COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-3679-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHAN MOEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

FINE, J. Jonathan Moen appeals from a judgment convicting him of driving while under the influence of an intoxicant, *see* § 346.63(1)(a), STATS., and from the trial court's order denying him postconviction relief. He was convicted by a six-person jury. Although he requested a twelve-person jury, he did not base his request on any asserted constitutional right; indeed, his lawyer

specifically disclaimed any assertion that his request for a twelve-person jury was founded on the constitution:

> THE COURT: ... There has been a request for a 12-person jury; we've had some off-the-record discussions about it. This case post-dates the statute mandating a six-person jury. I understand there's no question, no constitutional challenge here, it's simply a request that the Court consider bringing up 12 jurors instead.
>
> [Defense Counsel]: That is correct.
>
> THE COURT: I decline, I'll have a six-person jury chosen.

The jury returned its verdict on November 11, 1997; the trial court sentenced Moen on December 4, 1997. On June 19, 1998, the supreme court released its opinion in ***State v. Hansford***, 219 Wis.2d 226, 580 N.W.2d 171 (1998), which held that § 756.096(3)(am), STATS., 1995–96 ("A jury in misdemeanor cases shall consist of 6 persons."), violated Article I, § 7 of the Wisconsin Constitution. The only issue presented by this appeal is whether Moen may assert ***Hansford***'s invalidation of § 756.096(3)(am) as a ground to get a new trial. He may not. Accordingly, we affirm.

As noted, ***Hansford*** held that a statute requiring that misdemeanor cases be tried before six-person juries violated the Wisconsin Constitution. Moen contends that ***Hansford*** must be applied retroactively and that he is, therefore, *ipso facto* entitled to a new trial even though he did not base his request for a twelve-person jury on the constitution. Although under ***State v. Koch***, 175 Wis.2d 684, 694, 499 N.W.2d 152, 158 (1993), which held that "'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past'" (quoting ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987)), ***Hansford*** applies to all cases "pending on direct

review," ***Hansford*** only applies to those cases where the constitutional issue was raised before the trial court.

Griffith's rationale for mandating that new rules for criminal prosecutions be applied to all cases pending on direct review was that for a new rule announced by an appellate court to apply to only the lucky case chosen to have the issue decided would be unfair to all those other appellants who had similarly preserved the issue but who were not first in the appellate queue:

> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

Id., 479 U.S. at 323 (quoted source omitted). To be a "similar" case, of course, the issue must have been preserved in the trial court—as it was in ***Griffith***, 479 U.S. at 317, 319, ***Koch***, 175 Wis.2d at 692, 499 N.W.2d at 157 (preserving claim to which subsequently announced ruling by United States Supreme Court applied), and ***Hansford***, 219 Wis.2d at 232, 580 N.W.2d at 174. By seeking reversal based on an argument that he did not make before the trial court, Moen seeks not parity with Hansford, Koch, and Griffith, but an advantage that would ignore the general rule that, except for unusual circumstances, constitutional issues must be raised in the trial court before they will be considered on appeal. *See* ***State v. Caban***, 210

Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997).[1] Stated another way, if the supreme court had not decided ***Hansford***, Moen's case would not have been one of those eligible to be plucked from "the stream of appellate review," ***Griffith***, 479 U.S. at 323 (quoted source omitted), for use as the vehicle to declare the statute's invalidity—Moen never asserted that the statute was invalid. Although, undoubtedly, there is an advantage to a defendant to have more rather than fewer jurors, because that increases the numerical chance for a hung jury, that advantage does not warrant overturning a fair, error-free trial on a ground that Moen did not raise before the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[1] One of those unusual circumstances justifying appellate relief even though the issue was not raised before the trial court is where the defendant has been convicted of a substantive crime that an appellate court later decides is beyond the legislature's constitutional power to create. *See* ***State v. Benzel***, 220 Wis.2d 588, 592–593, 583 N.W.2d 434, 436–437 (Ct. App. 1998). This is not such a case, however. Rather, to use the words of ***Benzel***, this case concerns the application of a constitutional principle that "does not affect the basic accuracy of the factfinding process at trial." ***Id.***, 220 Wis.2d at 592, 583 N.W.2d at 436. Moreover, this is also not a situation, as in ***State v. Howard***, 211 Wis.2d 269, 564 N.W.2d 753 (1997) (must be nexus between possession of gun and underlying crime for dangerous-weapon enhancer to apply) (collateral review), cited by the trial court and relied on by Moen, where not only did the error go to the heart of the factfinding process, but to apply waiver principles would saddle a defendant with the burden of arguing something that could not have been foreseen. *See* ***id.***, 211 Wis.2d at 287, 564 N.W.2d at 762. Here, as noted in the main body of this opinion, Moen's attorney knew of a possible constitutional challenge to the statute requiring six-person juries in misdemeanor cases but specifically did not make one.