions," while another exception allows for disclosure for a use specifically authorized by a state law if the use is "related to the operation of a motor vehicle or public safety." The case addressed the interaction between the disclosure restrictions under the DPPA and the two state laws that require disclosure of public records.

The case originated with a request made by the New Richmond News newspaper to the City of New Richmond Police Department for copies of certain accident and incident reports. The police department responded to the request by noting that the DPPA requires redaction of information in the requested reports because the reports were prepared using information from

state motor vehicle records. It cited a 2012 opinion of the U.S. Court of Appeals for the Seventh Circuit that employed a careful reading of the exceptions in the DPPA. The newspaper asked the police department to reconsider its decision, citing an informal Wisconsin attorney general opinion from 2008 that had concluded that the DPPA did not require such redactions. However, the police department stood by its decision and refused to provide unredacted versions of the reports, prompting a lawsuit by the newspaper. The circuit court granted summary judgment to the newspaper, concluding that the disclosures fell under the two exceptions in the DPPA or did not reveal personal information covered by the DPPA in the first place. The supreme court agreed to hear the case on a motion to bypass the court of appeals, but the case was remanded to the court of appeals after the death of Justice Crooks left the supreme court equally divided on whether to affirm or reverse the circuit court.

The court of appeals first addressed the Wisconsin statute specifically mandating that law enforcement agencies provide access to uniform traffic accident reports. Finding this use to be related to the operation of a motor vehicle or public safety, the court upheld the lower court's determination that disclosure of the unredacted accident reports was not prohibited by the DPPA.

The court of appeals then addressed whether disclosure in response to a public records request of information in the incident reports, which were not covered by the statute governing accident reports, was permitted under the DPPA's "agency functions" exception. The newspaper, noting that the state public records law declared responding to a public records request an "essential function" of government, argued that the duty under the public records law to provide access to public records upon request was an "agency function" that fell within the exception in the DPPA. The court of appeals rejected this argument, calling it an unreasonable reading of the DPPA that would lead to "untenable results" and defeat the purpose of the DPPA. The court also rejected the notion that police departments had any heightened need to comply with the public records law.

The court remanded the case back to the circuit court for consideration of whether disclosure served any other function other than compliance with the public records law. The court also remanded the case for a determination as to whether the information in question had actually been derived from state motor vehicle records, and not merely verified using such information. BB