

WJCIA Annual Training Conference

Legislative and Case Law Update

September 25, 2009

Wisconsin Dells

Presented By:

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I. Delinquency

- **State v. Joseph L.C.** – Wis. Ct. of Appeals (March 2009 – unpublished)

A 14 year old was interrogated by police and a social worker for 45 minutes. Were the subsequent admissions voluntary? Should the interview have been recorded by law enforcement?

- **State v. Alyssa L. L.** – Wis. Ct. of Appeals (Nov. 2008 – unpublished)

16 year old Alyssa was questioned by law enforcement and a social worker concerning sexual behavior with adults. During the interview, she admitted sexual conduct with a child under 16 years of age and was subsequently found delinquent for sexual assault.

Was Alyssa “in custody” for Miranda purposes and were the statements voluntary?

What is the proper role for social workers during interrogations?

- **State v. Hebert** – Wis. Ct. of Appeals (Dec. 2008 – unpublished)

Driver stopped for equipment violations and received a verbal warning. Officer then advised driver he was going to walk his dog around her car. Was the subsequent drug seizure permissible?

- **State v. Zachary J. S.** – Wis. Ct. of Appeals (May 2009 – unpublished)

Zachary was questioned by police in the rear of a locked squad car. Was he “in custody” for Miranda purposes?

- **State v. Schloegel** – Wis. Ct. of Appeals (May 2009)

A high school student’s car was searched by law enforcement and school officials in the school parking lot. Was the student entitled to Miranda warnings? Was he “in custody”? Was the search legal?

- **Safford Unified S.D. #1 v. Redding** – U.S. Supreme Court (June 2009)

13 year old Savanna Redding was strip searched by school officials looking for prescription strength ibuprofen. Did this search violate the Fourth Amendment? Were the school officials liable for damages? What are the limits of school officials in searching for controlled substances?

II. Procedure

- **State v. Kleser** – Wis. Ct. of Appeals (March 2009)

A 15 year old was charged as an adult under original adult court jurisdiction (s.938.183). What is the proper procedure to be followed under s.970.032? (copy attached) What evidence is necessary to permit a “reverse waiver”?

- **State v. Featherston** – Wis. Ct. of Appeals (April 2009)

In July 2006, Robert was 16 years old when he was involved in various traffic offenses. The state charged him with 3 charges, including reckless driving, two weeks after he turned 17. Did the state intentionally delay in charging him so as to deprive him of juvenile court jurisdiction?

III. Disposition

- *State v. Vanbeek* – Wis. Ct. of Appeals (Feb. 2009)

A student was charged with a violation of s.947.015 (bomb threat). He was ordered to pay over \$15,000 in restitution for salaries and benefits to teachers and staff during the resulting evacuation. Is the school district a direct victim under s.973.20 for restitution purposes?

IV. Termination of Parental Rights

- *Jamie L. L. v. Erica M. D.* – Wis. Ct. of Appeals (Dec. 2008 – unpublished)

The trial court failed to hold a disposition hearing in a timely fashion under s.48.427(1). Did the trial court lose competency to proceed? Did the delay require a reversal of the TPR order?

- *Dunn County H. S. v. Debra O.* – Wis. Ct. of Appeals (Jan 2009 – unpublished)

The trial court terminated parental rights to three children. The mother complained she was given inadequate notice of the conditions for return. The mother further argued a prior permanency plan order allowed visitation but only if each child agreed to the visitation. Is the mother entitled to a reversal of the TPR orders?

- *Monroe County D.H.S. v. Luis R.* – Wis. Ct. of Appeals (June 2009)

Issues of the Indian Child Welfare Act (ICWA) of 1978 were raised. Was the county social worker a “qualified expert witness” within the meaning of 25 U.S.C. 1912?

Is the standard of proof under 25 U.S.C. 1912 “proof beyond a reasonable doubt” on “clear and convincing evidence”?

