Appeal No. 2006AP1694-CR **Cir. Ct. No. 2005CT184**

WISCONSIN COURT OF APPEALS
DISTRICT IV

IN THE MATTER OF TRIAL EXPENSES IN STATE V. CURTIS S. BOCKORNY:

LA CROSSE COUNTY DISTRICT ATTORNEY'S OFFICE,

APPELLANT,

V.

CURTIS S. BOCKORNY,

RESPONDENT.

FILED

Aug. 9, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Bridge, JJ.

The issue we certify is whether courts have inherent authority, notwithstanding sovereign immunity, to impose a monetary sanction against the State for its conduct as a litigant.[1]

The State charged Curtis Bockorny with the crimes of operating a motor vehicle under the influence of an intoxicant and with a prohibited blood

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[1] We certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 (2005-06).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

alcohol concentration. Before trial the circuit court granted Bockorny's motion in limine to exclude evidence related to the preliminary breath test (PBT). At trial the following exchange occurred on direct examination of the arresting officer:

> Q. After the defendant completed the field sobriety tests, did you arrest the defendant?
>
> A. Yes, after – after a PBT test.

Bockorny moved for a mistrial, which the court granted.

Bockorny later moved for an order requiring the State to pay his trial expenses. For legal authority the motion relied on WIS. STAT. § 805.03 and ***State v. Heyer***, 174 Wis. 2d 164, 496 N.W.2d 779 (Ct. App. 1993). The court granted the motion and ordered the district attorney's office to pay Bockorny $2,550 "contingent upon the State retrying this matter." The decision was based on the conduct of the State's witness, the additional expenses Bockorny would incur if the case were retried, and the court's conclusion that "equity would demand that someone … pay for that."

The district attorney's office appeals from the order. On appeal one of its arguments is that the monetary sanctions against it are barred by sovereign immunity. In support the district attorney relies on the familiar line of cases that bars taxation of costs against the State in the absence of express statutory authority. The district attorney asserts that no such statutory authority permits the sanction imposed in this case. In response Bockorny argues, in part, that the circuit court has statutory and inherent authority to sanction parties and attorneys

for misconduct, and that sovereign immunity does not apply in this case because the ordered sanction was not a "suit" against the State.[2]

Assuming Bockorny is correct that the circuit court has inherent authority to sanction parties in general for misconduct, and that the court properly applied that authority to the mistrial facts of this case, the question then becomes whether the court's inherent authority overcomes sovereign immunity principles that might otherwise bar such a sanction when the sanctioned party is the State. This question presents a clash of two principles that each have a constitutional foundation, and it may ultimately be resolved as a separation of powers issue.

Circuit courts have inherent powers, which are those that must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions. ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 747, 595 N.W.2d 635 (1999). In reviewing the cases where inherent authority has been held to exist, the Wisconsin Supreme Court has stated that some of the categories of cases include regulating members of the bar and ensuring that the court functions efficiently and effectively to provide the fair administration of justice. ***Id.*** at 749-50. The court has recognized that inherent powers derive from the state constitution. *See*, *e.g.*, ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 577-83, 575 N.W.2d 691 (1998); ***Flynn v. Department of Admin.***, 216 Wis. 2d 521, 548-552, 576 N.W.2d 245 (1998).

[2] The cover of the respondent brief now before us displays an earlier caption showing the circuit court as the respondent filing the brief. As explained in our order of May 24, 2007, that caption was in error. Bockorny is now the respondent, and he has since adopted the already-filed respondent brief as his own.

Sovereign immunity also derives from the state constitution: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." WIS. CONST. art. I, § 27. As mentioned, sovereign immunity has been held to bar taxation of costs against the State. *See, e.g.*, ***Klingseisen v. State Highway Comm.***, 22 Wis. 2d 364, 370-71, 126 N.W.2d 40 (1964) (otherwise-taxable motion costs cannot be taxed against State in absence of specific statutory authorization); ***DOT v. Wisconsin Pers. Comm'n***, 176 Wis. 2d 731, 736-38, 500 N.W.2d 664 (1993) (general statute permitting award of discovery expenses is not sufficient to authorize award against State); *but see* ***Flottmeyer v. Circuit Court for Monroe County***, 2007 WI App 36, ¶¶8-12 and n.5, ___ Wis. 2d ___, 730 N.W.2d 421 (statute authorizing court to assess jury fees against "plaintiff" is sufficient to be considered consent, for sovereign immunity purposes, for an assessment against State in criminal case). Beyond costs, sovereign immunity also bars suits against the State more broadly, such as a suit alleging misrepresentation by the state lottery. ***Brown v. State***, 230 Wis. 2d 355, 363-64, 602 N.W.2d 79 (Ct. App. 1999).

Given that both the inherent authority of courts and sovereign immunity have constitutional foundations, it is not clear which principle should prevail. It may be that the issue should be analyzed as a separation of powers question. The Wisconsin Supreme Court has held that only the legislature may waive sovereign immunity. ***Panzer v. Doyle***, 2004 WI 52, ¶¶108-09, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds by* ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶91, 295 Wis. 2d 1, 719 N.W.2d 408. In ***Panzer***, 271 Wis. 2d 295, ¶110, the court held that the governor, by executing an agreement that purported to waive sovereign immunity, "exercised a core power of

the legislature, and as such his action cannot stand." Nor did the governor have inherent authority to waive sovereign immunity. ***Id.***

In reaching those conclusions, the supreme court did not undertake a detailed application of separation of powers principles. *See, e.g.* ***State v. Chvala***, 2003 WI App 257, ¶¶9-10 and ¶¶13-23, 268 Wis. 2d 451, 673 N.W.2d 401, *aff'd,* 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747. Each branch has a core zone of exclusive authority into which the other branches may not intrude, and in these core areas any exercise of authority by another branch of government is unconstitutional. ***Id.***, ¶9. However, the majority of governmental powers lie within areas of shared authority, where the powers of the branches overlap, and in these areas of shared powers one branch of government may exercise power conferred on another only to the extent that it does not unduly burden or substantially interfere with the other branch's exercise of power. ***Id.***, ¶10.

We conclude that applying these principles to the question of whether the judiciary has inherent authority to impose monetary sanctions against the State is a question most appropriate for resolution by the supreme court, and therefore we certify this appeal.