V. Special Education

- **Forest Grove School District v. T. A. – U.S. Supreme Court (June 2009)**

Does the I.D.E.A. authorize reimbursement for private special education services when a public school fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education services through the public school?

VI. Legislation

- **34 C.F.R. 300.300 – Parent has the right to revoke consent for their child to receive special education services at any time. After a parent signs initial consent for placement, a parent can withdraw a child from special education. The revocation must be in writing.**
- **2009 Wisconsin Act 8 (copy attached)**

VII. Miscellaneous

- **Wisconsin Department of Public Instruction – March 2009
“Answers to Frequently Asked School Discipline Questions”**
- **Wisconsin Department of Justice
Advisory Memorandum (April 2009) concerning a citizen’s right to openly carry a firearm.**

VIII. Latest Developments

The Wisconsin Supreme Court has agreed to hear the case of Schill v. Wisconsin Rapids School District. This case involves whether or not the personal e-mails of public employees held on public computers must be released under the public records law.

Adjourning a preliminary examination for cause is within the court's discretion. *State v. Selders*, 163 Wis. 2d 607, 472 N.W.2d 526 (Ct. App. 1991).

A court commissioner's determinations of admissibility of evidence will be upheld absent an erroneous exercise of discretion; the reviewing court then determines whether, if believed, the evidence would permit a reasonable magistrate to conclude that the defendant probably committed the crime. *State v. Lindberg*, 175 Wis. 2d 332, N.W.2d (Ct. App. 1993).

If a bindover decision is made by a court commissioner or circuit judge, review must be by a motion to dismiss brought in circuit court. Habeas corpus is not available to review a bindover. *Dowe v. Waukesha County Circuit Ct.* 184 Wis. 2d 724, 516 N.W.2d 714 (1994).

Single count complaints under sub. (7) and multiple count complaints under sub. (10) are to receive the same procedural treatment. In multiple count complaints a court must dismiss any count for which it believes there is not probable cause to believe a felony has been committed by the defendant. The specific felony charged need not be proved and it is inadvisable for the court to opine as to what felony was probably committed. Evidence that is not transactionally related to a count for which bind over is considered proper may not form the basis for a count in an ensuing information, but the information may include any count that is transactionally related to a count on which the defendant is bound over. *State v. Williams*, 198 Wis. 2d 516, 544 N.W.2d 406 (1996), 93-2444. See also *State v. Williams*, 198 Wis. 2d 479, 544 N.W.2d 400 (1996), 93-2517 and *State v. Akins*, 198 Wis. 2d 495, 544 N.W.2d 392 (1996), 94-1872.

Following a bindover at a preliminary hearing, the proper test for reviewing a challenge to an information that alleges wholly new charges not accompanied by the original charge is the sufficiency of evidence test. *State v. Cotton*, 2003 WI App 154, 266 Wis. 2d 308, 668 N.W.2d 346, 02-2923.

The purpose of a preliminary examination is limited to an expeditious determination of whether probable cause exists for the state to proceed with felony charges against a defendant. This limited purpose does not permit a criminal defendant to compel discovery in anticipation of the hearing. There is no 6th Amendment right, based on effective assistance of counsel, and no compulsory process right to subpoena police reports and other non-privileged materials prior to the examination. *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06-1826.

It was not proper to dismiss a criminal charge added in the information because the prosecutor successfully objected at the preliminary hearing to questions that were relevant to that crime but not to the crime charged in the complaint. *State v. White*, 2008 WI App 96, 312 Wis. 2d 799, 754 N.W.2d 214, 07-2061.

970.032 Preliminary examination; juvenile under original adult court jurisdiction. (1) Notwithstanding s. 970.03, if a preliminary examination is held regarding a juvenile who is subject to the original jurisdiction of the court of criminal jurisdiction under s. 938.183 (1), the court shall first determine whether there is probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b), or (c), whichever is applicable. If the court does not make that finding, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

(2) If the court finds probable cause to believe that the juvenile has committed the violation of which he or she is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), the court shall determine whether to retain jurisdiction or to transfer jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938. The court shall retain jurisdiction unless the juvenile proves by a preponderance of the evidence all of the following:

(a) That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

(b) That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.

(c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused under the circumstances specified in s. 938.183 (1) (a), (am), (ar), (b) or (c), whichever is applicable.

History: 1993 a. 98; 1995 a. 77, 352; 1997 a. 35, 205; 2005 a. 344.
This section does not violate a defendant's right to equal protection. *State v. Martin*, 191 Wis. 2d 647, 530 N.W.2d 420 (Ct. App. 1995).

The juvenile bears the burden of proof to demonstrate that the factors under sub. (2) support removing jurisdiction to the juvenile court. The removal decision is within the discretion of the trial court. *State v. Verhagen*, 198 Wis. 2d 177, 542 N.W.2d 189 (Ct. App. 1995), 94-2823.

Sub. (2) (a) allows the trial court to balance the treatment available in the juvenile system and adult system and requires it to decide under the facts of the case which treatment will better benefit the juvenile. *State v. Dominic E. W.* 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998), 97-2446.

Sub. (2) is not unconstitutionally vague. *State v. Armstead*, 220 Wis. 2d 626, 583 N.W.2d 444 (Ct. App. 1998), 97-3056.

The plain, unambiguous meaning of sub. (2) is that evidence of facts of the offense contrary to the preliminary examination or, where the preliminary examination is waived, the criminal complaint, is not admissible at a reverse waiver hearing. *State v. Kleser*, 2009 WI App 43, ___ Wis. 2d ___, ___ N.W.2d ___, 07-2827.

Sub. (2) makes no provision for the admission of hearsay at a reverse waiver hearing. When a statute does not specifically authorize hearsay, it is generally prohibited. *State v. Kleser*, 2009 WI App 43, ___ Wis. 2d ___, ___ N.W.2d ___, 07-2827.

970.035 Preliminary examination; juvenile younger than 15 years old. Notwithstanding s. 970.03, if a preliminary examination under s. 970.03 is held regarding a juvenile who was waived under s. 938.18 for a violation which is alleged to have occurred prior to his or her 15th birthday, the court may bind the juvenile over for trial only if there is probable cause to believe that a crime under s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31 or 943.10 (2), 943.32 (2) or 961.41 (1) has been committed or that a crime that would constitute a felony under chs. 939 to 948 or 961 if committed by an adult has been committed at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9). If the court does not make any of those findings, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

History: 1987 a. 27; 1993 a. 98; 1995 a. 77, 448; 1997 a. 35, 205.

970.04 Second examination. If a preliminary examination has been had and the defendant has been discharged, the district attorney may file another complaint if the district attorney has or discovers additional evidence.

History: 1993 a. 486.

If the state has no additional new or unused evidence upon which to base a 2nd complaint, a preliminary examination order discharging a defendant is appealable. *Witte v. State ex rel. Smith*, 80 Wis. 2d 332, 259 N.W.2d 515 (1977).

When a first preliminary examination became chaotic, the prosecution properly abandoned the proceedings before presenting all its evidence and reissued the complaint. *State v. Brown*, 96 Wis. 2d 258, 291 N.W.2d 538 (1980).

The state is not barred from recharging a defendant, whether or not it has new evidence. *State v. Hoffman*, 106 Wis. 2d 185, 316 N.W.2d 143 (Ct. App. 1982).

This section allows for issuance of a second complaint if the district attorney has evidence that was not used at the first preliminary. "Unused" evidence in the context of a preliminary hearing means unused by the court in reaching its decision whether to bind the defendant over for trial. *State v. Twaite*, 110 Wis. 2d 214, 327 N.W.2d 700 (1983).

A complaint may be reissued when "new or unused" evidence would support a finding of probable cause. What constitutes new or unused evidence is not easily definable, but it is not evidence that is not merely cumulative or corroborative and is determined by applying common sense. *State v. Johnson*, 231 Wis. 2d 58, 604 N.W.2d 902 (Ct. App. 1999), 98-2881.

This section specifically limits the availability of a second preliminary examination and precludes a request for a de novo hearing under the more general s. 757.69 (8). *State v. Gillespie*, 2005 WI App 35, 278 Wis. 2d 630, 693 N.W.2d 320, 04-1758.

970.05 Testimony at preliminary examination; payment for transcript of testimony. (1) The testimony at the preliminary examination shall be transcribed if requested by the district attorney, the defendant or an attorney representing the defendant or ordered by the judge to whom the trial is assigned. The reporter shall file such transcript with the clerk within 10 days after it is requested.

(2) (a) When a transcript is requested under sub. (1) by someone other than a person specified in par. (b) or (c), the county shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

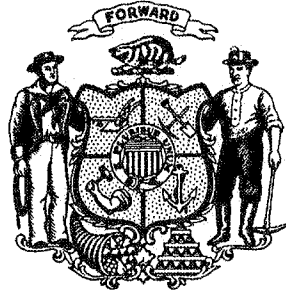
(b) When a transcript is requested under sub. (1) by the state public defender or by a private attorney appointed under s. 977.08, the state public defender shall pay the cost of the original from the appropriation under s. 20.550 (1) (f) and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

(c) When a transcript is requested under sub. (1) by a defendant who is not indigent under ch. 977 or by an attorney retained by a defendant who is not indigent under ch. 977, the defendant shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting the copies.

History: 1993 a. 437; 1995 a. 199.

Counsel is not entitled to a free copy of the transcript if the original is reasonably available. *State v. Schneidewind*, 47 Wis. 2d 110, 176 N.W.2d 303 (1970).

State of Wisconsin



2009 Senate Bill 36

Date of enactment: April 14, 2009
Date of publication*: April 28, 2009

2009 WISCONSIN ACT 8

AN ACT to amend 343.32 (1m) (b) (intro.), 938.34 (14r) (a) and 961.50 (1) (intro.) of the statutes; relating to: motor vehicle operating privilege suspensions for controlled substance violations.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 343.32 (1m) (b) (intro.) of the statutes is amended to read:

343.32 (1m) (b) (intro.) The secretary shall may suspend a person's operating privilege for not less than 6 months nor more than 5 years whenever notice has been received of the conviction of such person under federal law or the law of a federally recognized American Indian tribe or band in this state or the law of another jurisdiction for any offense therein which, if the person had committed the offense in this state and been convicted of the offense under the laws of this state, would have ~~required~~ permitted suspension of such person's operating privilege under s. 961.50. The person is eligible for an occupational license under s. 343.10 as follows:

SECTION 2. 938.34 (14r) (a) of the statutes is amended to read:

938.34 (14r) (a) In addition to any other dispositions imposed under this section, if the juvenile is found to have violated ch. 961, the court shall may suspend the juvenile's operating privilege, as defined in s. 340.01 (40), for not less than 6 months nor more than 5 years.

~~The~~ If a court suspends a person's operating privilege under this paragraph, the court shall immediately take possession of any suspended license and forward it to the department of transportation together with the notice of suspension stating that the suspension or revocation is for a violation of ch. 961.

SECTION 3. 961.50 (1) (intro.) of the statutes is amended to read:

961.50 (1) (intro.) If a person is convicted of any violation of this chapter, the court shall may, in addition to any other penalties that may apply to the crime, suspend the person's operating privilege, as defined in s. 340.01 (40), for not less than 6 months nor more than 5 years. ~~The~~ If a court suspends a person's operating privilege under this subsection, the court shall immediately take possession of any suspended license and forward it to the department of transportation together with the record of conviction and notice of the suspension. The person is eligible for an occupational license under s. 343.10 as follows:

SECTION 4. **Initial applicability.**

(1) This act first applies to violations occurring on the effective date of this subsection.

* Section 991.11, WISCONSIN STATUTES 2007-08 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].